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## Freedom in the Free World: The Extimate Becomes The Law

### 1. Epigones in America

In a well-known and oft-repeated anecdote relating Freud's arrival to the United States in 1909 with his then friend and colleague Carl Jung, Freud supposedly remarked that the warm reception they were being greeted with by their hosts on the other side of the Atlantic was premised on a fundamental misunderstanding: 'They don't understand', Freud supposedly said, 'that we are bringing them the plague.' Whether this conversation took place or not is immaterial. Its repeated circulation, the circulation of the signifier, as Lacan would emphasize later, is what matters: the signifier takes a life of its own and determines meaning, the same meaning that Freud so presciently suggested was destined to misunderstanding. It is this misunderstanding that Lacan insisted is at the heart of all human communication: we delude ourselves into thinking we understand each other, but the most we can hope for is a successful, and hopefully bloodless, misunderstanding.

In the case of psychoanalysis, welcomed in each and every discipline over the last century, it is clear that this misunderstanding is not due to a *lack* of understanding but to a reluctance to understand; a passion for ignorance as Lacan would call it. And the reason for this reluctance is the same as Freud predicted: why, after all, would we embrace a discourse whose likely outcome is to show us our own ugliness, confront us with the self who, even if we suspected we harboured, hoped no one else would realize we had?

Does this misunderstanding extend to the reception of psychoanalysis in the legal academy? My fear is it does. Like many attempts, particularly in vogue at the start of this century to 'wed' law with other disciplines, the enthusiastic conjoining of law with psychoanalysis, far from critiquing and challenging law, ended up consolidating law's existing presuppositions.

Consciously or unconsciously, the enthusiasm for such unions (and I include myself in this merry-go-round) addressed, but unfortunately did not redress, the limitations of our own discipline. We fell prey, that is, to the classic lover's delusion: all-too-well aware of own weaknesses and limitations, we abdicated the work, and the responsibility, for our salvation to the other discipline, duping ourselves into believing that our beloved would make up for our lack. Conveniently ignoring that, as Lacan (1979) put it a propos all relationships (whether they are between humans or between disciplines), 'in persuading the other that he has that which may compliment us, we assure ourselves of being able to continue to misunderstand precisely what we lack.' (p. 133)

What is it that we continue to willfully misunderstand, about ourselves or our discipline, and will do anything to avoid encountering? Lacan coined a neologism for the ultimate goal of a successful analysis: the hope is not to adjust the patient to reality, nor to mould her in the person of the analyst, nor to 'reconcile her with her demons' (as popular parlance has it), but to confront her with her own extimate core. And what is the extimate? The extimate is that part of ourselves that is so painfully intimate that we have hidden not somewhere far away, nor only from other people, but inside us, from ourselves: we have excluded it, from others and from ourselves, in the *interior*. Lacan's (2006) metaphor for the message of psychoanalysis, and how it is categorically *not* psychotherapy, is not dissimilar to Freud's, and for the same reasons: we have to treat it, he suggests, like the tumour that it is and that is spreading, and exteriorize it (p. 274). This means we must bring it to the surface, that is, the surface of the signifier.

Although the extimate, as we just said, is usually painstakingly and safely hidden out of view, occasionally, not often, but once in a while, we are confronted with it in all its raw and obscene excess: no attempt is made to hide it and the shock is not only at its nakedness but its shameless refusal to hide. This is the challenge, I suggest, posed by Joshua Oppenheimer's *The Act of Killing*. At the end of our excavation into Law's unconscious I will illustrate the culmination of our analysis with this film, a documentary that I will argue displays the extimate

not only as an intrinsic part of the legal order but as the Law itself. My grim conclusion will be that when the extimate is not only the hidden core of the Law, but has become the Law itself, the subject has no choice but to acknowledge her own complicity in it. That is, she has no choice but to confront the abyss not only at the heart of her fellow beings, nor only of the symbolic order, but at the heart of herself.

## **2. Successful Misunderstanding**

We are fortunate that Robert Burt was not only present at the start of the psychoanalytic turn in law in the United States but has generously given us an account of his participation, in the form of a description of Anna Freud's seminars at Yale. Despite the grace of his account, we do not need to read between the lines to gauge what he found worrying about Anna Freud's style: confident, overbearing, bordering on 'dogmatism' he intimates. Lacan I believe would not only have nodded in agreement with Burt's observations but, unlike Professor Burt, would have been a lot less circumspect in his choice of epithets and less sparing in his critique. The direction taken by Lacan thereafter, however, 'the direction of the treatment' as he called it in a famous intervention, is much less optimistic than Burt's, and much less benign. Rather than aiming, let alone hoping for 'a democratic resolution' of the patient's conflicts in fruitful cooperation with a judge or therapist in the 'holding place' of the therapist's room or courtroom, as Burt proposes, it is no exaggeration to say the Lacanian analyst aims not at a 'resolution' but a 'dissolution' of the subject, not at a 'synthesis' but a separation of the fake identifications that give the patient's ego the illusion of identity.

