

Traversing Terra Nullius: Legal Origins and Freudian Fictions

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Introduction

The editorial prospectus for this volume opens with a concision which will not be emulated here: 'Terra Nullius is the principle of violence that inheres in every origin. And, in its wake, there is no law, no text, no culture, free of that violence'. In an immediate sense, this is an invitation to counter certain pacific pretensions of law. But we may also be editorially swayed towards a more pointed pursuit. That would involve tying law to the violence of the origin - not an origin whose violence has a fixed and forceful palpability, but an origin which is pervaded by what is null or non-existent, and an origin whose violence is constantly impelled by that very nothingness. Such a scene of the origin is one I will now visit by way of an analytical retelling of an occidental myth of violent origination. This is one of the most influential myths of modernity, not so much in its gruesome immediacy as in its psychoanalytic attenuations. It is the story of the killing and eating of the primordial father in Freud's *Totem and Taboo* (Freud 1960). What this visit gives back to editorial inspiration is an intimate positioning of law at the centre of this scene. Not only do we see law there imbued with originating violence, but we also find it fully occupying the place of the origin. There can be nothing before this law. Or, putting that at a tangent, what is before this law can only be nothing. Or, putting it at another

tangent, law ultimately comes from nowhere. It is not beholden to anything before it. The rule of law would demand as much. But in Freud's company, the attributes of that demand may be more intimidating than they are usually taken to be. Thus, it is readily said that the primacy of law is an essential attribute of civilized order. Freud would not disagree. However his potent myth would also insinuate an intractable savagery into law, and into its civilized order, a savagery which would match and lend its force to the nothingness from which law comes.

I have set the scene of the primal parricide quite fully in a recent essay (Fitzpatrick in press). There will be a little repetition here but it should suffice to weave in the story as we go along. For present purposes, what should be emphasised from the previous essay is Freud's uncertainty in every telling of the tale about whether 'the deed', the killing of the father, actually happened (e.g. Freud 1960: 159-61).

In the elusiveness of origins the deed cannot be known to have happened or known not to have happened. Since the deed originates human culture and our ability to know, and to order and represent what we know, how may we ever encompassingly know it? It could at best be a dim, perhaps uncanny evocation, tantalizing, ever out of reach. What preceded the deed itself would presumably be even more intractable. Freud can only account for it in his explicit terms by resort to categories of cultural being given to us by the deed. The deed creates society but a society was already created so as to perform the deed. The oedipal configuration results from the deed but all its components were already in place motivating the deed. And so on. The origin becomes a place where we already were. Yet if we are to originate, we must come from a place we have not been.

I will now explore these antinomies of the origin in three connected things emerging from the murder - society or civilization, individual being, and the

Oedipus complex. They will then be brought together in a focus on how Freud originates law. Thence we find that the place of the origin is settled by an integral combination of law and savagery, and it is this combination which creates the origin of occidental being.

Antinomies Of The Origin

Firstly, then, society or civilization. Freud's primal 'horde', even if the name may bear a certain unruly connotation, appears to be an intensely social scene. Certainly it manifests little of the chaos that normally precedes the pre-modern origin. When first encountered, in the company of Darwin, it is to do with the 'social state of primitive men'. What seems particularly social is the compact between the brothers. In one version, they 'came together... one day' or, in a different one, an 'attachment... had grown up among them during the time of their exile' from the father's exclusive domain; or it is said that 'they lived together in a community' and 'clubbed together' to overcome the father. There was, in any case, an 'organization which made them strong'. It 'may have been based on homosexual feelings and acts'. In short, these 'social fraternal feelings... were the basis of the whole transformation' (Freud 1960: 125, 141, 144, 146; n.d.: 103-4). The social scene after the event is supposed to be something radically different, however. 'The great crime' was 'the beginning of society'. It was 'the great event with which civilization began'. Or, in another version, after the event, the brothers enter into 'a sort of social contract' (Freud 1960: 140, 150; n.d.: 104). Yet, somewhat inversely, society originating in its difference to the primal horde is still seen as capable of taking on the characteristics of the primal horde (Freud 1985c: 154-5).

