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FREUD AS LAW PROFESSOR: AN ALTERNATIVE HISTORY

Charles Yablon*

On leaving school Freud had to face the anxious problem of choosing a career. He had not yet come to any decision, and his father had left him entirely free in the matter. The boyhood dreams of becoming a great general or a Minister of State had long vanished in the face of reality. For a Viennese Jew the choice lay between industry or business, law, and medicine. The first of these was quickly discarded by someone of Freud's intellectual type of mind, in spite of his occasional regrets for a more assured existence. There seems to have been a temporary hesitation over the study of jurisprudence.

1 Ernest Jones, *The Life and Work of Sigmund Freud* 37 (1953).

We are gathered here today to pay tribute to one of the great legal minds of the twentieth century. In his long and fruitful career as lawyer, law professor, and legal theorist, Sigmund Freud literally revolutionized both the theory and practice of the legal profession. His contributions are to be found everywhere; from his early work on alternative dispute resolution, to his fundamental reconceptualization of the lawyer-client relationship, to his trenchant critiques of the law and economics movement, even the standard fifty-minute billable hour are all reflections of his vast influence on law and legal theory.

It is my role today to provide a brief outline of Freud's life and work. I realize that this material will be familiar to many in the audience, particularly the lawyers, so I promise to keep it short.

As most of you know, Freud was born in 1856 in Moravia, to a not particularly successful Jewish wool merchant, and was raised in Vienna. His intellectual gifts were readily apparent, and he graduated from the gymnasium at age seventeen, a year earlier than usual, with a degree *summa cum laude*. What many of you may not know is that Freud had serious doubts about becoming a lawyer. There is evidence that, upon entering the university, he was undecided between a career in law and, of all things, medicine.

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Apparently, Freud was concerned that law might not provide sufficient intellectual sustenance for someone of his theoretical bent. Like another philosophically minded lawyer, his near contemporary, Oliver Wendell Holmes, Freud wondered whether it was possible for someone to "live greatly within the law." There is evidence that Freud, a lifelong anglophile, had been dissuaded from a career in law by reading John Austin's *Province of Jurisprudence* shortly before entering the university. For Austin, law consisted of nothing more than the commands of the sovereign, and Freud doubted that he could find much intellectual stimulation in analyzing and classifying the mandates of the Austro-Hungarian Emperor.

Fortunately for the future of jurisprudence, however, Freud then read Henry Maine's famous work, *Ancient Law*, and discovered, to his great delight, that law could also be an instrument for studying historical change in social, economic, and intellectual conditions as well as for analyzing the relationship between individuals and societal institutions. Since these were matters of great interest to the young Freud, he opted, as he began his university studies, to take his degree in law. Thus did Freud embark on his great intellectual adventure and rescue himself from a boring and banal career as a Viennese family doctor.

In late nineteenth-century Vienna, a poor Jewish law student like Freud, no matter how brilliant, had no serious prospects for a university position as a teacher or scholar. Accordingly, for financial as well as personal reasons, Freud chose, after his university studies were completed, to attempt to develop a private practice. This turned out to be a most salutary decision, because it was by turning his powerful intellectual gifts to the problem of attorney-client relationships that Freud made his unique contribution to jurisprudence.

The story of Freud's great discoveries is well known, but it bears repeating here. We have all heard how Freud, while performing the ordinary duties of a single private practitioner—general litigation, will and contract drafting, handling partnership and other small commercial disputes—began to notice that his clients often had strange reactions to the outcomes of their legal problems. Clients for whom Freud achieved large monetary judgments, particularly in intrafamily disputes, often seemed passive, or even upset by their good fortune. Clients who lost, or paid large amounts in settlement, sometimes seemed strangely relieved and even happy. In a famous case involving a woman named Dora,

Freud's success in getting her a substantial award from her father's estate actually caused her to become hysterical.

Freud recognized that in order to fully represent and act in accordance with his client's best interests, he needed to develop a far deeper and more profound understanding of their true needs and desires. He approached this new area of study in a typical lawyerly fashion. Lawyers traditionally perform a great deal of research with respect to a particular case. Most of this research involves two types of analysis: analysis of the testimony and other evidence available to prove the facts of a particular case, and analysis of the statutes, case law, and other legal authorities relevant to the case. Freud recognized that a conscientious lawyer needs to perform a third type of analysis. He must analyze the desires, needs, even the dreams of his clients, to fully understand their psychological relationship to the legal dispute. Freud called this third form of analysis "psychoanalysis."

In his two pathbreaking early books, *The Interpretation of Dreams and Other Claims for Relief* and *On the Psychopathology of Everyday Lawyer-Client Relationships*, Freud put forward a new and radically different theory of mental development and psychological motivation. It was a theory that was based, of course, on his own experiences as a lawyer. Freud asserted that the complex interaction between lawyers, clients, and legal rules that characterizes the lawyer-client relationship, is replicated, albeit in different forms, in the human mind.

Thus, Freud offers a tripartite division of the human psyche. The most basic or primordial part, the *id*, contains our most fundamental drives and desires for power, love, and gratification of all forms. It is, of course, the client. Constraining and limiting those drives, however, is the *superego*, the internal judge who incorporates societal norms, prohibitions, and taboos. The key role is that of the lawyer, who must mediate between the demands of the *id* and the constraints of the *superego*, between the client and the judge, to find a satisfactory resolution of the tensions that give rise to the legal difficulties. This lawyerlike part of the human psyche Freud named after himself. He called it *ego*.

