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Punishing Guilt

Although psychoanalytic insights have garnered some recognition in the criminal law, they have also encountered significant resistance. For instance, psychoanalysis has illuminated the prevalence and potency of guilt in psychic life, an insight that would seem germane to criminal processes intent on adjudicating culpability for antisocial behavior. Yet the psychoanalytic view of guilt potentially challenges the efficacy and legitimacy of legal mechanisms. This essay contemplates the question of interdisciplinary work in law and psychoanalysis by analyzing certain rare instances in American jurisprudence where courts have attempted to grapple with psychoanalytic understandings of guilt and the desire for punishment. These cases dramatize the deep tensions that exist between psychoanalytic and legal conceptions of human agency, tensions that also plague the efforts of psychoanalytically oriented reformers to revolutionize a penal system intent on punitive regulation.

> "[Modern criminology and dynamic psychology] will come to the conclusion that the unconscious need for self-punishment has to be considered one of the most important emotional forces shaping the destiny of men and that the future of mankind will depend on it, on whether we succeed in reducing the power of this unconscious force that threatens us all with extinction."
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> —Theodor Reik, author's note to *The Compulsion to Confess*

> "At best a courtroom makes an awkward psychiatrist's couch."
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> —*Curl v. State* (Wisconsin 1968)

Psychoanalytic models of human behavior and motivation have exerted pressure on American jurisprudence in a number

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of areas, and nowhere more than in the criminal law. Yet even in this context, mainstream legal culture has stubbornly resisted assimilating insights into the workings of the unconscious and the prevalence of irrationality in mental life. By the 1960s, as psychoanalytic methods and models surfaced visibly in courtrooms, penal codes, psychiatric hospitals, and certain fields of criminology, they were met with increasingly vigorous efforts to relegate such insights to the margins of juridical culture. Psychoanalysis envisions a subject not easily regulated by law. This tension becomes particularly evident around the question of guilt as both a persistent feature of affective life and a matter of legal adjudication. Models of the psyche that identify guilt and a desire for punishment as widespread factors in human behavior sit uneasily with a legal subject who is presumed capable of autonomy and a legal system that has little tolerance for uncertainty.

One judicial opinion from this era vividly dramatizes the fraught relationship of psychoanalytic theory to criminal justice. A federal judge in the District of Columbia sentenced defendant Lawrence Miller to a hefty prison term of two to six years upon conviction by a jury for stealing another man's wallet in 1961. In the context of what appeared to be an unremarkable case of petty theft, however, Chief Judge David Bazelon, writing for the court of appeals, reversed Miller's conviction on procedural grounds.

The jury's verdict at trial rested largely on the testimony of complaining witness Cornell Watson, who claimed that, unbeknownst to him at the time, Miller had pilfered his wallet as Watson boarded a public bus in downtown Washington, DC. According to Watson, he "felt a slight jostle" (Miller v. United States 1963, 768) and soon discovered the absence of his wallet. Other bus passengers claimed to have observed two people running away from the bus; upon hearing this report, Watson quickly exited the bus and spied several men on a nearby street examining a wallet that resembled his. In Watson's account, Miller separated from the group and subsequently fled, wallet in hand, over a number of city blocks with Watson in pursuit. Eventually, Miller ceased running and was apprehended first by Watson and then by the police. But Miller was not in possession of the wallet at the time of his arrest; instead, a stranger ultimately discovered the wallet and returned it to Watson.

On appeal, Miller challenged his conviction on the ground that the trial judge had improperly instructed the jurors on the nature of their task when he had explained that, if they believed Watson's story, "the rest of the verdict will be relatively simple to arrive at" (Miller v. United States 1963, 769). No direct evidence beyond Watson's testimony linked Miller to the crime. Yet the judge's instruction assumed that, if the jury found Watson credible, the following series of conclusions must inexorably follow: (1) that Watson's wallet had, in fact, been stolen (rather than, for instance, having fallen out of his pocket); (2) that Miller was one of the two figures whom bus passengers observed running down the street; (3) that Miller had absconded with the wallet but dropped it before his apprehension; and, therefore, (4) that it was Miller who had snatched the wallet and fled with it to escape capture, thereby committing the crime of robbery.

Closer inspection reveals the flaws in this apparently plausible logic. For example, under existing legal doctrine Watson's loss of his wallet, combined with his observations of the men handling an apparently similar wallet and the chase to which Miller put him, permit but do not mandate the inferences that Watson actually suffered a robbery and that Miller was the culprit. Here, the trial judge's blithe characterization of the jury's task as "simple" belied the equivocal nature of the evidence and the necessity for its exacting scrutiny. In Judge Bazelon's words, "the more difficult question was not whether the evidence was true, but what inference should be drawn from it" (Miller v. United States 1963, 769). Putatively on this basis alone, Bazelon set aside Miller's conviction and ordered a new trial.