Lacanian analysis is a bloody and gruesome process that, far from rectifying the patient's conflicts and leading each adversary to come to a democratic empathy with the other's viewpoint, aims at shifting the ground from under all participants' feet, including, aptly, that of the analyst /

judge. For the Lacanian analyst is not there to judge, punish, forgive, cooperate with or reconcile the patient with her adversaries, real or imaginary. The analyst's goal is much more ambitious and much more painful: it aims at shuttering the subject as she finds her and making room for the birth of a new subject. Once the deed is done, the analyst, and the moribund ex-subject that used to be her patient, can slip gently out of view, making way for a new subject: a true and ethical subject.

For Lacan the reception of psychoanalysis not only in the United States but worldwide was premised on a fundamental, and, for better or worse, phenomenally successful, misunderstanding: psychoanalysis, he felt compelled to keep repeating, is not psychotherapy. In particular psychotherapy all-too-often proceeds as if there are only two people in the room, ignoring the inevitable presence of the Big Other of the symbolic order, 'the mediation that speech constitutes between subjects.' (Lacan, 2006, p. 288) It is the presence of the third - an uninvited presence forced on us all - that renders psychoanalysis a preeminently social and political activity. Our psyche and its pains are never just ours, but are on loan from the Big Other of the symbolic order. Until and unless this forced debt is acknowledged, and shaken off, no patient can claim to confront her neuroses. In particular, without taking into account the dimension of the symbolic, any dyadic relationship, (between patient and analyst, or litigant and judge) remains at the level of the imaginary and worse, Lacan warns, the imaginary becomes the norm. So, despite the fact that Freud was at pains to distinguish between the imaginary and reality, psychoanalysts, Lacan (2006) accuses, first 'made the imaginary into another reality, and then, in our times, [found] in the imaginary the norm of reality.' (p. 388)

For Lacan none was guiltier of this pathological misreading of Freud than ego psychologists including Anna Freud and her followers, the same posse Robert Burt discusses and so presciently found wanting. Lacan waged a long vendetta against ego psychologists' teachings and practices as propagated by its troika in the US, a triumvirate made up of Ernst Kris, who had left Vienna for the US during the war, Rudolf Lowenstein, who had been Lacan's own analyst, and Heinz

Hartmann who had been in analysis with Freud (Fink, 2004, pp. 38-62). In scathing and repeated attacks on the treatment meted to patients by these prophets, Lacan lambasts them for presuming to try to 'cure' their patients' egos: a euphemism, as far as Lacan (2006) was concerned, for trying to reshape their patients in line with the analyst's ego, serving as 'an excuse', that is, 'for the analyst's narcissism'. (p. 288)

Lacan saw this as a wider plot by ego psychologists along the lines of Roosevelt's New Deal: he mocks Kris as the intellectual leader of the 'New Deal of ego psychology' who makes it his business to exhort the analysand to adopt to her social environment and to so-called reality: 'Kris' ideas about intellectual productivity', Lacan (2006) concludes, 'thus seem to me to receive the Good Housekeeping Seal of Approval for America.' (p. 332) In the process ego psychologists forget that the ego, the product of and steeped in the imaginary, is not only 'the seat of illusions' (Lacan, 1991, p. 62) but 'frustration in its very essence.' (Lacan, 2006, p. 208) The theory of the ego, to put it bluntly (as Lacan often did), is nothing short of 'an enormous error.' (Lacan, 2006, p. 395) Far from 'curing' this imaginary prosthetic of ours, the Lacanian analyst must lead it to recognize its own fundamental sickness and direct it to accept its own demise. Not least because what for ego-psychologists constitutes a supposedly 'healthy' ego, is, for lacanian analysts, all the sicker: for the subject as well as for those unfortunately enough to be around her.

While ego psychologists bear the brunt of Lacan's wrath it is no exaggeration to suggest that the reception of psychoanalysis generally, on both sides of the Atlantic, has been one of successful misunderstanding. We are never far from using and abusing psychoanalytic terms in every day speech, yet the ubiquity of Freud's vocabulary in our language, far from proving an acceptance or even an understanding of his teaching, is made at the same time as the implication of psychoanalytic insights is radically denied. The paradoxical result of the appeal to psychoanalysis therefore is to domesticate rather than confront the challenge posed by the unconscious.

Does this misunderstanding extend to the Yale School of Law and Psychoanalysis? As I started suggesting, Robert Burt's polite reservations concerning his seminars with Anna Freud would have found (loud and ostentatious) agreement from Lacan. Lacan would have been less sanguine, however, and much less optimistic about Burt's reading of psychoanalysis' 'lessons' for law thereafter. If there's one theme pervading Burt's work is the hope that judges can become 'reliable guides for disputing parties – even deeply opposed parties – in working toward amelioration and mutually satisfying resolution of their conflicts.' This aspiration, he suggests, is also that of psychotherapists, whether the conflict they are addressing is that between two persons or within the conflict-driven mind of one person, their patient: in the same way that 'a psychotherapist assists the patient in coming to recognize the previously warring portions of his mind', so a judge can try to lead 'the warring litigants to recognize one another without fear or hostility.' As the psychotherapist aims to help the patient resolve the conflict in their psyche, so the judge aims to resolve the conflict between litigants, ideally with a decision, or interpretation of the law that is offered for agreement even to the losing side. The latter will be instructed, in effect, that whether they like it or not, there is 'an agreed communal meaning to the law and that they have wrongly interpreted that law.' The upshot of a psychotherapeutically-inspired legal proceedings can form the starting point, Burt suggests, for 'friendly interaction', 'new mutually respectful' and 'egalitarian social relationships' indeed for an 'egalitarian democratic society'. 'I see', Burt concludes, 'psychoanalysis as a training ground for a democratic relationship with others.'

