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GUILT, THE LAW AND TRANSGRESSION

Russell Grigg*

Kant famously held two apparently contradictory principles: first, that all that occurs in the empirical, phenomenal world is, necessarily, determined by prior events; and second that acts of the will are acts done freely. The freedom “in the strictest, that is, in the transcendental, sense” that Kant ascribes to the will is, as he acknowledges, incompatible with the determinism of the empirical world.¹ The freedom must therefore lie in the noumenal world and thus outside the empirical world governed by a priori causal laws. Kant’s attempt at reconciling the freedom of the will with the determinism of the empirical world is widely considered unsuccessful. Therefore, the conclusion that either every event is determined or that some events are acts of free will seems inescapable.

Why, then, did Kant ever seriously attempt to reconcile freedom and determinism in this way? Or, to put the question slightly differently, what grounds are there for countenancing even the possibility of free will? Because Kant accepts the first principle that everything in experience occurs according to causal laws, there can be no empirical grounds for this freedom. As such, he accepts that any cognition we may be capable of having of this freedom can not derive from experience. Kant finds these grounds elsewhere, namely, in our recognition of the moral law, which “forces this concept [of freedom] upon us,” such that, were it not for the moral law, “one would never have ventured to introduce freedom into science.”²

Kant provides a famous example to illustrate the point:

Suppose someone asserts of his lustful inclination that, when the desired object and the opportunity are present, it is quite irresistible to him; ask him whether, if a gallows were erected in front of the house where he finds this opportunity and he would be hanged on it

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¹ Immanuel Kant, Critique of Practical Reason 5:29 (1788), reprinted in Practical Philosophy 163 (Mary J. Gregor ed. & trans., 1996).

² Id. para. 5:30, at 163.
immediately after gratifying his lust, he would not then control his inclination.  

For Kant there is no question of what the man will do. “One need not conjecture very long what he would reply,” he writes, and he takes this to illustrate the nature of desire: a person’s desire will always be subordinate to that most overarching desire—the desire for life. A person will therefore forego the most extreme pleasure if he is convinced that it comes at the price of death. Kant then contrasts this state of affairs with another:

[A]sk [this same person] whether, if his prince demanded, on pain of the same immediate execution, that he give false testimony against an honorable man whom the prince would like to destroy under a plausible pretext, he would consider it possible to overcome his love of life, however great it may be. He would perhaps not venture to assert whether he would do it or not, but he must admit without hesitation that it would be possible for him. He judges, therefore, that he can do something because he is aware that he ought to do it and cognises freedom within him, which, without the moral law, would have remained unknown to him.

Thus a man may still be prepared to do what he thinks is right, do what he believes in, do his duty, even though he knows that his act will result in his own death. It is from the recognition of this possibility that we derive the concept of a free act. For Kant, then, if there were no free will there could be no duty, and the contrast between acting on a desire and acting for the sake of duty would not exist; he therefore takes the example to illustrate the difference between duty and desire.

Lacan disagrees with Kant’s analysis of the contrast between desire and duty and makes the entirely correct observation that a person may well be prepared to act on a desire in the knowledge that it will not be for his own good and may even result in his demise. Indeed, even in Kant’s example, a person is quite capable of finding that the risks and dangers posed by the neighboring gallows add to the attraction of the transgression.

As a matter of fact, Kant would not have had to go very far, even in his own time, to find an illustration of such a case—South and, either West to Paris where the Marquis de Sade was writing *Philosophy in the Boudoir*, or East to Vienna for Mozart and Da Ponte’s *Don Giovanni*. Both illustrate the ambiguity of desire—an ambiguity that is present in Lacan’s paper “Kant avec Sade”—which will not be clarified fully until later, with the concept of jouissance. The ambiguity is that if we think of the satisfaction of desire as producing pleasure then desire will always find a limit beyond which pleasure is not produced. We can call

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3 *Id.*

4 *Id.* para. 5:30, at 163-64.
this limit the subject's well-being. But if, on the other hand, we think of
desire as jouissance, then, as psychoanalysis has discovered, its very
essence lies in its transgression.

The point is, clearly, that jouissance and transgression form a
couple: there is no jouissance without transgression. But the point
becomes less clear when we ask what it is that has been transgressed.
While it may seem obvious that the transgression is a transgression of
the law, this does not exhaust all questions. Which law is transgressed?
The moral law? The law of the land? These issues, which bear upon
the question of the law and its relation to jouissance, are highly relevant
to psychoanalysis.