There is a kind of solution, as simple as it is significant, to this irresolution between the sameness and difference of the origin. It can be glimpsed in an indicative ambivalence attending the state of the primal horde. Freud wants this to be the original condition of 'man' or 'mankind' (Freud 1960: 125; Freud 1985a: 155). This is the origin as protean continuity, as the same. But Freud also wants to say that the primal horde is qualitatively different to what comes after. He equates it with the animal, especially in his reliance on Darwin's ethology. Put more generally, 'the gulf which was created later between himself and the animals did not exist for primitive man' (Freud 1960: 125; n.d.: 104). *Homo* in the primal horde is not yet *sapiens*. All action there is instinctual, thought is not separate from action. There was no individual, only 'collective impulses' and a 'common will' (Freud 1960: 159-61; n.d.: 104; 1985a: 155). Then, with the reflective understanding induced by the parricide and a realization of the futility of continually battling over the succession to the father, the brothers enter into a social contract and create 'the first form of social organization accompanied by a renunciation of instinctual gratification' (Freud n.d: 103-4). But, it still goes on, this incipient civilization is also the product of the 'attachment' between brothers in the primal horde. That initial, savage state provides the mythic primal matter out of which civilization is shaped via the *novus actus* of the parricide. And that savage state has a mythic continuing force, it persists with-in civilization. I will accommodate the adaptive savage more expansively in a little while.

So, society's or civilization's irresolute origin itself forces a resolution. Society is both a protean continuation and a ruptural break with what went before. That conundrum can now be seen as 'solved' in the splitting of society so that it is in part persistent and similar to what went before, and in part novel and dissimilar. And it is the savage totem - or Freud's tendentious version of it, rather - which is the pivoting institution, bringing this disparity into a relation and providing society with its distinct place. 'The totemic clan', for Freud, is

'the next form of human society' after the primal horde (Freud 1985a: 157). It is a reprise in social terms of the *primaeval* parricide, and it carried the force and effect of this mythic origin. The place of the father is occupied, in an immediate sense, by a totemic animal which is periodically killed and eaten in a ritual feast. Although Freud derived this substitution of the animal for the father partly from speculation about them both being similarly strong and feared, and partly from anthropological claims that animal sacrifice was 'the oldest form of sacrifice', he relied mainly on psychoanalytic cases of animal phobia in children (Freud 1960: 126-34, 161; n.d.: 104). The only instance of the totemic festival which Freud recounts in any detail is especially satisfying in its thoroughness. It is a borrowed rendition of 'a sacrificial ritual current among the Bedouin of the Sinai Desert at the end of the fourth century A.D.' (Freud 1960: 138). A living camel is 'bound upon a rude altar' and after initial solemnities:

Forthwith the whole company fall on the victim with their swords, hacking off pieces of the quivering flesh and devouring them raw with such wild haste, that in the short interval between the rise of the day star which marked the hour for the service to begin, and the disappearance of its rays before the rising sun, the entire camel, body and bones, skin, blood and entrails, is wholly devoured (see Freud 1960: 138).

The savage involvement of 'the whole company', and the company's absorbing so completely the symbolic equivalent of the father and of the father's unlimited power, evoke the wholeness or the plenitude of the primal condition and affirm its persistence as the realm of the social. Yet the totemic feast also marks the break. It is a 'repetition and commemoration of ... [the] criminal deed, which was the beginning of so many things - of social organization, of moral restriction and of religion' (Freud 1960: 142). And so, the 'totemic culture everywhere paved the way for a more advanced civilization' (Freud 1960: 101).

Above all, in a sense literally, the totem was the inexorable marker of the continuing identity of a group (Freud 1960: 103-8). All members of the group were of the totem. They ingested it and took it into themselves. In this sense they were the totem, identifying with it just as there was an identification with the father. But as a marker of the group's continuing identity, the totem cannot ultimately be contained by any or even all of its members. In one way, it is true, the members of a totemic group 'are submitting to nothing but' themselves (Borch-Jacobsen 1991: 76). But the members submit only in or through forms, rituals, ceremonies of the totemic feast. It is the cardinal crime against the group for any or, it should be added, all individual members to kill or to eat the totem animal when acting outside of the forms, rituals and ceremonies - outside, that is, the realm of the sacred.

The sacred and, what becomes the same thing, the social are set beyond any individual or any collection of individuals. In the totemic feast:

Each man is conscious that he is performing an act forbidden to the individual and justifiable only through the participation of the whole clan; nor may any one absent himself from the killing and the meal (Freud 1960: 140).

What is more, the participants in the feast take from it a social being. They are identified with and through the totem. They 'acquire sanctity' in the consumption of 'a sacrosanct victim': 'the participation in the same substance establishes a sacred bond between those who consume it' (Freud 1960: 137, 140). The social quality of that bond would seem to be condensed in the excess attending the totemic festival, even if Freud does not make the point directly (cf. Durkheim 1915). 'A festival is a permitted, or rather an obligatory, excess...', and in that excess 'every instinct is unfettered and there is a licence for every kind of gratification' (Freud 1960: 140). Primordial drives are in this way harnessed to the distinctly social. The paradox of an obligatory excess, a compulsory self-abandonment, nicely captures the ambivalent position of a

savagery that is in yet outside, that is for yet against a restrained and civilized sociality.