While not forming a basis of Miller's appeal, an additional question concerning the evidentiary import of Miller's chase occupied an even greater share of Bazelon's attention, offering him an opportunity to bring psychoanalytic research squarely to bear on criminal processes. Disputes over the status of a suspect's flight from the scene of a crime or from the police arise frequently in criminal prosecutions, dividing those who consider such behavior a clear sign of the suspect's "consciousness of guilt" from those who emphasize its multiple determinants and unreliability as evidence. The first view, colorfully captured in the oft-quoted proverb, "The wicked flee, even when no man pursueth; and the righteous are as bold as a lion,"[1] understands the taking of evasive action as inescapably guilty behavior; the

second sees a desire to elude law enforcement as compatible with innocence and fueled by external exigencies, such as fear of police brutality. Bazelon lamented the limited scope of these disputes because, "although some courts recognize that flight may be prompted by something other than feelings of guilt, judicial opinion seems to assume that if flight is prompted by feelings of guilt, the accused is certainly the guilty doer" (Miller v. United States 1963, 771). Allowances for the equivocal significance of flight itself, then, have "not been extended to the second assumption that one who feels some guilt concerning an act has committed that act." Citing Freud's 1906 address to the legal profession, "Psychoanalysis and the Ascertainment of Facts in Legal Proceedings," as well as decades of psychoanalytic research on the pervasiveness of "guilt feelings," Bazelon attempted to disentangle not only flight from guilt, but also guilt itself from guilt.

Bazelon's discussion includes two lengthy and comprehensive footnotes that warrant close scrutiny for both the substantive claim to which they offer support—the potential incommensurability of psychic guilt and legal guilt—and their remarkable endorsement of psychoanalytic reasoning. The first traces the evolution of Freud's thought on unconscious guilt and its relation to criminality, a line of inquiry that received sustained attention on the part of Freud's student, Theodor Reik. Here Bazelon observed the "universal" status of guilt as a "self-reproaching attitude, a self-accusatory one, a self-attacking one" (Miller v. United States 1963, 772*n*10, quoting Zilboorg 1954, 50). His second footnote enumerates source after source espousing "the contemporary view of the dynamics of human behavior," in which guilt emerges definitively as a central feature of psychic life. In addition, it places the psychoanalytic understanding of guilt in a context that encompasses literature, politics, and religion. Thus referring his readers to Freud, Reik, Dostoevsky, Camus, Maimonides, and some forty other authors ranging from Franz Alexander and Hugo Staub to Winnicott, Bazelon emphasized the difficulty of distinguishing "actual guilt" from a "sense of guilt" when the latter is "present in so-called normal as well as neurotic people" (772). On the basis of such insights, Bazelon proposed a novel jury instruction, where requested, to the effect that "flight does not necessarily reflect feelings of

guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt" (773). In other words, Bazelon exhorted courts to honor the complexity of intrapsychic conflict and the unconscious. By indicting the trial judge's reductive logic, Bazelon implicitly critiqued the law's own tendency toward reductionism. Psychoanalysis offered him a language and a hermeneutics through which better to capture the untidiness, contradiction, and uncertainty surrounding human motivation and behavior.

For exactly these reasons, Judge Bazelon's endorsement of psychoanalytic insights into unconscious guilt inspired a spirited dissent from his junior colleague, Judge Warren Burger, who would later become Chief Justice of the United States Supreme Court. Burger accused Bazelon of espousing a perfectionism that was at once frivolous and perilously disruptive of the law's effective operation. Deriding the "tendency to demand a perfect trial as distinguished from a fair trial, which is all the Constitution requires or mortal agencies can afford" (Miller v. United States 1963, 775), Burger contrasted the probing inquiry demanded by Bazelon with the jury's function as a representative and arbiter of community values and common sense. Burger lauded the "sense of reality . . . common experience and community conscience" that juries bring to a trial, and he spurned the arcane considerations perhaps "appropriate to a philosophical interchange between judges, lawyers and experts in psychology" but "totally unnecessary" to a jury's processes (775). Indeed, as early as the 1930s psychoanalysis emerged in Supreme Court jurisprudence as a metonym for arcane theories thoroughly divorced from mainstream American society and its "reality" when Justice Benjamin Cardozo wrote, "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed" (Shepard v. United States 1933, 104).

But the enthusiasm that marks Judge Bazelon's invocation of psychoanalytic theory for such complex explanations of human behavior took hold at least briefly in other courts as well. For instance, three years earlier, heralding psychiatry as "a great and important science upon which the legislative and judicial branches rely" (Pollard v. United States 1960, 464), Judge Thomas McAllister of the federal court of appeals gave great credence to psychodynamic accounts of unconscious processes.