It is significant that, for Freud, psychoanalysis only recognizes one
law: the Oedipal law that lies at the heart of all society—a law that
every subject has already always transgressed. Any subsequent
transgression is always and only a substitute. Yet even here there are
further issues, for it is not as if Freud's Oedipus complex is unequivocal
on the relationship between the law and jouissance.

Perhaps it would be better to say that Freud has two quite separate
and opposite views about the relationship between jouissance and the
law, one of which is expressed in the Oedipal myth, the other in the
myth of the primal horde. Both are myths of the father in Freud but
with significant differences. The most striking difference is the
inversion in the relationship between desire and the law. The Oedipus
complex is meant to explain how desire and jouissance are regulated by
the law. Both the Oedipus myth “borrowed from Sophocles” and the
primal horde myth involve the murder of the father. The consequences
of this murder are exactly opposite in the two cases because of the place
the law occupies in each case. Both deal with what Lacan had
previously been calling the Name-of-the-Father, a signifier intimately
tied up with jouissance and its regulation by the law, yet the relationship
between the law and jouissance that unfolds in each, oddly enough,
ends up inverted. In the Oedipus myth, the law is there from the outset;
it is an inexorable law, demanding punishment even when the
transgression has been committed unwittingly. The law precedes
enjoyment and enjoyment henceforth takes the form of a transgression.
In Totem and Taboo, on the other hand, enjoyment is there at the outset,
at least in appearance, and the law comes afterwards. This leads Lacan
to say that there is “une schize, a split, separating the myth of Oedipus
from Totem and Taboo.”5 The reason? They are responses,
respectively, to the clinical experience of hysteria and obsessional
neurosis. The Oedipus complex is the myth that Freud creates in
response to the clinic of hysteria and the myth of the primal horde father

5 See Jacques Lacan, D’un discours qui ne serait pas du semblant (June 9, 1971 session),
of Totem and Taboo is Freud’s response to the clinic of obsessional neurosis.

Lacan discusses the issue of the relationship between jouissance and the law in The Ethics of Psychoanalysis and in “Kant with Sade” in relation to Antigone. It is not always clear what Lacan has in mind in these texts, particularly in “Kant with Sade.” And there has been a tendency to conceptualize what he says in terms of a distinction between the “positive law” and some form of the Law, such as, for instance, the law of the super-ego. On this interpretation, it seems reasonably clear how positive law and the Law (of the super-ego) might differ: Antigone acts in the name of a higher law, in the recognition that Creon’s law, which is the positive law, falls short of it. In her no-saying to the power of the city she can be allied with civil protesters, agitators and—why not?—terrorists in so far as she transgresses the positive law in the name of something “higher.”

I think this is not only incorrect but also trivializes the distinction, reducing it, as it does, to the recognition that the legal code and the moral code are not the same thing. For while it may be true that they are not the same thing, they are not entirely distinct either—and for good reason. Let me explain.

First of all, there is the case of Dostoyevsky. When Freud came to explore the relationship between guilt and transgression he came to the view that the causal chain between them was sometimes the opposite of what we would ordinarily suppose. Common sense would have it that you feel guilty because of a transgression. But Freud speculates on cases where one transgresses because one feels guilty; and by transgressing you at least give the guilt an object. Thus, a person who is oppressed by an unconscious sense of guilt, who is therefore unaware of its origin, might commit a criminal act in order that the guilt he or she carries unconsciously can find a real and particular object.

Melanie Klein reinforced Freud’s views. Aware of the intense violence and extreme cruelty the super-ego displays towards the subject’s unconscious desires, she recognized the unbearable situation in which this left the ego. The person’s response is to externalize the guilt, which it does by committing some crime or transgression for which they will be apprehended and punished. Thus, Klein gives further support to Freud’s thesis in suggesting that where the motive for criminal behavior is the externalization of unconscious guilt, the external situation in some way reflects the ferocious internal attack perpetrated upon the ego by a hostile and threatening superego. As a consequence, the real, external punishment becomes less threatening than the sadism of the superego, before which the ego feels itself to be
more or less entirely helpless. This is a process that can be understood as coming entirely under the pleasure principle—or at least would come under the pleasure principle were it not for the fact that, at the same time as the "crime" is externalized, punishment by an external agent will satisfy the ego's own desire for punishment.