Freud advances two impelling reasons for the poignancy of the social. One is akin to theories of the social contract. Without some agreement among the brothers after the parricide, 'the new organization would have collapsed in a struggle of all against all, for none of them was of such over-mastering strength as to be able to take on his father's part with success' (Freud 1960: 144). Or, more expansively:

It is a reasonable surmise that after the killing of the father a time followed when the brothers quarrelled among themselves for the succession, which each of them wanted to obtain for himself alone. They came to see that these fights were as dangerous as they were futile. This hard-won understanding - as well as the memory of the deed of liberation they had achieved together and the attachment that had grown up among them during the time of their exile - led at last to a union among them, a sort of social contract. Thus there came into being the first form of social organization accompanied by a renunciation of instinctual gratification; recognition of mutual obligations; institutions declared sacred, which could not be broken - in short, the beginnings of morality and law (Freud n.d.: 103-4)

But there has to be more. The agreement of individuals would only be that. It would be insufficient to found the distinctness of the social. Freud does provide another, and for this purpose, more apt impelling reason. 'The totemic system was, as it were, a covenant with their father', with a dead father who 'became stronger than the living had been'. This father was accorded a 'deferred obedience' and thereafter 'in totemism and in religion generally' remembered through 'expressions of remorse and attempts at atonement' (Freud 1960: 143-5). This at-one-ment and 'identification' with the father entail a social contract of a more Hobbesian variety. Here the father insinuates a

sovereign power beyond the reach of individuals. This is much like another murderous Deed, this time the death of God at our hands, as it is reported by Nietzsche's madman: 'This deed is still more distant from them than the most distant stars - *and yet they have done it themselves*' (Nietzsche 1974: 182 - para. 125 - his emphasis).

The condign qualities of the totem persist in the evolution of society. They inhabit 'all later religions', for example (Freud 1960: 145). And like the totem, the 'task' of civilization 'is one of uniting separate individuals into a community' (Freud 1985c: 333). There is, in part, a development away from savage origins, one which Freud sets not only against the persistently savage instincts of the individual but also against the prospects of a society itself returning to the savage integrity of the primal condition, something he saw happening in 1921 and which compelled him to write *Group Psychology and the Analysis of the Ego*:

Human groups exhibit once again the familiar picture of an individual of superior strength among a troop of equal companions, a picture which is also contained in our idea of the primal horde (Freud 1985a: 154).

Yet the very impetus for civilization to emerge and to remain in being comes from its difference and opposition to its savage pre-creation. Civilization is constantly shadowed by an antithesis which came before it. Despite itself being a positive, 'organic' force, despite its ingrained heritability and its cumulative progress over 'incalculable ages', civilization remains always precarious (Freud 1985c: 285-7, 313, 333; 1985d: 361).

But the conflicts in civilization's origins, and thence in civilization itself, are more intimate than this. Civilization originated and was sustained in the murder of a father who, again, 'became stronger than the living had been' (Freud 1960: 143). In a sense there are 'two fathers' involved here - one of brute savagery and one of civilizing authority (see e.g. Salecl 1993: 9-11; Žižek 1992b: chapter

5). But 'they' are still the same father, as the prospect of reversion to the condition of the primal horde and rule by 'an individual of superior strength' would indicate. What is more, civilization came not just from a subordinating identification with the dead father but was also the violent 'triumph over the father' in the concerted action of individuals (Freud 1960: 145). And individuals, with their ever unruly instincts, are never for Freud wholly subordinated to a civilizing society. So, in all, what is savage and unruly is not a matter of exceptional deviation but intimately and closely inhabits civilization in its 'normal state'. Any 'group formation' retains in it 'the survival of the primal horde' (Freud 1985a: 155). And for all Freud's liberalism, the state of his beleaguered civilization itself had to be not entirely removed from that of the primal horde. Leaders had to be strong and followers had to follow - 'the latter... stand in need of an authority which will make decisions for them and to which they for the most part offer an unqualified submission' (Freud 1985d: 359).

It is little wonder, then, that civilization had to be 'made permanent', if the phrase may be given a certain over-literal quality (Freud 1960: 134). Put another way, in order to persist, civilized society has to be continually remade. The obliging Bedouin again provide Freud's 'elementary form' of this imperative:

Anyone who has eaten the smallest morsel of food with one of these Bedouin or has swallowed a mouthful of his milk need no longer fear him as an enemy but may feel secure in his protection and help. Not, however, for an unlimited time; strictly speaking, only so long as the food which has been eaten in common remains in the body. Such was the realistic view of the bond of union. It needed repetition in order to be confirmed and made permanent (Freud 1960: 134).