My fear is Lacan's response to these all-too-worthy yet all-too-optimistic aims would have been a dry, 'Bonne chance avec ça'. Lacan's despair at the reception and mis-reception of Freud's work stemmed from his own insistence on the precedence of the signifier and Freud's readers' (in this case including his own daughter Anna) all-too common tendency to underplay its importance. It is not only separation from the mother, or sexuality, that is traumatic in Freud, and even less so



in Lacan. Language itself is a traumatizing force, traumatic precisely because human bodies are invaded by a force that they neither invite nor control, yet have no choice but to accommodate. So all our experiences, and not just sexuality (as caricatures of Freud would have it), are refracted through and distorted by signifiers that are at the mercy of the Big Other of language. It is because of Lacan's insistence on the subject's determination by the signifier that he had little faith in the benign communication and understanding hoped for by Burt, whether the 'holding place' is that of a therapist's couch or a court of law.

### **3. The First Castration**

For Lacan, as for Freud, the story of psychoanalysis is a story of loss: there is no human subject who has not suffered a loss, and the first thing we lose is the plenitude that came before our immersion into language. For Lacan the first castration inflicted on the human being is not by a real or imaginary father threatening punishment but from our introduction to language. Human beings' entry into language is not only alienating but violent: as soon as our demands are formulated in signifiers, the seemingly simple dimension of 'need' is transformed into the troublesome dimension of 'desire' because signifiers never quite fit: the words at our disposal never coincide with our bodies or the world around us. Hence Lacan's famous aphorism, following Hegel, that 'the word is the murder of the thing.' Our social order, including our legal order, just like our subjectivity, is founded on this primal and irretrievable loss. What we are left with is the *hope* of recuperating this loss, that is, with desire.

Unfortunately it is not only bittersweet and impossible desire that is born with language, but also repression and thereby the unconscious: from the moment we start to speak, says Lacan (1998), 'from that exact moment onward and not before ... there is such thing as repression.' (p. 56) And we repress because not only language never quite fits the signifieds we presume to

represent but because language is outside the subject and at the mercy of the symbolic order: ‘The fact that the symbolic is located outside of man is the very notion of the unconscious.’ (Lacan, 2006, p. 392) There is only one outcome to our conscription into language and that is irredeemable lack: lack emerges from the invasion of the symbolic, ‘by the fact that the subject depends on the signifier and that the signifier is first of all in the field of the Other.’ (Lacan, 1979, pp. 204-5) From then on we are condemned to stop making sense of ourselves, and of each other. If we communicate with each other at all, it is not because we touch each other’s truth but because we successfully misunderstand each other: ‘misunderstanding’ concludes Lacan (1993), ‘is the very basis of interhuman discourse.’ (p. 163). Of course, far from heeding this hiccup, the speaking being’s reaction is to keep talking and talk even more: we babble on demanding, in effect, that we are heard and, even more optimistically, that we are understood. Unfortunately, as Lacan (2008) adds, ‘language cannot be other than a demand, a demand that fails.’ (p. 124)

#### **4. Free to Speak Emptily**

If language belongs and is at the mercy of the Big Other, not of the subject, and before the subject is even born, then what sense does it make to talk about *free* speech? And what is the significance of recognizing the loss inflicted by language for the human subject generally, and for the legal subject in particular? For psychoanalysis the castration wrought by language is so central, that our ability to lie is in fact what constitutes us as subjects. Beginning to lie means we have worked out that there is a gap between the word and the thing itself, and, moreover, that we can use that gap, for better, or worse ends. No wonder lawyers, whose skill is at manipulating language, are thought to dwell, and thrive, in a polite, if not contemptible distance from the truth, since at least Plato’s *Gorgias*.

Since lies are at the heart of language, indeed since language itself is a lie, a representation whose very point is to stand in for something else, for psychoanalysis, the contrast is not between free and coerced speech but between full and empty speech. Sadly most of our utterances, in or out of Court, are no more than empty speech, chewed up leftovers of other people's meals that barely touch the truth: our utterances are always already borrowed from, framed by and structured by an order that we belong to not 'freely' but through our forced conscription into language. The only hope is that some 'full speech' will 'hitch a lift' with our empty speech when we are busy chattering.