In response to testimony that emphasized intrapsychic conflicts as the basis for a defendant's spate of apparently irrational crimes, the appellate court recognized that unconscious guilt and an avid desire for punishment may so compromise the volition required to perform a criminal act that it amounts to legal insanity, precluding the assignment of criminal responsibility.

Defendant Marmion Pollard, a police officer described by the trial court as an "intelligent . . . well-adjusted, happy, family man" (United States v. Pollard 1959, 475), whose wife and daughter had been brutally murdered in their home by a drunken neighbor two years earlier, began perpetrating a series of poorly executed robberies on the eve of his marriage to a second wife. These robberies proved so clumsy and ill-conceived that Pollard was eventually apprehended while returning to the car that he had left at the site of one failed attempt. All of the experts on the defendant's mental state, including those retained by the government, agreed that the available evidence supported a finding of legal insanity. Each examination of Pollard concluded that he had committed those crimes in a dissociated state sufficient to qualify as an "irresistible impulse" under the applicable insanity test.

Notwithstanding the unanimity of this psychiatric evidence, however, the trial judge dismissed it in favor of the antithetical conclusion that Pollard had *chosen* not to resist his antisocial impulses and was therefore legally culpable. The psychiatric account posited "that [Pollard] had an unconscious desire to be punished by society to expiate those guilt feelings and that the governing power of his mind was so destroyed or impaired that he was unable to resist the commission of criminal acts" (476). Professing "great respect for the profession of psychiatry" (477), while describing its viewpoint as "deterministic . . . with little or no room for moral or ethical judgments" (479), the trial judge instead credited the opinion of Pollard's colleagues and others that the defendant seemed "sane." Far from characterizing Pollard as too profoundly disturbed to warrant criminal culpability, the evidence, in this court's view, revealed a normal man who reacted to his misfortune by electing to pursue a course of crime. Indeed, observed the judge, Pollard's "feelings of despondency and depression induced by the brutal killing of his wife and infant daughter were not unnatural," and "periods

of depression, feelings of guilt and inadequacy are experienced by many of us" (481).

Although the trial court refused to credit the experts' uncontroverted testimony on the question of Pollard's insanity, the court of appeals did just that, reversing the judge's assignment of criminal responsibility to Pollard. In light of Pollard's "bizarre and ineffectively planned and executed" robbery attempts, "conduct [that] on the part of a highly intelligent police officer with a knowledge of how crimes are committed, has about it nothing of sanity" (Pollard v. United States 1960, 460), the explanation attributing such conduct to guilt and "an unconscious desire to be apprehended and punished" rang true for the appellate court.[2]

The proposition that we all bear significant quantities of unconscious guilt, and that this guilt frequently impels us into punishing circumstances, poses no novelty to psychoanalysts, but it radically contravenes essential tenets of our legal system, particularly the criminal law. With few exceptions, the legal culture of the United States and its law enforcement community posits subjects whose instincts of self-preservation and self-interested rationality promote efforts to avoid punishment at almost any cost. Punishment deters, we say, or at the very least exacts a painful—and unwanted—price from the wrongdoer. Our much-heralded adversarial system, moreover, purports to foster the ascertainment of truth and to insulate the individual from arbitrary exercises of state power.

But recent high-profile cases involving false confessions and other incriminating conduct confound these assumptions. Why would someone inculpate herself unnecessarily, whether by fleeing suspiciously from the scene of a crime or by other means? Rational actors should not be so willing to contribute to their own detriment without perceptible advantage. Yet psychoanalytic insights show us that in inviting detriment upon ourselves, we are simultaneously seeking an advantage: a gratification of the wish to be punished. Although neither Freud nor psychoanalysis more generally discovered the potency of guilt and the allure of punishment, he drew this aspect of modern humanity squarely to our attention.[3] In "The Economic Problem in Masochism," Freud observed with respect to certain patients that "the satisfaction of this unconscious sense of guilt is perhaps

the most powerful bastion in the subject's (usually composite) gain from illness—in the sum of forces which struggle against his recovery and refuse to surrender his state of illness" (1924, 166). Without a successful psychoanalytic treatment, the only adequate substitutes for our self-generated symptoms may derive from external sources of distress. While powerful enough to produce seemingly intractable symptoms, this unconscious sense of guilt is indiscriminate in its search for punishment; accidental circumstances that induce suffering will often provide the same satisfaction. Consequently, Freud found,

> contrary to all theory and expectation, that a neurosis which has defied every therapeutic effort may vanish if the subject becomes involved in the misery of an unhappy marriage, or loses all his money, or develops a dangerous organic disease. In such instances one form of suffering has been replaced by another; and we see that all that mattered was that it should be possible to maintain a certain amount of suffering. (166)

