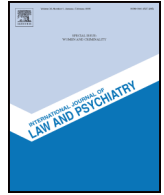




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## Psychoanalysis and the law

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## ABSTRACT

The paper discusses Freud's view of the law as the implementation of collective violence on the individual violator. I focus on the implications of the link between the superego (as the source of moral judgment) and the aggressive drive and suggest that we need to be ever vigilant regarding the danger of employing the law as a disguised means of taking pleasure in collective violence. The paper also discusses Freud's conception of personal responsibility, according to which we are responsible for all our behavior, including unconsciously motivated behavior (such as slips and dreams). However, the kind of responsibility Freud has in mind is not the moral responsibility of blameworthiness or praiseworthiness, but rather responsibility in the sense that, whether or not acknowledged, all our behavior reflects our personal desires and motives.

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## 1. Freud on the law

Freud had relatively little to say about psychoanalysis and the law. In the twenty-three volumes of his writings, one finds two essays in which Freud makes explicit reference to the law. In one set of comments, a critique of the Austrian law declaring the practice of psychoanalysis by laypersons illegal on the ground that it constitutes practicing medicine without a license. In these comments, Freud essentially advocates civil disobedience when the law is unjust (Freud, 1926).

The second set of comments, made in his essay *Why War*, consists of a far-ranging response to the question "Is there any way of delivering mankind from the menace of war?" put to him in a letter by Einstein. His response reveals Freud's thoughts regarding the relationship between right (*recht*) and might (*macht*), the roots of war in the destructive instinct, the role of Eros as a barrier against the destructive instinct, and the "progressive displacement of instinctual aims... and impulses by a strengthening of intellect in limiting war and violence." (Freud, 1933[1932], p. 214). Freud (1933[1932]) writes that "Right [in the form of the law] is the might of a community. It is still violence ready to be directed against any individual who resists; it works by the same methods and follows the same purposes. The only real differences lies in that what prevails is no longer the violence of an individual but that of a community" (p. 205). He also writes that "the community must draw up regulations... and must institute authorities to see that those regulations—the law—are respected and to superintend the *execution of legal acts of violence*" (p. 205) (my emphasis). Freud also makes it clear that in his view all forms of violence are the product of the instinctually based aggressive drive and that although necessary to prevent and control aggression, the law itself constitutes a form of institutionalized collective violence. In these comments, the normally politically

conservative Freud appears to take a Foucaultian position regarding the relationship among the law, society, and power.

As suggested in Butler's (2014) recent review of Derrida's *The Death Penalty*, Freud's position is congruent with Nietzsche's argument that the framework for the relationship between crime and punishment reflected in the law is based on the relationship between debt and payment or between debt and restitution. On the societal level, payment or restitution for unpaid debt is made in the form of punishment at the hands of society. On the intrapersonal or intrapsychic level, payment is made in the form of guilt, a way of punishing or inflicting injury upon oneself by oneself. Insofar as guilt is the internalized product of societal prohibitions in the form of a superego structure, one can think of it as an indirect form of societal punishment as payment for the debt incurred by committing a transgression.

Indeed, from the perspective of Kleinian theory, the child's capacity for guilt is viewed as a developmental achievement and as an expression of socialization because it opens up the possibility of "reparation" for the harm that one has inflicted on another (Klein, 1975).

The link between Nietzsche's discourse of debt and restitution and Klein's use of the term "reparation" is noteworthy. Also noteworthy is Freud's (1930[1929]) formulation that the superego, the intrapsychic structure that metes out punishment, is closely aligned with the aggressive instinct. Implicit in this formulation is the caution that a moralistic and self-righteous stance, including its presence in the law, is often in the service of aggression and violence rather than the expression of truly moral values. This is a central theme in this paper.

Butler cites Nietzsche's observation that in Roman law, creditors of unpaid debt were given "psychic reimbursement" through allowing dismemberment of the debtor, thus providing the creditor the pleasure of seeing the debtor suffer, "the pleasure of doing violence" (as cited in Butler, 2014, p. 31). Thus, the illegal violence inherent in causing injury to another committed by an individual is met with the legally and socially sanctioned violence as a form of payment or restitution. What

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is especially interesting about Nietzsche's observation—which, in a sense, is profoundly psychoanalytic—lies in his calling our attention to “the pleasure of doing violence,” particularly when that pleasure is enshrined in the law. That is, whereas the notion that the collective violence in which the law is embedded, may be pleasurable is implicit in Freud (after all, insofar as violence gratifies the aggressive drive), it is made explicit by Nietzsche's description of “the pleasure of doing violence.”

That the means through which the law is carried out often literally entails collective violence, or perhaps more accurately, legally sanctioned violence, is reflected in the recent spate of unwarranted police killings of African American boys and men in the United States which, for the most part, has not led to any sanctions. The police who carry out these killings, whose duty is to maintain law and order, seem to construe the law as providing a low threshold for a license to kill. That is, they are legitimate agents of collective violence. Furthermore, as is often the case with collective violence, the threshold for its enactment is especially lowered for those who society has identified as the dangerous other and the marginalized.

Continuing with the metaphor of debt and payment, it is noteworthy that when embedded in an accepted and powerful social structure, such as a corporation, certain actions for example, General Motor's failure to repair ignition problems even after deaths were reported, may not be viewed as criminal. Rather, the punishment takes the form of monetary payments. Here, Nietzsche's description of a debt and payment is no longer a metaphor, but a literal transaction. However, the payments are impersonal in the sense that they are corporate rather than individual or personal payments. No single individual or set of individuals is involved in the payment. Most important in the present context, the “collective violence” of the law is now muted or even absent. Rather, an impersonal monetary transaction or “settlement” takes place, which quite often, stipulates no admission of wrongdoing.