For psychoanalysis the instrument for this hope is free association; its wager is that free association can bridge the gap between full and empty speech, between speaking and being spoken for by language. Even free association, however, can only partially achieve this since free association does not faithfully repeat but often tames and domesticates the unconscious. Indeed, as Lacan cruelly pointed out, there is nothing 'free' about free association since to associate 'freely' is the hardest and most daring act an analysand can achieve: once the analysand lets go of the hold the Big Other (here in the person of the analyst) has on her and speaks 'freely', the analysis is over. Sadly even in the idealized safe 'holding' place imagined by Robert Burt in a therapeutically-inspired courtroom, the odds that the parties will let go of their illusions about themselves, let alone of their adversaries, let go of the hold of the Big Other (here in the form of the judge), and engage in 'free associative speech' are slim indeed.

In contrast to legal thinking, for psychoanalysis the subject's speech is no indication of the subject's truth, indeed for psychoanalysis the subject's truth emerges when the subject disappears or, in Freudian terms, when she 'slips'. It is not what we say but what 'escapes' that is important: as Lacan (2006) responds to Descartes, 'I am thinking where I am not, therefore I am where I am not thinking.' (p. 430) That is, the core of our subjectivity is not our thinking, or our speaking, or our doing, but our cut: when we stumble in our thoughts, our words or our acts and unwittingly

betray our lack rather than our mastery, that is when we encounter a fragment of the truth. As Lacan (1998) spells it out, it is when we stop thinking, when we utter stupidities that we may find out something about our desire: ‘The subject is not the one who thinks. The subject is precisely the one we encourage, not to say it all, as we tell him in order to charm him, but rather to utter stupidities ... It is precisely to the extent that the guy is willing not to think anymore that we will perhaps learn a little bit more about it.’ (pp. 21-22) Without the willingness to speak not only ‘freely’ but ‘fully’ and indeed thoughtlessly, however safe the holding place of the courtroom Burt envisages, and however much the judge may abdicate her hierarchical status, we cannot hope to arrive at the truth.

The repercussions of this insight for legal systems are overwhelming. If, as psychoanalysis suggests, the divided subject does not know the truth about herself, the assumption in legal systems that a subject may be relied on to give truthful evidence about herself or others becomes suspect. One can surmise here the gulf between free association, through which, eventually, and after a great deal of resistance, the subject’s unconscious truth may be glimpsed and the carefully drafted legal statements. If free association is one way to approximate the subject’s unconscious, the ‘anything but random’ parties’ affidavits and statements in legal cases are as far away from the truth of the subject as it is possible to get. In particular, the parties in a legal process try to control the meaning of their words *before* their utterance. For psychoanalysis, however, the only relevant meaning is the one determined retroactively, *after* the words have been spoken; it is at that point that we can look back and examine whether our unconscious, the only speaking part of us that doesn’t lie, has given us away, or, which is the same thing, led us to our own truth.

This explains the lack of conviction in legal language even when it *convicts* and indeed punishes. For psychoanalysis, despite legal injunctions, on oath and on more, we can never know the ‘truth, the whole truth and nothing but the truth’ because that is precisely what we will not say. (Fink, 2007, p. 32) This is why the analyst/judge, in contrast to Burt’s plea, must refrain from

trying to fathom what, if anything, the subject ‘means’, or ‘intends’ to say. The analyst/judge must focus only on what is spoken: to the utterance, the surface of the signifier. As Lacan (2006) protests, ‘I repeatedly tell my students, “Don’t try to understand!”’ (p. 394) Trying to understand, again, is a sure recipe for the slippery slope back to the imaginary; the analyst’s task, on the contrary, is to maintain the inscrutable position of the dummy in a game of poker, or, as Lacan points out in his analysis of *Las Meninas*, Velázquez’s position in the painting that he is painting. The aim is not to understand but to enable the patient/litigant to come face to face with the truth of her utterance, whether or not she ‘meant’ it. Above all, if there is such a thing as a right answer in analysis, it does not lie with Herculean judges but with the analysand herself: the analysand (or, in Burt’s analogy, the litigant) who has let go of pre-rehearsed scripts, not the one insisting on controlling her own as well as her adversary’s speech, is the one who will encounter the truth.

## **5. The Law Made Me Do It!**

If the legal process cannot be relied on to deliver the truth, then what is the function of law for psychoanalysis? For Lacan the stop-gap of language that gives rise to desire is not only inevitable nor all negative: a full realization of desire would be catastrophic for the subject. A limit is necessary not only for creating desire but for preventing its full realization, which would spell the end of subjectivity. Lacan refers to the hypothetical scenario of an unlimited realization of desire as a state of unlimited *jouissance* which would be a state of constant, if blissful, torment for the subject.

This is where Law comes in very useful: in setting a limit to *jouissance*, Law gives birth to desire within the confines of the symbolic order, within the pleasure principle; for the pleasure principle, paradoxically, does not seek unlimited pleasure but manageable pleasure: in effect what the pleasure principle demands is that ‘pleasure should cease.’ (Lacan, 1991, p. 84) Prohibition

therefore incites desire *within* the parameters of the law: as Lacan (2006) explains, ‘It is not the Law that bars the subject’s access to jouissance – it simply makes a barred subject out of an almost natural barrier ... The true function of the Father is fundamentally to unite (and not to oppose) a desire to the Law.’ (pp. 696-698) Let’s not forget also law’s prohibitions are reassuring for the subject, making it look that what we cannot attain due to our inherent lack is instead prohibited: much easier to blame the law for our perennial dissatisfaction than have to admit our own limitations. Nathaniel Hawthorn’s notorious ‘limit-loving classes’ is not just one class but all of us.