This nexus between guilt and suffering, whether experienced in the form of neurotic symptoms, organic disease, general misfortune, or submission to external sources of punishment, emerged early in Freud's work. In the lecture on the utility of psychoanalytic techniques for criminal interrogation that Judge Bazelon quoted at length in his *Miller* opinion, Freud warned law students aspiring to become magistrates that "in your examination you may be led astray by a neurotic who, although he is innocent, reacts as if he were guilty, because a lurking sense of guilt that already exists in him seizes upon the accusation made in this particular instance" (1906, 113). Freud cautioned these would-be jurists that apparent indicia of guilt may in fact bear little or no relation to the crime in question, a scenario in which guilt and innocence become inextricable and virtually indistinguishable. Although innocent of the particular act under investigation, the neurotic defendant may betray a pervasive sense of guilt that is no less powerful and psychically rooted for its basis in fantasy.

The self-justifying function of guilt makes a notable return appearance in Freud's 1916 essay, "Some Character Types Met

with in Psychoanalytic Work," under the rubric "Criminals From a Sense of Guilt." Further complicating the conflation of sentiment and deed, Freud describes the phenomenon whereby a person commits actual transgressions out of a preexisting sense of guilt and an attendant desire for punishment. In this account, the guilt that lays the groundwork for future "criminality" invariably issues from the childhood experience of oedipal desire and its concomitant parricidal wishes (332–33). Such neurotic subjects pose problems that the criminal law cannot afford to ignore, since, in the words of Freud's earlier paper, "many people are like this and it is still open to question whether your technique [of interrogation] will succeed in distinguishing self-accusing individuals of this kind from those who are really guilty" (1906, 113).

By *Civilization and its Discontents* (1930), moreover, Freud went so far as "to represent the sense of guilt as the most important problem in the development of civilization and to show that the price we pay for our advance in civilization is a loss of happiness through the heightening sense of guilt" (134). This guilt and the loss it engenders, he argued, are experienced as "a sort of *malaise*, a dissatisfaction, for which people seek other motivations" (135–36). Indeed, in his view, guilt may constitute the most primary affect, one that inheres in the necessity of relating to others. Unlike the "conscience" inaugurated by the developing superego, guilt does not require cognitive abilities to reason and reflect. It functions not only as a harsh internal critic—captured neatly in Reik's formulation that "no earthly judge will attain the strictness of the superego in many persons" (1925, 268)—that forcefully, if imperfectly, enacts a regulatory function, but it also induces wrenching conflicts by virtue of our being thrust into the social world.[4]

Following Freud, other early- and mid-twentieth-century analysts diagnosed unconscious guilt and the desire for punishment as the root of much criminal conduct, both real and imagined, and proposed psychoanalytic models as alternatives to the reigning penal one. Beginning with the sensational 1924 trial of Leopold and Loeb, in which dynamic psychology took center stage,[5] and culminating in the involvement of psychoanalytically oriented doctors and lawyers during the 1950s in drafting the Model Penal Code, the nation's first proposed uniform code

of criminal statutes,[6] a psychoanalytic understanding of crime and its perpetrators seemed poised to reshape criminal justice entirely. In its American incarnation, psychoanalytic psychiatry also influenced the legal treatment of sex offenders during the middle decades of the century, as legislation and jurisprudence emerged that cast such offenders as psychopaths in need of study and treatment rather than of conventional punishment.

Proponents of psychoanalytic models identified key misunderstandings at the heart of our justice system that exacerbated, rather than contained, criminal activity. For instance, an article by Atwell Westwick in *Psychoanalytic Quarterly* cautioned that "much criminal behavior is so utterly irrational and so deeply rooted in the unconscious, that without psychoanalysis its meaning and its causes and the corrective possibilities involved are entirely beyond the ken and reach of judges, probation officers, social workers, teachers, wardens, prison directors, psychologists" (1940, 280). Sheldon Glueck of Harvard Law School, among others, maintained that insight into the dynamics of unconscious guilt exposed punishment as at best an ineffective deterrent and at worst an incitement to crime (Hale 1995, 93). Franz Alexander and William Healy's *Roots of Crime* (1935) detailed case studies of criminal offenders whose deeds and their redress played out self-punitive impulses. Alexander also coauthored a volume, *The Criminal, the Judge, and the Public* (1931), with attorney Hugo Staub, on behalf of whose criminal clients Alexander conducted forensic examinations and testified in court. Described by its translator, Gregory Zilboorg, a prominent figure in forensic psychiatry, as "the first authoritative, scientific, psychoanalytical study of criminal psychology and of the psychology of punishment to be offered in this country to the general reader" (Alexander and Staub 1929, 7), the volume offered psychoanalytic interpretations of both criminal behavior and the penal system. Alexander and Staub contended that unconscious guilt finds expression in a desire to punish others: "In other words, the louder man calls for the punishment of the lawbreaker, the less he has to fight against his own repressed impulses" (227).[7] Perhaps most influentially, Reik's *The Compulsion to Confess: On the Psychoanalysis of Crime and of Punishment*, comprising lectures and writings from Vienna in the 1920s and published in English in 1959, understood crimi-

nal conduct and criminal law alike as expressing, in addition to assigning, guilt and a need for punishment.