While some, in recent years, have questioned Freud's psychological classifications as being mere metaphor and lacking sufficient empirical foundations, there is no doubt that they are an extremely powerful way of understanding and talking about the conflicts and tensions people experience in their interactions with each other

and with societal institutions. There is also no doubt that such a theory could only have been developed by a lawyer.

Slowly, in the early years of this century, Freud's writings and unusual style of legal practice began to attract the attention of a small group of brilliant young lawyers. These Freudian lawyers, or "psychoanalysts" as they were sometimes called, would often see clients for months at a time, without ever filing an action or drafting any papers on their behalf. Instead, they became adept at client-interviewing techniques, seeking to elicit directly from the client the sources of the tensions and difficulties that gave rise to the legal problems. These lawyers found that often their best results were obtained by saying very little. They also found that when these interviews were successfully completed, the client often felt that the matter had been successfully resolved, and there was no need for formal legal action.

More traditional lawyers derided these new techniques as mere "talking remedies" and claimed that the Freudian attorneys were not really practicing law at all. Nonetheless, the psychoanalytic movement continued to gain strength and influence. In the United States, many young lawyers rejected both the empty formality and the contumaciousness of traditional legal practice in favor of the new Freudian techniques. One widely remarked upon event occurred in 1941, when Jerome Frank, a noted psychoanalytic lawyer, actually turned down an appointment to the prestigious United States Court of Appeals for the Second Circuit in order to take a newly created chair in psychoanalysis at the Yale Law School.

In Europe, however, by the early 1930s, the spectre of Nazism was sufficiently threatening that Freud's followers urged him to leave Vienna for safer and more hospitable destinations. Freud's first inclination was to resettle in England, but when he learned that the complex requirements for admission to the British bar would make it impossible for him to practice law there, he chose instead to go to New York, where admission requirements for foreign lawyers were less stringent. Freud turned down many prestigious appointments at the most famous law schools and chose instead to join many of his emigre colleagues at the University in Exile, which later became the New School for Social Research. Freud was the first and only professor in their newly created Department of Law.

During his years in the United States, Freud was impressed by the interdisciplinary approaches to law that were being pursued by

young American scholars. He liked to meet, once a month or so, with Karl Llewellyn, and they would have wide-ranging discussions, in German, of course, on everything from the law of the Cheyenne Indians to the quality of food in the German army during the First World War. Freud became concerned, however, by a certain reductionist tendency he saw in some of this work, particularly work which utilized economic models wherein complex human needs and desires were assumed to be embodied in a simple prescription for "wealth maximization." In one of his last works, *Beyond the Pleasure Principle*, Freud warned against any attempt to base legal rules on simplistic models of human behavior and desire. Freud argued that these models failed to recognize either the difficulty of ascertaining the true nature of any person's needs and desires or the extent to which such human desires are themselves the product of preexisting societal influences.

After Freud's death in 1941, the psychoanalytic movement continued to grow, both through wider teaching of psychoanalytic jurisprudence in the law schools and the creation of special "institutes" to further the training of lawyers specializing in psychoanalysis. There has been some dispute as to whether nonlawyers should be permitted to study and practice Freudian techniques. On the Continent, where law is an academic discipline, and there is no significant differentiation between legal education and other forms of higher learning, there has been some acceptance of such nonlawyer psychoanalysts, even the occasional medical doctor. In the United States, however, serious psychoanalytic training has been limited, and I think properly so, to lawyers. It is hard for me to imagine anyone being a successful psychoanalyst who has not first received a solid grounding in the subtleties of reasoning and argumentation provided by a good basic legal education.

Freud's influence has not been limited to psychoanalytic jurisprudence, but has pervaded the entire field of law. Enriched by Freudian insights, legal scholars have provided ever more careful and detailed studies of the ways in which individual desires, social norms, and legal rules interact. The reductivist tendencies that Freud warned against have largely been avoided. There was an attempt a few years ago, led by an obscure law professor named Posner, to revive some of the old classical economic approaches to the study of law. While he did obtain some adherents and notoriety for a while, the movement seems to be dying out, as it becomes clear that it has no serious normative vision of law and as the criticisms of its methods mount. One of the most devastating critics

has been the Dean of the Harvard Law School, Duncan Kennedy, who has argued that proponents of the law and economics approach have no place in law school. As Kennedy has stated, "Anyone who is unable to comprehend the basic Freudian insight that human nature embodies fundamental contradictions has no business teaching law. They might be okay in an economics department."

But it is in the field of legal practice itself that Freud has left his most profound legacy. It may be hard for many in the audience to imagine this, but there was a time when the popular conception of lawyers was of a group of greedy, nasty, untrustworthy, overly aggressive, and generally disagreeable people, concerned solely with fostering endless litigation and benefiting from the misery of others. It must also be admitted, with some chagrin, that there was at least a small element of truth in some of this vilification. Since the advent of the Freudian movement, of course, this picture has changed dramatically. Law is now considered the foremost of the helping professions, attracting the most considerate, decent, and caring members of each generation of college graduates. As the Dean of the Yale Law School, Monroe Price, has stated, "I can't imagine anyone going into the practice of law these days who isn't concerned with helping people, and frankly the big bucks aren't there anymore anyway."

And so, about fifteen years ago, when the trustees of Yeshiva University decided to establish a new law school, they could have done the obvious thing and named the school after some famous judge or other conventionally successful lawyer. They chose instead to name the school after someone who had followed a unique and more difficult career path, whose influence on law has been far greater than that of any single judge. Accordingly, I am pleased to welcome you all here today to the Sigmund Freud School of Interdisciplinary Law.