Likewise, by repeatedly consuming the totem, 'clansmen reinforced their identification with it and with one another' (Freud 1960: 140). But this does not simply involve a repetition of the same thing:

... it became a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal, whenever, as a result of the changing conditions of life, the cherished fruit of the crime - appropriation of the paternal attributes - threatened to disappear (Freud 1960: 145).

It is the constant challenge of what is different that provokes the affirmation of what is nominally the same (cf. Caillois 1959: 101-3). This is the case with every myth of origin where the originating act is repeatedly evoked and brought to bear on new situations which are thence taken within its formative, and normative, range (Eliade 1965: chapter 1). In the same way 'every sacrifice repeats the initial sacrifice and coincides with it' (Eliade 1965: 35). The gods are conveniently voracious. No ultimate expiation is possible, and the 'return' to the origin has to be 'eternal'. Or, returning to Freud through Nietzsche, 'the collective murder' becomes 'the engine of the perpetual movement' (Girard 1988: 242).

The antinomies of the social are replicated in the origin of individual beings, and with this origin we can now overlay a further opposition, that between the individual and society. Freud's writings on and around the primal horde vacillated between the primacy of the group and the primacy of the individual, and at times he accorded them equal status (Freud n.d.: 101; 1985a; Borch-Jacobsen 1988: 234-6). In *Group Psychology and the Analysis of the Ego*, he propounds a primal condition of stark, collective simplicity in which there is no room for individual will or action. But almost immediately after doing this, 'further reflection' leads him to advance a radical 'correction'. 'The individual (*sic.*) members of the group' were absolutely bound in the commonality but this being bound did not include the father. The reason for the inability of the

ordinary members to be otherwise than subsumed in the collective was the father's comprehensive and 'unlimited power', his total determination of their being (Freud 1960: 148; Borch-Jacobsen 1991: 72-5). 'But the father of the primal horde was free. His intellectual acts were strong and independent even in isolation, and his will needed no reinforcement from others' (Freud 1985a: 156).

The transformation of this scene puts father and sons in a relation. After 'the great crime' the brothers are rapidly able to individuate in their acquisition of 'the sense of guilt'. The emergence of authority follows from this along with the necessarily individual internalization of the father's unlimited power. The sense of guilt 'set(s) up the super-ego by identification with the father; it gave that agency the father's power' (Freud 1960: 143, 150; 1985c: 325). And so 'what was the outside becomes the inside' (Lacan 1988: 169). There are some obvious puzzles with all this which parallel those attending the origin of society. If the power of the father in the primal horde were utterly pervasive so that each of the sons was fixed in the collective amber, how could they make the break and produce the origin which they did? They do so by being the same before the origin as they were after it. They form 'attachments' to each other apart from and against the father. They eventually 'banded together' and purposively agreed to kill him. The 'resolution' can also be played out in antinomies similar to those found with the origin of society. The individual is split between a persistent savagery and the demands of an imperious civilization, neither of which can ultimately be separated from the other. And whilst a resurgent savagery may always dislodge civilization from its precarious hold on the individual as well as on society, civilization itself can never overcome the savagery within the individual or within society. Civilization does, after all, depend integrally on this selfsame savagery, as we saw. Yet no matter how effective the return made by the primal condition, a condition which Freud in

1921 saw 'human groups' coming to 'exhibit once again', the father/leader is not able entirely to eliminate 'the conscious individual personality' (cf. Freud 1985a: 154). And if individuals must, because of their destructive instincts, 'offer an unqualified submission' even to civilized 'leaders', this is offered only 'for the most part' (Freud 1985d: 359). In all, the individual now persists and is not lost in the group. Yet, as we have seen, there is a suppression of the same individual in the totem, in the sacred, in society.

The Oedipus complex appears to offer an overall resolution since the origins of society, the individual and other things all 'converge in it' (Freud 1960: 156). But the Oedipus complex itself seems far from immune to the irresolution of origin. It seems to exist exuberantly before and after its very birth. To identify its originating force

... we need only suppose that the tumultuous mob of brothers were filled with the same contradictory feelings which we can see at work in the ambivalent father-complexes of our children and of our neurotic patients (Freud 1960: 143).