Following their emigration from Europe, Alexander and Reik represented antithetical poles of the American psychoanalytic community: the former firmly ensconced in the world of medical psychiatry, the latter a lay analyst and "literary celebrity" (Hale 1995, 131).[8] Nonetheless, their work jointly exemplified the kinds of intervention that psychoanalytic theory sought to effect in the new world. Indeed, both writers explicitly envisioned a revolution in criminology and penology that would transform a fixation on the deed into a more nuanced contemplation of psychological processes. In his essay "The Compulsion to Confess," Reik announced confidently: "It is easy to predict that the psychological insights of psychoanalysis are destined in the near future to transform criminology and criminal jurisprudence in an incisive manner" (1925, 255). The prevailing approach to crime and punishment, in the psychoanalytic view, reflected a profound and dangerous misunderstanding of human psychology: both the psychology of the alleged offender and the psychology of those who adjudicated guilt and punished it.

"Through the effect of unconscious guilt," Reik observes, "many people are prevented from fighting for their rights," since "the unconscious of an accused man may wish for the very thing he strives against with all of his might" (1932, 158). To compound this danger, the mechanisms that purport to protect those rights are compromised by the blindness law exhibits toward unconscious mental life. Without psychoanalytic insight, Reik suggests, we have underestimated the power of unconscious thoughts, and "those thoughts have, as it were, taken their revenge by blotting out the line of demarcation between thought and deed, between criminal act and forbidden wish, even when a judicial decision between guilt and innocence is in question" (153). The power of our basest impulses compels us to ask "whether the commission of a criminal act is in our own case so unimaginable, so remote from possibility as we assert. If we all unconsciously harbor such evil wishes . . . is there really such a world of difference between the wish and the deed? Is punishment really the proper reaction to a breaking through of the boundary line between the two?" (153–54). If not, then what alternatives existed? Alexander and Staub touted psychoanalysis

itself as the remedy, particularly in its psychiatric incarnations, predicting that if "the existence of unconscious motivations of human actions is recognized," couches and hospitals would supplant prisons, and "medical treatment and education naturally take the place of punishment" (1929, 90).

The ubiquity of guilt and its equivocal relation to actual acts, however, does not find ready accommodation in a courtroom. This disharmony surfaced in Freud's 1906 lecture and persisted through his later work on guilt as well as that of other analysts. In his biography of Freud, Ernest Jones remarked that "it was indeed this reflection of Freud's that as time went on was to prove a fatal stumbling block in what at first promised to become a useful aid to the legal profession" (1955, 339). Freud's initial optimism about the utility of psychoanalytic techniques to legal processes dampened at the prospect of the neurotic witness or defendant whose unconscious guilt serves to incriminate him for a crime he did not commit. Reik, too, emphasized the incommensurability between psychoanalytic and legal conceptions of guilt:

> The judge who asks: "Is this man (or woman) guilty?" expects the answer from psychological experts to be yes or no. But the psychoanalyst can say nothing about that, even after an examination of a man's instincts, conducted under the most favorable circumstances. He might perhaps say: "I have found that this man, who is a model of consideration and altruism, has to deal with severe sadistic impulses of an unconscious nature." The road from such an impulse to the corresponding deed is long and indirect. (1932, 40)

The psychoanalytic approach, then, was to expose the illusion of binary certainty and reveal its underlying psychic investments; it offered little to support existing conceptions of justice.

Hence Reik's faith in the transformative potential of psychoanalytic insights for criminal law faltered at times. In contrast to Alexander's unbounded optimism, Reik doubted whether psychoanalysis was indeed a desirable interloper in legal processes. Among other things, he feared that "the functionaries of the law" would misunderstand psychoanalysis as a means of eliciting

nearly incontrovertible evidence against the accused from her own unconscious. In "The Unknown Murderer," for example, he describes the case of a parricide in which doctors adduced evidence of the defendant's Oedipus complex as proof of his guilt. "No, I do not wish for the 'introduction' of psychoanalysis into court," reflected Reik. "I had rather it stayed outside. I think a law court is not the right place for psychoanalysis. Its influence goes deeper; its research into criminology will lead to a recognition of many of the problems involved in criminal justice" (1932, 36). Alluding to some analysts' apparent belief in the efficacy of psychoanalytic methods for fact-finding and the adjudication of guilt or innocence, Reik cautioned: "In the present state of our science, psychoanalysis is neither suited nor competent to solve the question of guilt or innocence." Indeed it is "quite unsuited to discovering the material facts, as the judge has to do." Psychoanalysis in the courtroom, worried Reik, might prove too much; far from absolving us, unconscious guilt makes criminals of us all.