## **6. The Obscene Remainder**

If Law functioned only to create and sustain our desire through its prohibitions, enabling us to navigate close to the sun but without us risking being burned by it, then we might, occasionally at least, be thankful for its interventions. Unfortunately there is not just one law, or indeed, in lacanese, one father. Lacan calls the benign law masking our limitations with its prohibitions the symbolic law, or law of the father, enabling us to adjust to and endure, more or less unsuccessfully and more or less painfully, the symbolic order. There is another law, however, and another father, and this is the remnant of Freud’s primal father of *Totem and Taboo*, whose murder is never deadly enough: as with all gods and fathers, we can never kill them completely.

In Freud’s mythology, the primordial crime that establishes a community of legal subjects is the sons’ murder of the father. Once the real father is dead he returns as the *symbolic* father: the all-enjoying, all-prohibitive primal father is domesticated and transformed into the ‘Name of the Father’, presiding over the symbolic order in the form of public rules and principles. The transformation, however, is not seamless. A surplus remains from the primal father haunting the symbolic and what remains, Žižek (1992, 2000) insists, is the obscene underside: the remainder of

the dead father of *Totem and Taboo* is the excess that has not been absorbed by the symbolic order. For Žižek this obscene underside to the public law is intrinsic to the functioning of the system and indeed supports and guarantees it.

Does our legal discourse acknowledge this remainder? Of course not: modern legal philosophy, from Kant's *The Groundwork of the Metaphysics of Morals* to Dworkin's *Law's Empire* today, we see a rehearsal of the hope that reason and pure form in the guise of the rule of law can eradicate pernicious acts. What insistence on pure form however does not appreciate is that adherence to form generates its own libidinal enjoyment. Žižek calls this the obscene surplus, referring to the all-too familiar scenario of subjects deriving libidinal satisfaction from the supposedly neutral activity of performing their duty: whether it is following the rules, obeying orders, or filling in the forms. Alenka Župancic (1996) explains this alliance between obscene pleasure and duty: it's as if 'the pathological', she writes, 'takes revenge and imposes its law by planting a certain kind of pleasure on the path along which we follow the categorical imperative.' (p. 120) We don't have to delve into the annals of history for examples of subjects using their 'legal duty' as an excuse for committing evil acts 'legally'. The ongoing refugee crisis at Europe's borders comes with daily instances of police, soldiers, and guards claiming they are 'following orders' when ruthlessly attacking refugees trying to cross the border. The excess violence we witness goes far beyond their 'legal duty' and shows the perverse enjoyment hidden but inherent in the supposed 'neutral' activity of enforcing the law.

Far from being isolated 'bad apples' in an otherwise functioning system, such excess, Žižek argues, is part and parcel of the machinery of prohibition. Žižek (1991) goes further to suggest that one only becomes a 'full' member of a community not when she identifies with the community's explicit rules, but when she participates in its hidden rules, its obscene underside and in its excesses (p. iv). As Freud started exploring in *Group Psychology* and Lacan (2006) spells out

more bluntly, the ‘feeling that most solidly ties the troop together’ is ‘knowledge in a pathetic form; people commune in it without communicating, and it is called hatred.’ (p. 400)

## **7. Castrated Law**

We have come some distance from Robert Burt’s hope that psychoanalysis might teach lawyers respectful and mutual understanding. What the analysis has shown instead is a fundamentally castrated and lacking subject that cannot be trusted to understand or reconcile herself with herself, let alone with her adversaries. It gets worse: if, as I have described, language inflicts a fundamental division on the subject, a division that we only grudgingly and embarrassingly acknowledge, what is harder to acknowledge and come to terms with, is not that we ourselves are divided, but that the entity we direct our demands to, the Big Other of Law, or Government, is also irretrievably cut. For psychoanalysis, however, the gap in the constitution of the human subject is matched by a gap in the Big Other of the symbolic order, including the legal order: indeed laws, politics, religions and culture are so many (incomplete) attempts to gloss over and efface this gap. We turn to them precisely because we are ourselves divided.

In contemporary societies, the view that the Big Other is itself divided, that the symbolic order is ‘not all’, that the Law is already castrated is an open secret. On a daily basis we cannot fail to witness blunders and irregularities, if not outright crimes, committed by our governments, civil servants, police, priests, and numerous others in positions of authority. In the legal arena, notwithstanding Ronald Dworkin’s persistent claims of Judge Hercules’ infallibility and omniscience, every law student and every lay observer can detect the cracks in Law’s castle. What is it that holds the building together then, if not the same passion for ignorance that we encountered earlier, the same will to continue to misunderstand that, in the case of society, we call ideology?