Note, incidentally, that Klein's analysis of guilt and transgression makes little reference to any Oedipal dynamics but relies very heavily upon an aggressiveness that is internal and innate. And in point of fact it is not quite accurate to say that Freud puts the guilt before the transgression, for the unconscious guilt in question has its own origin in Oedipal desires and wishes concerning the murder of the (primal) father.

Of course, none of what Freud says about guilt and transgression will work unless the transgression is not only a legal transgression but a moral one as well. The transgression had better be a moral one, and moreover one that is symbolically linked to the original, unconscious, Oedipal crime.

There is a second point about criminal transgression that I would like to mention: the case of war-time atrocities. There are three very common, though perhaps not universal, features of the war-time atrocity that are particularly relevant to the point I want to make concerning the light psychoanalysis is able to throw on criminal transgression. The first is that the perpetrators of the particular type of criminal act that we call war-time atrocity are, on the whole, otherwise good, decent and law-abiding citizens. That is to say, they generally have no previous history of criminal transgression and generally no subsequent history of violent crime either, a fact which in itself is quite remarkable. There is plenty of post-war trauma and mental illness, of course, but actual crime is much less frequent. The second fairly common characteristic is that such actions are generally condoned, or at the very least excused, by the people on whose side and on whose behalf those who commit the atrocities are fighting. Their readiness to fight and, if necessary, sacrifice their own lives is arguably a significant factor in this response by their people to their actions. The third feature, and the one I want to emphasize, is that wartime atrocities are rarely random events but generally display a symbolic, strictly Oedipal structure. We can see this most clearly when they take a ritualized form: the raping of women in the presence of a helpless, impotent, intimidated father or father-figure; or again, the specific forms that bodily mutilation takes. In this case, the atrocity, in its transgressive function, reflects the very form of the social fabric, and not only the social fabric of the victims but also of the perpetrators themselves. In other words, the transgression is an

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expression of the symbolic laws, and not just as they pertain to the victims but also as they pertain to the perpetrators' group as well. Moreover, the symbolic link is what makes criminal behavior part of the subject's psychopathology. That is, criminal behavior is never in itself psychopathological. What makes criminal behavior psychopathological is the features it has in common with other, non-criminal, forms of psychopathology: typically, compulsive behavior, repetition and exaggerated remorse. There will also be a symbolic link with the history of the subject. 7

The comparison between criminal behavior and psychopathology is similar to the case of the superego in relation to moral behavior, particularly the superego of the obsessional neurotic. As we know, the obsessional is a particularly moral individual. But what reveals the presence of the pathological superego in his moral rectitude is that indignation at the immorality of others is combined with a sadistic and inhumane adherence to the moral law. Or again, the obsessional sometimes manifests a readiness to devote himself to the well-being of others by his general love of humanity and warm devotion to everyone, but with the exception—and here's the rub—of those whom he loves the most.

Thus, the psychopathological aspect to the behavior of the criminal manifests itself in the same way as it does in the behavior of the obsessional or any other neurotic. The psychopathology is not expressed by the act, criminal or otherwise, but in the form or general structure of the behavior in question, and so what is common to the behavior of the criminal act and psychopathology is the symbolic content. But in this respect whatever psychopathology might appear in criminal behavior is no different from psychopathology in other circumstances. Things are no different here than they are with respect to the differences between neurosis and psychosis. The themes are the same, the content of the symptoms and so forth are the same; where they differ is in the structure of the two conditions where one results from the process of repression, the other from foreclosure. However, Lacan also indicates that the fact that the psychotic's discourse is just as interpretable as neurotic phenomena, such as dreams, leaves the two disorders at the same level and fails to account for the major, qualitative differences between them. Therefore, if psychoanalysis is to account for the distinction between the two, it cannot do so on the basis of meaning alone. It can only do so on the basis of the "structure," and the structures it recognizes are those familiar to us in psychopathology: neurosis, psychosis and perversion.

