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An assessment of the existence and influence of psychoanalytic jurisprudence in the United States

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ABSTRACT

In light of the ongoing controversy over the value of psychoanalysis generally, this article summarizes the standards for scientific expertise in law and concludes that the future of psychoanalytic jurisprudence does not lie in the courtroom. After a brief survey of the history of psychoanalytic jurisprudence in legal contexts and institutions, I identify a revival of psychoanalytic jurisprudence, including (i) its association, primarily as a social theory, with Critical Legal Studies (in the US context), and (ii) the influence of Jacques Lacan in the legal academy. The unifying themes in this critical methodology include the construction of the subject through the language and rituals of the law, the failure of mainstream jurisprudence to be sufficiently critical of the legal status quo, and the repression or denial of injustices in legal history. Paralleling that revival, I note that a field of scholarship employing traditional Freudian conceptions is also currently engaging interdisciplinary legal studies, intervening in law reform efforts (particularly in criminal law), and criticizing the background assumptions and conventions in contemporary judicial opinions. I conclude that psychoanalysis is both threatening to mainstream legal culture and a rich source of insights for contemporary studies of legal processes and institutions.

1. Introduction

I begin by recalling an event on March 29, 2015, when, in the Sunday *New York Times* book review section, there appeared a friendly review of Jeffrey Lieberman's new book, *Shrinks*: *The Untold Story of Psychiatry* (Angier, 2015). In that story, Lieberman is highly critical of Freud and of the psychoanalytic tradition (Lieberman & Ogas, 2015). Of course, his rejections of Freud as unscientific, and of psychoanalysis as virtually ineffective, hardly qualify as an untold story—his story is neither a new critique nor an unusual assessment. Natalie Angier, the reviewer, admires Lieberman's work, and in her review she joined in the scathing critique, recounting her own analysis as both miserable and useless (Angier, 2015). She concludes, with Lieberman, that there is no clinical evidence that expensive analysis works, therefore Freud led us astray (Angier, 2015).

Just as Lieberman's argument is unsurprising, the *reactions* to the book and to the flattering review were, in the context of New York City, completely predictable. In numerous letters to the editor over the next two weeks, various clinical psychiatrists condemned both Lieberman's distorted view of psychoanalysis and his scandalous denunciation of Freud as unscientific (Letters, 2015). After all, psychoanalysis has grown and evolved into a modern treatment that pays attention to neuroscience and pharmacology, and it is effective for some patients. However, the *Zeitgeist*, the mainstream view or cultural *tendency*, is to view psychoanalysis as outdated (Letters, 2015).

Episodes like the *New York Times* controversy above are perennial, and they always unfold in the same manner: The critics wonder why anyone would still be talking about Freud, and the defenders of psychoanalysis offer explanations, but sometimes divide over the question of whether analysis is scientifically based or merely a useful interpretive exercise. For example, Morris Eagle is optimistic about "systematic outcome research" to address "the issue of accountability" in psychoanalysis (Eagle, 1996), while Jonathan Lear questions whether the standards of empirical science are decisive in assessing the value of psychoanalysis—after all, numerous valuable scholarly enterprises are not empirically based (Lear, 1995).

The 1998 Freud Exhibit, planned for the Library of Congress in Washington D.C., was condemned (and postponed) for years as a waste of government money (Merkin, 1998). The same old debate with the same positions arose (Weeks, 1998), often in letters to the editor of *The Washington Post* where reports of the exhibit originated. The debate also arises every time a faithful disciple of Freud rejects the Master, confesses to personal heresy, and writes a book. Jeffrey Masson and Frederick Crews both made loud their respective renunciations of Freud and the "religion" of psychoanalysis (Crews, 1980; Masson, 1984), which events stirred up both the critics and defenders of the psychoanalytic tradition.

For purposes of this article, I concede at the outset the ongoing controversy over Freud, including the general suspicion in popular culture

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concerning the relevance or utility of psychoanalysis. I also identify a division among friends of Freud between (i) those who emphasize the clinical, or medical and scientific, claims of psychoanalysis, on the one hand, and (ii) those who use psychoanalytic theory in cultural studies, or in historiography and literary criticism, as an interpretive method of investigating and evaluating culture, on the other hand. That controversy and that division, I will argue, persists in law and in legal studies with respect to psychoanalysis.

2. The scientific claims of psychoanalysis in law

On the question of whether the clinical (medical or scientific) claims of psychoanalysis have a place in contemporary law, one must highlight the U.S. Supreme Court's opinion, in *Daubert* (Daubert v. Merrell Dow Pharm., 1993). During the late 1980s, there was a public discourse concerning junk science in the courtroom, as well as some confusion about the appropriate standard for admissibility of expert scientific testimony (Ayala & Black, 1993). Virtually everyone now agrees that the U.S. Supreme Court, in *Daubert*, ushered in a new evidentiary regime, giving to judges the responsibility for evaluating expertise *and* instructing judges as to the markers or characteristics of genuine science. Nowadays, in most U.S. courts, when a case is filed involving scientific evidence, the judge evaluates the proposed experts *before the trial*, and attempts to determine (i) whether their scientific testimony is testable (or reproducible by others), (ii) whether there is an established (and *low*) error rate, (iii) whether there is support from peer-reviewed publications, and (iv) whether the testimony reflects a view generally accepted in the relevant scientific discipline (Caudill & LaRue, 2006, pp. 6–7). I have argued elsewhere that these four factors represent an idealized view of science, and that they lead judges at times to reject the best science in the case because the expert concedes uncertainty, and at other times to accept some questionable science on the basis of an expert's credentials alone (Caudill & LaRue, 2006). For purposes of this article, I note that in this new evidentiary regime, psychoanalysis does not fare well in the courtroom. Indeed, you can find very few published cases where psychoanalytic theories are accepted as expertise. Psychoanalysts are often found *not* to be qualified unless they testify as *psychiatrists* and emphasize clinical *psychiatry* in their testimony. For example, in *Huber*, an analyst who had one year of psychoanalytic training and was certified to analyze patients, was deemed *not* to be qualified (U.S. v. Huber, 1979). A psychiatrist who was also a psychoanalyst, in the *Ramalho* case, was deemed to be qualified (N.J. v. Ramalho, 2013). If you testify as a psychoanalyst, then the opposing counsel (unless his or her own expert is also a psychoanalyst) will attack your testimony as insufficiently scientific. And if the judge is like federal District Court Judge Rakoff, who said, "In the case of certain kinds of purportedly scientific evidence, courts have sometimes proved quite credulous … [as with] psychoanalysis…," then you will be rejected before the trial even starts (Rakoff, 2008).