What does ideology efface in the case of Law? For starters, what ideology does a good job at concealing in the case of the legal system is the violence at Law's conception. What, after all, is Law's origin? If, as modern man proudly claims to have established, Law is not a set of rules issued by an omniscient deity up above, then how does it appear? One of Freud's most devastating claims for lawyers is that law and the legal system are not created to dispense justice or even order or even efficiency. As he explains the origin of prohibitions with disarming simplicity, what other origin can we impute to the creation of laws, than that of desire itself? Take the ultimate law of laws, the incest taboo and indeed all taboos: 'Since taboos', Freud (1913) reminds us, 'are mainly expressed in prohibitions, the underlying presence of a *positive* current of desire may occur to us as something quite obvious and calling for no lengthy proofs... For, after all, there is no need to prohibit something that no one desires to do, and a thing that is forbidden with the greatest emphasis must be a thing that is desired.'(p. 69) So it is the subject's renunciation of her desires rather than her striving after lofty ideals that leads to the creation of laws, religions, and moralities

Have we made any progress from so-called primitive taboos with our modern law? In contrast to many Gods and many religions, modern law prides itself not on issuing prohibitions from above, but on enabling the subject to participate in governance and in law-making. Kant in particular is credited with divorcing ethics from religion as well as any notion of a Supreme Good. In his account of morals, Kant doesn't look for the Good: what determines the morality of our action, he insists, is not its *content*, but its *form*. The only criterion for a law becoming universal is conformity to the categorical imperative and the categorical imperative does not prescribe any particular content.

Freud is not impressed with Kant's achievement: despite his nobility and optimism, even Kant, in Freud's view, could not eliminate pathological elements from the source, let alone the application, of the law. For Freud (1913) what Kant calls the moral law, the inner voice of conscience which utters the categorical imperative, is nothing other than the superego and the

superego is indistinguishable from the workings of taboos in pre-modern societies; the categorical imperative, in short, is a remnant of the primitive within modernity: ‘taboos still exist among us. Though expressed in a negative form and directed toward another subject-matter, they do not differ in their psychological nature from Kant’s categorical imperative’, which operates in a ‘compulsive fashion and rejects any conscious motives.’ (p. xiv)

Is Freud right to dismiss Kant’s noble aims so easily? What Freud appreciated, and Lacan spelled out, is that when form is all there is to law, and no specific content is prescribed, the law itself functions like a taboo, rendering formal law, like the superego, a sadistic agency. Indeed the ‘emptiness’ of formal law, the fact that it doesn’t enunciate any notion of the Good other than doing one’s duty, can lead the subject to do something not only for the sake of duty but *only* for the sake of duty. That is, a subject can conform to the formal structure of the categorical imperative irrespective of the substantive content of that imperative, in other words, while pursuing diabolically evil ends. A famous abuse of Kantian ethics was of course Eichmann’s appeal to Kant during his trial in Jerusalem; throughout the proceedings Eichmann insisted that, in putting himself in the position of the instrument of the Big Other’s – here the Führer’s – will, he was only performing his ‘duty’. There is no guarantee, therefore, that conformity to the categorical imperative will render an act ‘pure’, that is, untainted by pathological motives, while evil acts can still be ‘pure’ that is, conform perfectly to the categorical imperative.

We are full circle back to Freud’s insight that the origin of law is desire. Kant’s categorical imperative, far from being free from pathological desires, is animated by those desires at their extreme: even when we obey the moral law, our motive for obeying it is still pathological self-interest. Lacan (1979) agrees: Kant’s moral law, he concludes, ‘looked at more closely, is simply desire in its pure state.’ (p. 275) The moral law derives its power to bind us from the desires we ourselves repress when we follow it: as we repress our desires and follow the law, we find substitute satisfaction in the law itself. In that sense, we do not repress our desires because of the

law; we have law *because* we have repressed our desires. This is the added, ‘obscene’, dimension to the ‘noble’ concept of duty that we prefer to forget.

## **8. The Law is the Law**

If the genesis of every law is repression of our desire, then what makes any legal system, lawful? What gives a system of laws its supremacy over other systems? For psychoanalysis, the founding gesture of the legal system is a crime so radical it redefines the existing standards of legality and illegality. The genius of the arch-crime is that it dissolves its own criminality by negating and overcoming the existing definitions of what is legal and what is criminal: ‘it turns its own transgression into a new order.’ (Žižek, 2009, p. 40) Like Brecht’s, ‘what is the robbery of a bank, compared to the founding of a new bank’ the founding of a new legal system was preceded by a crime so great it overthrew the existing system and set up a new one. Once the crime is universalized it no longer appears as a crime but it turns from transgression into a new order masquerading as universal law. So law, although a crime at its inception, becomes ‘universalized crime.’ (Žižek, 2009, p. 41)

Although this is the case with every system, by and large this is not an origin lawyers choose to dwell on. The rationale for contemporary calls to pay restitution to the descendants of victims of past injustices, from slavery, to colonialism, to apartheid, is the acknowledgement of the original crime that set up the system and a false hope that somehow the system can ‘cleanse’ itself of the crime that installed it in power in the first place. What is left of the law once we appreciate its violent roots, the obscene dimension at its core, and its own continuing castration? Is it any more than a tautology, the law is the law and there is nothing beyond, or behind or before it? Perhaps, as the priest explains to Joseph K when he wanders into the Cathedral, ‘it is not necessary to accept it as true; one must only accept it as necessary.’ (Kafka, 1953, p. 243)

## 9. The Extimate Becomes the Law

Joshua Oppenheimer's documentary of the Indonesian genocide of communists in 1965-66 in *The Act of Killing* goes a step further in its depiction of the creation and maintenance of a legal system. The film is shocking, to put it mildly, not only because of its depiction of unspeakable crimes, but in the very method of their depiction; not only is the extimate displayed in all its obscene and traumatic horror, but the extimate, what in most subjects and systems is safely hidden out of view, has, in this instance, acquired the status of the Law itself.