These considerations did not escape the notice of legal authorities. The tentatively receptive attitude that some courts had displayed toward psychodynamic theories of human conduct and motivation grew more inhospitable as the deep tensions between legal and psychoanalytic assumptions and concerns challenged not only the epistemic certainty of the law but also the premises underlying its authority. Such tensions emerge starkly in an opinion of the New Jersey Supreme Court (New Jersey v. Sikora 1965) concerning the exclusion of psychodynamic testimony on the issue of premeditation in a homicide crime. In this case, the trial judge had prohibited the defendant's psychiatric expert from answering a hypothetical question that attempted to establish whether the defendant possessed the capacity to premeditate the crime or, alternatively, whether his personality disorder, combined with the threatening circumstances surrounding the events at issue, rendered the defendant's actions automatic rather than fully deliberate. On appeal, the New Jersey Supreme Court upheld the trial court's decision and the defendant's conviction for first-degree murder following the exclusion of the disputed evidence.

While the *Sikora* court conceded that expert evidence on the question of capacity to premeditate might, in fact, have been

relevant and should at least have been considered by the judge to determine its value for the jury, the opinion recounted in great detail the testimony which the expert would have given precisely in order to discredit it for legal purposes. In doing so, the court issued a stern indictment of psychoanalytic models of the mind in their relation to law—that is, as evidence. The majority opinion, by Justice John J. Francis, derisively summarized the doctor's "thesis" that "man is a helpless victim of his genes and his lifelong environment; that unconscious forces from within dictate the individual's behavior without his being able to alter it" (New Jersey v. Sikora 1965, 198). Such determinism, asserted the court, has no place in courts of law:

> For protection of society the law accepts the thesis that all men are invested with free will and capable of choosing between right and wrong. . . . Criminal blameworthiness cannot be judged on a basis that negates free will and excuses the offense, wholly or partially, on opinion evidence that the offender's psychological processes or mechanisms were such that even though he knew right from wrong he was predetermined to act the way he did at that time because of unconscious influences set in motion by the emotional stresses then confronting him. In a world of reality such persons must be held responsible for their behavior. (202)

The court thus invoked both the "reality" principle animating Judge Warren Burger's dismissal of psychoanalytic insights and the more metaphysical principle that legal authority and its mechanisms of social control depend on a conception of human agency irreconcilable with the unconscious.

Concurring in the court's judgment, Chief Justice Joseph Weintraub put the matter even more plainly in a separate opinion. The excluded testimony "would be incompetent as to guilt for the reason that it does not bear upon the issues as the law conceives them. Rather it simply challenges the law's entire concept of criminal responsibility" (205). Psychodynamic psychiatry, he explained, "traces a man's every deed to some cause truly beyond the actor's own making. . . . Thus the conscious is a puppet, and the unconscious the puppeteer" (205). Since

criminal law conventionally requires proof of both a bad act and an evil (or at least willful) intent, captured in the phrase *mens rea*, a theory that posits unconscious motivations for every action makes locating that intent a tricky business indeed. "Shall we indict for murder," Weintraub asks rhetorically, "a motorist who kills another because, although objectively he was negligent at the worst [and therefore liable for nothing greater than manslaughter], the psychoanalyst assures us that the conscious man acted automatically to fulfill an unconscious desire for self-destruction?" (206). So potentially destabilizing is such a model to criminal justice that it threatens to turn existing principles of culpability on their heads, making what this justice termed "a mishmash of the criminal law" (207). In a dismissal that echoes Burger's, the concurring justice concluded that "all of this is fascinating but much too frothy to support a structure of criminal law" (206).

Whereas Burger's reluctance to incorporate psychoanalytic insights into legal processes appeared to derive from a defense of so-called real world values such as common sense, his resistance also hinted at a concern for the epistemic stability of legal narratives and the integrity of legal institutions. The *Sikora* court's hostility toward psychodynamic models renders explicit this latter anxiety. Far from being irrelevant to determinations of guilt and responsibility, psychoanalytic models of human behavior threaten to undo these determinations entirely. Indeed, in this court's view the unconscious poses a grave threat to law and its subjects. In particular, the pervasive and corrosive nature of unconscious guilt seems both uniquely pertinent and uniquely troubling to legal rationality.