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7 This point is discussed in JACQUES LACAN, A THEORETICAL INTRODUCTION TO THE FUNCTION OF PSYCHOANALYSIS IN CRIMINOLOGY (Mark Bracher et al., trans., 1950); 1, 2 J. FOR THE PSYCHOANALYSIS OF CULTURE AND SOC'Y (1997).
Where transgression is an expression of guilt it is essential that the transgression result in loss and punishment. But it doesn’t necessarily have to be a criminal offence. A good, nasty marriage break-up where you lose the partner, kids and family home will do the trick just as well. We know the power of unconscious guilt in analysis, where it is not uncommon for unconscious guilt to become active, and the risk of major acting-out of this kind can be quite a serious consideration. To sum up this point, it is not merely a question of transgressing the law; the transgression has not just a legal dimension but a moral one as well.

This point raises a new question about the relationship between law and morality. In our societies, the movement over the past, say, 150 - 200 years has been to separate the law and morality, both philosophically—concerning in particular the justification of punishment—and in actual practice. Philosophically, ever since the emergence of the secular state and ever since the time of Jeremy Bentham’s Panopticon, the “progressive” approach to punishment has been the utilitarian one of justifying it by its consequences: that is, punishment deters potential criminals and rehabilitates actual criminals—or it should at least aim at so doing.8 Completely foreign to this are issues around retribution, reparation and expiation.

In my view, the notion of the therapeutic treatment of crime forms part of a general repressive approach to crime and transgression that began in the nineteenth century and that is best symbolized by the image of Bentham’s Panopticon. The thesis is, of course, Foucault’s, according to which the policy of reforming the individual offender emerged as the new form of social control to replace the former regime of punishment. The early interest by psychoanalysts in forensic issues led to the view that treating offenders was to be preferred over punishing them—better the couch than the cell. However, to this extent, psychoanalysis can be seen as contributing to a new view of punishment in our society, a view that reinforces the repressive function of the law.

Now, psychoanalytic approaches to crime since Freud have generally fitted into this progressive approach, particularly in the hope that psychoanalysis may be able to contribute to crime prevention. There were a number of psychoanalysts, most with a background in psychiatry, who became forensic specialists in the belief that psychoanalysis had something to offer law enforcement, crime prevention and punishment. The British psychoanalyst Edward Glover contributed not only to debates on the investigation and treatment of crime over a long period from the 1920s to the 1960s, but was also involved in the founding of both the Institute for the Study and

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8 That Prisons Departments have become Corrective Services symbolizes this shift.
Treatment of Delinquency and an institution called the Psychopathic Clinic, the world’s first ever psychiatric clinic concerned with delinquent study and therapy. Then, in Berlin in the late 1920s, Franz Alexander and the lawyer Hugo Staub published a book called The Criminal, the Judge and the Public, which produced a lot of interest at the time of its publication. Their work includes a number of case studies of criminal offenders, including one by Marie Bonaparte. The general tenor of these contributions can be described as “progressive.” There is an appeal for a more compassionate understanding of the factors that lead to criminal behavior, and this combines with an enlightened, non-retributive approach to punishment, including the recommendation that treatment replace punishment.

I don’t know if any psychoanalysts have argued this, but some philosophers have appealed to psychoanalysis to argue that psychoanalytic theories of compulsive behavior and unconscious determinism imply that it is a mistake to blame offenders for their transgressions since their behavior is beyond their conscious control. Humans never really act freely and hence cannot be held accountable for their actions. This is not, however, the lesson of Freud. Freud’s lesson is rather that you are responsible for your actions, even—particularly—those that you do not know you are doing.

Be that as it may, to view punishment as justified solely by its value as deterrent misses something of symbolic importance in any positive legal code. The point is that the law must in some way carry “moral weight,” that is, it must be seen both to serve the interests of justice and to arise out of serious moral considerations. It is this connection with morality that makes for the difference in gravity between a serious crime such as murder and a lesser one like civil disobedience. And the connection between morality and the law can get out of kilter, as when the punishment for civil disobedience exceeds the gravity of the transgression.

Renata Salecl relies upon this point, if I read her correctly, when in The Spoils of Freedom she refers to the “lawlessness” of socialism. She describes a situation in which the law under socialism—the law, that is, that defines what is legal, what is prohibited, what is constitutional, what is not constitutional—was subordinate to the goal of constructing communism; the law thus became a purely utilitarian law in which the means were subordinate to the final “good.” Salecl adds that under socialism the law was constantly transgressing itself, that the Party was constantly inventing new laws, constantly rewriting the constitution. The consequence of all this, however, was that there ended up no longer

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10 Franz Alexander & Hugo Staub, The Criminal, the Judge, and the Public: A Psychological Analysis (Gregory Zilboorg trans., 1931).
being any identification with the system as such; people only obeyed the law because they were compelled to, because they were afraid of the consequences if they didn’t. Implied here, then, is the fact that simply being afraid of the consequences is not enough. That is, the subject needs to accept the moral legitimacy of the law for the legal sanction to have the value of punishment. In the absence of this link with morality, punishment is transformed into something else: for instance, repression or revenge or, as in the case Salecl describes, mere social control, where the subjects obey the law not because they agree with the law but because they are compelled to.