Oppenheimer's technique for approximating the extimate is the time-honoured technique of poets who have been excavating the unconscious centuries before anyone had heard of Freud: truth here appears through the medium of fiction or, in its twenty-first century form, the cinematic screen. It is also the technique these killers say they used when perpetrating the massacres: their killings, were not 'only' killings, they claim. They were performances, shaped by and modeled after Hollywood movies: 'Each genre had its own method of killing', explains the film's protagonist and master assassin, Anwar Congo: 'Depending on whether we were actors in a mafia movie, or a western, or a musical, the method of killing would vary, and be faithful to the original'. What of course Anwar persists in ignoring (and the film's director is complicit in my view in allowing him to keep ignoring) is that in performing these Hollywood fictions they were perpetrating a gruesome truth: the genocide of over one million communists in Indonesia.

So what truths can we gauge from Oppenheimer's admittedly sleek, if not 'enjoyable' movie? The movie amplifies and displays what was already at the heart of every legal system; that is, we must not pathologise Indonesia's history as being somewhat out of the ordinary or that the legal order precipitated by the 1965 military coup is somehow unique. At the origin of every legal system, not only that of Indonesia, is a crime that, having asserted its own supremacy, can now

proclaim itself to be the universal law. In most legal systems this is safely hidden in the archives of history and not delved into, let alone celebrated. What is shocking and haunting about the depiction of the Indonesian legal system is that this history, far from hidden, is displayed with glee and pride by the perpetrators: ‘We won’, we hear them saying time and again, ‘so why should we hide? Indeed, should any of the survivors’ children dare to raise their voice in criticism, or, god forbid, revenge, we will exterminate them’. This is Anwar’s confident response not only to the filmmaker but on national television, to the applause of the studio audience and of the chat show host herself.

If there’s violence at the heart of the constitution of the legal system, there is no doubt that continuing violence has to be exerted for that system to maintain its supremacy. In most systems it is usually the preserve of the coercive powers of the State, the police and prison system. In the case Oppenheimer chronicles, this power is not only blatant but again on the surface. The ‘muscle’ as it were for the continuing exertion of power by the regime that perpetrated the genocide is the paramilitary Pancasila Youth whose three million members did the military’s ‘grunt’ work. In the film members of Pancasila Youth display all the characteristics of the crowd described by Freud in *Group Psychology*: feeling ‘invincible’ when in the group, they thirst for obedience and crave authority. For Freud what binds the members of the group together is love for the leader to whom they bestow the attributes of the ideal ego. For Žižek (and Oppenheimer’s film bears this out) the bonds that bind are much less benign and likely obscene. They are, first and foremost, an investment in shared guilt for their common crimes. Pancasila’s leader also bears all the characteristics of Freud’s primal father in *Totem and Taboo*: we see him repeatedly asserting his power over other members of the group by arrogating to himself the right to enjoy any and all women he meets. His minions bestow this privilege to him on a regular basis and can’t wait to entertain their leader with dirty jokes about insatiable women. If Freud had been observing

Pancasila Youth instead of Australian tribes, his analysis in *Totem and Taboo* would have been identical, because Australian tribes and Indonesia's youth are all of us.

When the extimate has not only taken over but has become the Law, what recourse does the subject have? In Oppenheimer's follow-up film, *The Look of Silence*, the brother of one of the victims revisits the scenes of his brother's gruesome torture and murder and confronts the perpetrators with their actions. The response, predictably, is, at best, a refusal to admit they knew: like Žižek's oft-repeated correction to Donald Rumsfeld's epistemological categories, these people know but they don't want to know: 'I had no idea this was going on next door' we hear them saying. In the background, even the perpetrators shake their heads in disbelief; much more us the audience. At other times, the response, far from a relatively benign 'Sorry, I didn't know', is more thinly veiled threats: 'Why are you digging here? You want the massacres to start all over again? Because if you keep digging, they will!' We are left fearing not only for the film-makers, but for the few brave survivors who are willing to break the silence.