Another unwelcome implication of psychoanalytic insights is the recognition that legal processes themselves provide vehicles for the expression and instantiation of our most irrational impulses. The prospect of citizens using the legal system as a vehicle for acting out their intrapsychic conflicts creates virtually universal disquiet, as when a plaintiff, for example, employs the civil law as a form of therapy. As California appellate judge David Sills wrote in the context of repressed memory litigation: "The judicial system most assuredly does not exist to provide a venue for cathartic confrontation" (Trear v. Sills 1999, 292–93); recourse to legal process must be reserved for disputes war-

ranting a legal remedy, cases in which legal solutions can right a social wrong. Still less are we comfortable when a criminal defendant uses legal process for the purpose of self-punishment or, worse, when legal officials and the public they serve use that same process to discharge impulses that are equally suspect. In revealing the workings of what Reik called our "inner court," the arcane system of rules and punishments that wrack the human psyche, psychoanalysis threatens to demonstrate how deeply implicated the actual court and its functions are in unconscious processes.

If law has repressed the power of unconscious guilt and the forbidden impulses that both animate and disguise it, then this repressed material returns in suggestive ways. It returns in renewed controversy over the voluntariness and reliability of criminal confessions. It returns in our ongoing doubts about the introduction of evidence concerning "consciousness of guilt," such as flight from a crime scene or polygraph results. It remains immanent, though remarkably unexamined, in our efforts to ensure that a defendant's guilty plea is sufficiently "voluntary and intelligent." And it returns in current debates around what to do with inmates on death row who seek to expedite their executions rather than pursue each rightful avenue of appeal. I conclude with a brief glimpse into this last controversy.

Our punitive impulses, evident in the unprecedented number of incarcerated prisoners taxing the American penal system, find particularly vexed expression in this culture's uneasy embrace of capital punishment. The United States now stands alone among Western nations in its continued use of state-sponsored execution as a criminal sanction. As members of the judiciary and governing officials have recognized publicly, the irreversibility of death raises particular concerns around the potential arbitrariness and inaccuracy of our penal system. If the executed prisoner is later exonerated, then we have committed homicide. But whether or not the inmate is innocent of the crime at issue, our willingness to kill in the name of guilt finds sufficient resonance with criminal conduct that the authority and legitimacy of the systems in place to carry out this punishment remain perpetually in question. At Freud's direction, Reik undertook in 1926 to express Freud's views on capital punishment. Consistent with the psychoanalytic account

of the destructive impulses animating unconscious guilt, Reik's synthesis of Freudian theory and its implications for criminology and law emphasized once again the extent to which punishment gratifies the righteous and the condemned for identical reasons. Punishment "offers those who execute it and those who represent the community the opportunity to commit, on their part, the same crime or evil deed under the justification of exacting penance" (1926, 473). Only our cowardice in facing what he calls "the facts of emotional life" prevents us from recognizing our punitive impulses as sanitized versions of the very impulses leading to crime, "capital punishment as murder sanctioned by law."

Discomfort with this proximity between capital punishment and murder finds expression in the legal system's conflicted response to guilty pleas and waivers of rights that embrace the penalty of death. Courts have worried that a "defendant's request for the death penalty might be viewed as a plea for State-assisted suicide" (People v. Kinkead 1995, 416), and that the prospective suicide makes legal institutions and their actors complicit in his willful demise. In particular, a phenomenon known as "death penalty volunteerism" has troubled our courts since the Supreme Court permitted reinstatement of capital punishment nearly three decades ago. These cases arise when a condemned prisoner petitions to abandon any remaining legal remedies for challenging her sentence, seeking to hasten an execution that otherwise looms on the horizon as a likely, if not inevitable, destiny. Suddenly the very system that sought to exact the prisoner's life as a penalty must reverse course to ensure that the prisoner and the state are not colluding in yet another crime. According to Justice Thurgood Marshall, surely no champion of the death penalty, the volunteer "invites the State to violate two of the most basic norms of civilized society—that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified" (Whitmore v. Arkansas 1990, 157). A recent opinion by senior circuit judge Warren J. Ferguson put it still more starkly:

> The defendant is not taking his own life, he is co-opting the power of the state's capital punishment system to kill—a power that must only be wielded in accordance with the Constitution's fundamental protections. The people's interest in justice, which forms the basis of the state's power to execute, should not be so easily commandeered. The right to die is not synonymous with the right to kill. (Comer v. Schriro 2006, 1140)

A death row inmate's suicide by execution instantiates at once her incompetence as a legal subject and her capacity to arrogate the law's power. Here death that does not serve juridical ends appears paradoxically to signal *both* a compromised will *and* a dangerous excess of will that threatens to usurp state authority.