Now, I believe that Salecl’s comments do not apply uniquely to the former socialist states but apply, perhaps in a slightly modified way, to capitalist societies as well. What she describes is a legal system based on a utilitarian approach to punishment devoid of any notion that the penalty must match the crime—a utilitarian rationale that appeals uniquely to the consequences of punishment. For socialism, there was one ultimate consequence: the conditions for the establishment of communism. Under capitalism, the rationale is that punishment deters, quarantines and rehabilitates: punishment deters potential criminals; incarceration quarantines actual criminals from society; and, perhaps less convincingly, punishment leads to the offender’s rehabilitation. Unless we understand the law in this way and not just as a “positive legal code,” we will not properly understand the relationship between law and its transgression.

I have discussed three ways in which transgression and the law can be related and three corresponding “types.”

The first is that described by Freud, where transgression externalizes guilt that is of unconscious origins and relates to the Oedipal situation.

The second is that described by Kant, embodied by Antigone, where transgression is carried out in the name of the moral law.

3. The third, described by Lacan, is the figure for whom transgression is itself a source of jouissance. This is a figure, moreover, for whom the risk of loss and punishment compound the jouissance. I would like to end by adding a fourth, which brings us back to Freud.

The fourth is the jouissance of the ascetic, of the saint—the jouissance of instinctual renunciation. As Freud puts it:

Conscience . . . is indeed the cause of instinctual renunciation to begin with, but later the relationship is reversed. Every renunciation of instinct now becomes a dynamic source of conscience and every fresh renunciation increases the latter’s severity and intolerance.12

12 SIGMUND FREUD, Civilization and its Discontents, in 21 THE STANDARD EDITION OF THE
Thus, we too have tended to reduce punishment to a utilitarian function, albeit a correctional one; as a consequence, the retributive function and the converse expiatory function of punishment is so far removed from our modern sentiments that retributive justice is typically associated with the vengeful God of the Bible and the Talion Law.

Yet we haven’t given up totally on the retributive idea that the punishment must match the crime; the utilitarian approach has not so totally replaced the retributive philosophy that we think it is just to dissuade criminality by punishing the innocent where this would work. For example, the reason we consider it unjust to destroy the house of the family of those accused of crimes against the state, when the family members have not been implicated in the crimes themselves, is that however dissuasive the actions may be, it is still wrong to punish the innocent for the crimes committed by and in the name of another.

And this brings us back to the start, where the idea emerged that psychoanalysis could contribute to advances in criminology by advocating treatment over punishment. For this is part of a mental health approach to crime and punishment. It seems logical to think that if the criminal can be shown to have committed his or her crime as a kind of passage à l'acte that is perpetrated in the name of a punitive and sadistic superego, then the offender needs help, not hanging. However, an unintended consequence of the approach that takes the blame out of crime seems to be that it compounds the malaise in civilization.

Slavoj Žižek is sensitive to this point when discussing Kant’s concept of Achtung, respect for another person, who should never be treated solely as a means, always as an end. “How,” Žižek asks, “do we show respect” to a “criminal who cruelly and intentionally killed another person; how do we show proper respect for him?” Žižek replies, with characteristic hyperbole, “[b]y condemning him and shooting him, since this is the way we treat him as a free, reasonable person; whereas all the talk about the impact of social circumstances treats him ‘disrespectfully’—that is, not as a free, responsible agent, but as a plaything of social mechanisms.”13 Žižek is hyperbolical to the point of being misleading, because retribution need not entail cruel and excessive punishment, but simply respect for human dignity. This entails that the criminal be punished for his crime, and only for his crime, since this is the meaning of treating a person as an ends and not as a means, just as it entails that the law have moral legitimacy.

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13 SLAVOJ ŽIŽEK, Kant with (or against) Sade, in THE ŽIŽEK READER, 283, 293 (Elizabeth Wright & Edmond Wright eds., 1999).