We have come a long way from Robert Burt's hope that a psychotherapeutically-inspired legal process might aid democratic communication and understanding between adversaries. What a psychoanalytic reading has enabled us to see here, is the extimate at the very heart of the law, including law supposedly faithful to Enlightenment ideals of freedom and the rule of law. Could the connection between law, freedom and evil be closer than we want to admit? Kant (1958) for one, in his later work, started wondering whether man's capacity for evil was itself a product of his freedom. Could the Enlightenment ideas of reason, moral autonomy, and universality, as several philosophers have started to ask, be responsible for the very moral disasters they claimed to overcome (Copjec ed., 1996)? There is no doubt that the perpetrators of Indonesia's genocide do not hide their admiration for Western culture, which throughout the film functions as their ideal ego: it is not the audience in Jakarta they are thinking of when staging their reenactments, but London and Hollywood studios.

In a perverted twist that no Freudian would dismiss as a coincidence, and every Lacanian would see as confirming the primacy of the signifier, Pancasila Youth insist that the word ‘pre-man’ (designating ‘gangsters’ in the Indonesian language), is actually identical to the word ‘free man’. Gangsters are free men and freemen are gangsters, is the recurring message and celebration in their narrative. Since gangsters are the champions of freedom, where would Indonesian or any society be without us, they ask. It is a distortion of the signifier that the American government’s support for the coup during the height of the Cold War failed to correct. Not to mention the political as well as military assistance provided to the Indonesian military by US agencies that not only turned a blind eye to the genocide but actively encouraged and supported it.<sup>1</sup> Paradoxically at its ‘best’, this is what a psychoanalytic excavation of law enables us to see: not the greatness generated by our ideas and ideals of freedom, enlightenment, and law, but their obverse: their obscene ugliness when pushed to the extreme.

## **10. Dissolution**

How has the encounter between law and psychoanalysis managed to reach such diametrically different conclusions to those of Robert Burt that we saw earlier? While the attempts to shrug off, resist, domesticate, or simply co-opt Freud’s menacing message have taken many forms over the last century, I venture a suggestion as to the cause and source of this willful misunderstanding. My hunch is that psychoanalysis has been treated as an ‘and’, an addition or enhancement to the study of law, a discipline with which to wed, treat, and explore legal concepts and processes. While this coupling of law with psychoanalysis can lead to fruitful collaborations, as Robert Burt’s article so aptly describes, what it misses is psychoanalysis’ primary challenge not only to legal discourse but to all discourses: rather than aiming to ‘wed’ another discipline for the mutual advantage of both, in a process of mutual understanding and exchange, psychoanalysis,

whether we like it or not, aims to expose what lies underneath another discourse's primary presuppositions, an exposure that is not always pretty and, should it be carried to its conclusion, would lead not only to shame and embarrassment but to the destruction of the subject and/or discipline.

In the case of legal discourse, psychoanalysis problematizes law's primary presupposition, that is, the distinction between the public realm of law and state on the one hand and the private realm of the individual on the other. It points out that the distinction between public and private is problematic because what is supposedly most intimate and hidden by and from the subject is taken from outside: from our parents, teachers, public figures and the symbolic order of language and culture. For psychoanalysis the distinction between self and other, subject and neighbor, inside and outside is blurred because the most intimate part of ourselves is taken from outside, from the other. As Freud (1921) started exploring, 'In the individual's mental life, someone else is invariably involved, as a model, as an object, as a helper, as an opponent; and so from the very first individual psychology ... is at the same time social psychology as well.' (p. 69)

Psychoanalysis is not the first discourse to challenge the distinction between public and private bequeathed to us by liberal theory, or to critique its limitations and convenient ability to ignore injustices that are perpetrated in the off-limit realm of the 'home'. Psychoanalysis goes further, however, in pointing out that the two realms are not only linked but continuous and, like the moebus strip, indistinguishable. Rather than turning legal discourse upside down, psychoanalysis turns it *inside out*: that is, it reveals not the *opposite* or *antithesis* of legal discourse, not what is outside or even excluded by it, but its *other side*, that is, the ideologies, fantasies and unconscious desires that support legal discourse from underneath. And unfortunately, as we saw in the course of this article, the underside is not always healthy or clean but obscene and dirty. No wonder then every subject and every system, prefer to keep it out of view.



As I explored in my *Taking the Unconscious Seriously*, a psychoanalytic account of law does not promise mutual understanding or cooperation because all too often such promises perpetuate the consolations of fantasy and connive with the forces that obscure and efface our limitations. Instead, a Lacanian analysis exposes what is lacking both in the subject and in Law, and aims to reveal the obscene core at their centre. Its radical and brutal message is that neither Law nor the individual are whole, that the incomplete, failing and miserable organism we grapple with on a daily basis is 'all there is'. For the subject to recognize the fault in the system, including the consoling fictions she relies on, is for the subject to come to terms with the non-existence of the Big Other, an approach that I term 'atheist jurisprudence'.

Far from a benign encounter for mutual understanding, respect and cooperation, the encounter between law and psychoanalysis contemplates not only the explosion of the primary presuppositions underpinning Law, but also, at its conclusion, the disappearance of psychoanalysis from the scene altogether. Psychoanalysis, in other words, is unique amongst discourses because it is at ease with its own aphanisis, its own disappearance once its bloody task is complete. Once the subject, and the Law, have come to terms with their own castration and encountered their own extimate core, psychoanalysis can retreat, making way for the birth of a new subject and, ideally, a new symbolic order.

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