I recognize that these distinctions may make little sense to a practicing analyst, who from his or her training onward never limited his or her practices to Freudian texts—the notion that "psychiatry" is good and "psychoanalysis" is bad is highly simplistic, ignoring the fact that licensed psychiatrists often train as analysts and use whatever means are effective to help their clients. Indeed, Professor Imwinkelreid distinguishes between (i) cases where expert psychoanalytic testimony might not be admitted, such as a claim that the dreams of a rape victim establish the fact of the rape, and (ii) cases where expert psychoanalytic testimony should not be controversial at all, such as a claim in a malpractice case that psychoanalysis has been effective in treating patient disorders (Imwinkelreid, 2003). However, in the adversarial setting, with new scientific standards that include "general acceptance" as a factor, attorneys will use whatever strategies work to disqualify an opposing expert, even if that means capitalizing on an unjustified bias against the mere mention of psychoanalysis.

On the other hand, analysts participate and are influential in numerous less formal legal settings, such as civil commitment hearings, child custody disputes, and proceedings initiated to revoke (or to return after revocation) a professional license. An analyst or expert in psychoanalytic theory is not likely to be challenged, in those settings, even though the insights presented are based in psychoanalysis. Robert Burt has offered the examples of (i) Joseph Goldstein's use of psychoanalysis in arguing for the best interests of children in custody disputes, including the potential preference of the "psychological parent" over the biological parent, and (ii) Jay Katz's use of psychoanalysis to provoke disputes between patients and their physicians, because patient–physician conflicts are often hidden by unconscious fantasies about physicians as well as simplistic notions of informed consent (Burt, 2006). Another example is the presentation of an expert report or affidavit from a psychoanalyst, in a license revocation hearing, stating that the medical problems of a professional have been resolved (Goldberg v. Ill. Dept. Prof. Reg., 2000). In all of these settings, no one is particularly concerned about the psychoanalytic orientation of a psychiatrist serving the law, helping settle disputes or raising unacknowledged issues, or assisting in restoring a license to a professional who has been treated for whatever illness caused a departure from professional standards. Notwithstanding persistent concerns over psychoanalytic expertise in the courtroom, clinical *uses* of psychoanalysis in law continue nowadays.

I turn now to the social and theoretical uses of psychoanalysis in law, which are many. Even though the turn to the social makes use of concepts from clinical practice – including hidden (or misrecognized) fantasies, conflicts, desires, senses of loss, and resistance – the focus changes to psychoanalysis as a social theory, dealing with a *collective* unconscious, with *groups* as the subject or analysand. Many of these theoretical studies provide the basis for practical analyses, discussed in part 4, addressing current controversies in law.

3. Psychoanalytic jurisprudence

3.1. History

We might first conceive of psychoanalytic jurisprudence as a philosophy of law, which came into the legal academy in the 1930s and 1940s, when psychoanalysis was both relatively popular in intellectual culture and dominant in psychiatry and psychology. Jerome Frank's *Law and the Modern Mind* identified the myth of law's coherence – reinforced unconsciously by lawyers – and the desire for social stability that causes citizens to seek an authority figure (Frank, 1930). Such views flourished in the 1960s, beginning with Bienenfeld's *Prolegomena* (to an unfinished book), which both (i) emphasized the psychological origins of law (in the mother's guidance and directions, as well as in the father's harsh prohibitions), and (ii) analogized the conflicts within a family, including Oedipal conflicts, to the conflicts among citizens within a state or nation (Bienenfeld, 1965). Goldstein's famous article "Psychoanalysis and Jurisprudence" reflected a confidence that the psychoanalytic tradition, while not a source of social or political values for law, could help judicial decision makers, for example, by "forcing into view conflicts between existing rules and preferred values which [the judge] may not see or may not wish to acknowledge" (Goldstein, 1968, p. 1060). Thus, while psychoanalysis might not, for example, provide a moral basis for requiring "belief beyond a reasonable doubt" as the standard for guilt in criminal trials, a judge "may, given the value preference for minimizing the chance of error which supports the reasonable doubt standard, draw on insights from psychoanalysis in determining whether the standard has been met in a particular case" (Goldstein, 1968, pp. 1060–1061). And while Goldstein was outwardly guarded concerning the integration of psychoanalysis and law, which was "not close at hand," he identified potential contributions that psychoanalysis might make in law, including the recognition (i) of unconscious forces (in order to understand the possible unconscious origins of pacifism), (ii) that one cannot identify the internal cause of behavior on the basis of "overt conduct"

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