Whereas individual violence (and even the impulse to engage in violence) often generates guilt, including chronic guilt, collective violence generally does not. Often, this is so because the “collective violence” (and perhaps the “pleasure of doing violence”) that characterizes both the law and other social violent actions such as war are legally sanctioned by society. In an odd and ironic sense, from a psychoanalytic perspective, the “collective violence” expressed in both the law and going to war represents a *sublimation* of aggressive impulses, that is, a displacement of aggressive instinctual impulses to socially acceptable aims. Hence, whereas for most non-psychopathic people, killing someone or even imagining killing someone would elicit guilt, it is far less likely to do so when the killing takes place in the context of war or in the context of legally executing a prisoner. Indeed, as Nietzsche noted, whatever cruelty and sadism are involved in killing a prisoner (or in other forms of socially approved violence), the act can be experienced not as a crime worthy of guilt, but as a moral duty. This observation is entirely in accord with Freud's (1930[1929]) recognition that the punitive component of the personality, the superego—the psychic structure that monitors moral duty—is allied with the aggressive drive.

## 2. Freud on personal responsibility

Central to the societal justification for meting out “collective violence” in the form of imprisonment or execution for the individual commission of a crime is the assumption of personal responsibility, which, in turn, rests on some conception of choice and free will.<sup>1</sup> The

<sup>1</sup> Interestingly, although it is individual employees and officers who were involved in failing to report ignition failures in General Motors automobiles and thus who played a central role in the death of some auto owners, there appears to be little or no interest in identifying them and holding them personally responsible despite the exalted place of personal responsibility in our system of law. Thus, the financial protection from personal responsibility given to members of a corporation by the law seems to have been extended to protection from other kinds of personal responsibility, including responsibility for one's role in the death of some people.

implications of Freudian theory for these concepts are complex and even appear contradictory.<sup>2</sup>

Freud essentially presents two views of personal responsibility that appear incompatible with each other. In one formulation, associated with his abstract metapsychological theory, the idea of personal responsibility is essentially absent. One's behavior and state of mind is determined by the dynamic interplay of impersonal forces (e.g., psychic energy and instinctual drives) and subpersonal component structures of the personality (i.e., id, ego, and superego).

In his more experience-near clinical theory, the province of personal responsibility is significantly expanded. However, as we will see, Freud's conception of personal responsibility is quite different from how that concept is understood in ordinary discourse. In particular, it does not entail free will nor does it imply moral blameworthiness or praiseworthiness. Although Freud would likely agree that the belief in and assignment of personal responsibility, as it is ordinarily understood, as well as the accompanying assumption of free will may be socially necessary, from the perspective of both his metapsychological and clinical formulations, they are seen as illusory and find no warrant in a psychoanalytic world view.

Freud's metapsychological account has been subject to criticism because it seems to leave little room for the operation of choice; and his clinical formulations have been subject to criticism because, the critics argue, they imbue too much of behavior with intentionality. With regard to the former, one of Sartre's (1956) main criticisms of Freudian theory is that it attempted to account for behavior through references to automatically activated subpersonal mechanisms, such as repression, rather than through the lens of personal choice. Sartre cites an example of a woman who is complicit in a seduction by allowing her hand to remain in the hands of a man whose aim is to seduce her and is then shocked and outraged when the seducer's aim becomes open and apparent. Sartre's argument here is that rather than accounting for the woman's behavior by appealing to activation of a subpersonal repressive mechanism that rendered her sexual temptation and fantasy unconscious, it would be more accurate to say that the woman had chosen not to “spell out” either the seduction project in which she was engaged or the commitment to not spell out that project (see Fingarette, 1969 for an elaboration of Sartre's view; and see Eagle, in press) for a further discussion of related views). Of course, Sartre's insistence on explanations of human behavior at the level of a personal agent making choices rather than at the level of subpersonal mechanisms is linked to the centrality he gives to existential choice and its capacity to transcend facticity. However, independently of that context, it nevertheless stands as a cogent critique of certain aspects of Freudian metapsychology (see Eagle, in press).

In his clinical formulations, Freud expands rather than restricts the range of personal responsibility. From the very beginning of psychoanalytic theorizing, Freud (Breuer & Freud, 1893–1895) viewed hysterical symptoms and later, all neurotic symptoms not as automatic products of constitutional weakness, but rather as motivated quasi-actions that reflected one's desires and fears and character structure. That is, neurotic symptoms were now viewed as agentic phenomena whose natural descriptive language is the discourse of “I desire; I fear,” and so on

In *Psychopathology of Everyday Life* Freud (1901) also included various slips and lapses in the same strange category of motivated quasi-actions rather than simply cognitive failures. For example, according to Freud's theoretical perspective, the slip made by the man who is staring at a well-endowed woman's sheer blouse and says “I need to go out for a *breast* of fresh air” is a quasi-action that reflects the desires of an agent. Although the agent may not want to openly reveal his desire (which is, itself, a desire that Frankfurt (1988) referred to as a second-order desire), it is nevertheless his. And it is in that sense that Freud (1925) is also able to say, somewhat startlingly, that we are responsible

<sup>2</sup> I focus on Freudian theory because post-Freudian theorists have little to say regarding the issues of free will and personal responsibility.

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