Cases addressing these petitions cast the law as a victim, persecuted by inmates who seek, through an otherwise routine waiver of their right to legal process, to entice the state into criminal activity and to "commandeer" justice. Legal subjects may be law's agents but never its equals. Hence it is not surprising that narratives demonstrating obeisance to law prove most successful in garnering permission for prisoners to hasten execution—ones in which the inmate embraces the blame for his wrongdoing, the condemnation of his community, and the finality of his punishment. The prospect of a prisoner hijacking legal process, combined with the irresolvable uncertainties surrounding his motivations for doing so, sets in motion a series of occasions for law to reassert its putative omnipotence while succumbing to paranoid suspicion. This scenario dramatically exposes the deep unease underlying the ability of the legal system to identify guilt and to punish it—that is, to uphold justice.

Here the "sense of reality" that, in Judge Burger's account, informs our cherished legal institutions begins to seem rather fanciful. Common sense as a basis for legal reasoning feels patently inadequate when the stakes include not only a prisoner's life but also the very ability of the law to distinguish justice from crime. But in this context complexity offers little solace. Of all law's mechanisms, capital punishment can least afford to tolerate indeterminacy. The persecutory anxiety such indeterminacy provokes lies behind our collective insistence

that law alone should determine the subject's guilt or innocence, death or life. Psychoanalysis reveals the fantasies of omnipotence that unconsciously organize our individual and cultural investments in categories of blame and victimization. Reik identified in the discourse of deterrence that has at least partially shaped criminal justice over the past two centuries an implicit acknowledgment that "no great gulf separates [us] from the crime, that we all carry in us latently all the germs of the criminal. . . . In other words, society begins to recognize its share in the guilt of crime" (1925, 291). When the spirit of retribution reigns, though, as it does at the present moment, such recognition of ambiguity succumbs to the certainties of the righteous. In addition to exposing the overdetermined psychic investments underlying legal reasoning, psychoanalytic theories of human behavior remind us, in Judge Bazelon's words, that "our moral judgments of other human beings must reflect the humility born of self-doubt" (1983, 270).

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Notes

1. A federal court of appeals recently illustrated this position in response to contested evidence of a criminal defendant's flight: "Abraham [the defendant] argues that the court should not have admitted evidence of flight because it was more prejudicial than probative. As for the evidence being prejudicial, the idea seems to be that it was truly prejudicial because it made Abraham look so guilty. Of course it did. People, including jurors, realize that while 'the wicked flee when no man pursueth,' Proverbs 28:1 (KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative" (United States v. Kennard 2006, 855).
2. One judge dissented from the majority opinion, explaining that he was "unable to entertain the concept that [Pollard] wished to be apprehended, while at the same time, yielding to an irresistible impulse to commit the crimes, and to escape detection and apprehension" (Pollard v. United States 1960, 464). The dissenting judge's convoluted syntax suggests something unassimilable about the notion that a person's desire for punishment might manifest itself in behavior that at once risks punishment and makes efforts to evade it. After all, Pollard took sufficient measures to elude capture that he remained free to repeat his criminal behavior many times over before his ultimate arrest—a fact that impressed the trial judge significantly. One either wants to get arrested or wants to commit crimes, so the logic goes, but not both.
3. Martha Grace Duncan's lively and insightful book (1996) analyzes the celebration and envy of criminals and the underworld in a vast range of cultural texts.

4. Melanie Klein (1937) established the primacy of guilt in early stages of human development. For an account of preoedipal guilt in Freud's work, see Ury (1997).
5. Nathan Leopold and Richard Loeb, Chicago teenagers from wealthy families, together killed a neighborhood boy solely in order to commit a "perfect crime." Clarence Darrow represented them at a mitigation hearing in which he marshaled experts schooled in psychoanalytic thought to emphasize their "mental abnormality" so that they would be spared the death penalty. Freud apparently declined requests to testify on the defendants' behalf. Historian Paula Fass (1993) offers a vivid account of the trial; see also the illuminating commentary of Brett Kahr (2005).
6. Deborah Denno (2005, 608–31) chronicles this influence and its implications.
7. Both early and late in his career, Alexander endeavored to build bridges between the psychoanalytic and forensic communities. At the Berlin Psychoanalytic Institute during the late 1920s, Alexander and Staub taught a course to lawyers and jurists that focused on the psychodynamics of criminal behavior. Upon his emigration to the United States, Alexander continued to identify psychodynamic conflicts, and particularly a desire for punishment, as the determinants of criminal behavior. Later, through his work with prisoners and repeat offenders, Alexander began to recognize the impact on criminal behavior of social and cultural forces that could not be reduced to psychodynamic conflicts. Toward the end of his life, Alexander returned to the goal of integrating psychoanalytic insights into criminal processes, collaborating with doctors and lawyers at the University of Southern California to conduct forensic seminars promoting a rehabilitative approach to criminal punishment (Pollack 1964).
8. According to Hale, "Reik represented the quintessence of psychoanalysis as a romantic science, in which literature and discovery were united," whereas Alexander "hoped to make psychoanalysis an integral part of medicine and psychiatry" (1995, 131–32).

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