We could also readily conclude from Freud's equating the primal brothers with the contemporary savage that they, like the savage, were riven with Oedipal conflict (Freud 1960: 159-61). The brothers were, after all, expelled by the father because they wanted to be like the father in having access to the mother/woman. And Derrida, no less, observes that the killing of the father 'inaugurates nothing since repentance and morality had to be possible *before* the crime' (Derrida 1982: 198 - his emphasis). So, it is tempting simply to extend my earlier argument about society and the individual to the Oedipus complex - the argument that what is originated precedes the origin.

There is, however, one difference which may at first appear little more than a nuance but it does, as we will soon see, prove vital. Although all the

components of the Oedipal configuration were in place before the killing of the father, it was only after the killing that they all came into play.

After they had got rid of him, had satisfied their hatred and had put into effect their wish to identify themselves with him, the affection which had all this time been pushed under was bound to make itself felt (Freud 1960: 143).

The brothers in their primal condition were oedipally ambivalent towards the father. They 'hated him but they loved him too' (Freud 1985c: 325). And 'so long as the pressure exercised by the primal father could be felt, the hostile feelings towards him were justified, and remorse... would have to await a later day' (Freud 1960: 160). The 'pressure' of the father was pervasive, his power was without limits (Freud 1960: 14; Borch-Jacobsen 1991: 72-4). And after the killing of the father this power persists and is even augmented - 'the dead father became stronger than the living one had been' (Freud 1960: 143). There are obvious and by now familiar problems with all this. How could one with limitless power be overthrown and how could that power in its persistence possibly be 'stronger' than unlimited power? The answer must be that Freud is also indicating the emergence of a new mode of power, one which depends on the loving, conscience-stricken submission to a dead father of illimitable potency (Freud 1985c: 325). Love for Freud can be many, not always splendoured, things but here it imports a self-responsiveness to anything the dead father may require and not so much now a desire to set in position the purely, completely determined power of 'the unrestricted primal father' (Freud 1960: 149). In short, 'the revenge taken by the deposed and restored father was a harsh one: the dominance of authority was at its climax' (Freud 1960: 150).

Freud's originating transition, then, is perpetually stretched between two impossibilities. One is the impossibility of complete determination from without - the impossibility of the father's unlimited, brute power or the

impossibility of a complete power of the common will. There were various testaments to that impossibility such as the brothers' remaining 'individuals' who can come together, kill the father and shatter the commonality. But that outcome by itself is equally impossible. If the primal condition would eliminate individuality, its successor would be nothing but individuality. Without more, this would result in the brutish and wearisome 'war of all against all', the re-emergence of the all-powerful leader and hence a return to the primal condition (Freud 1985a: 169-70; 1985c: 284). In an immediate way, Freud's mythic resolution involves a reversal of the player's roles. The father, once the complete savage, becomes the enduring repository of an ever-incipient civilization. The sons, once the begetters of civilization, become its brutish opponents. But these new roles, entail the persistence of the old. There remains an overall lack of integration to the story, an absolute poverty of mythic 'mediation'. I will now advance the savage as the figure of mediation. But there will also have to be more than this. Myths are neither ultimately resolving nor self-enforcing. That is where law enters and proceeds to occupy the place of the origin.

Savagery

Freud's picture of the savage is standard but significant as that. His one remarkable contribution is the emphatic equating of the savage with members of the primal horde (e.g. 1960: 142). In doing this he sharpened the contradictions, as it were, since it was not then possible to fudge the problem of origins and say that the members of the primal horde were 'semi-human' or 'more or less human'- to borrow standard designations from Atkinson, one of Freud's main sources (1903: chapter IV). The savage was human both before and after the transforming primordial parricide. Yet the primal horde and

savagery also manifest what is different to those distinctive attributes of humanity which follow the murder of the father. So, the savage has to be social yet not social, individual yet not individual, and so on. It has to combine a protean continuity with ruptural disjunction. It is the savage which, in short, occupies the impossible place of the origin in this paradigm myth of modernity. Put another way, the place of irresolution in the myth of origin is held by the savage (cf. Derrida 1976: part II chapter 3). Or, in yet another idiom, the savage is a fantasy filling the space of origin (Zizek 1991a: 211). Suitably burdened, the savage in Freud's text exhibits the contrary and ineradicable characters which have persisted with-in modernity. As different, as the negative side of the ruptural divide erected by myths of origin, the savage is the *prima materia* 'without form and void', that undifferentiated no-thing which 'hinders the world from being made, or from enduring' (Elaide 1965: 20). Freud relied on two images to convey these qualities or lack of qualities - images which are, again, significant for their unoriginality. One is animality and the other the condition of childhood. Freud identifies 'primitive man' with an animality of uncontained instinct, cruelty, aggression and murderous passions (Freud n.d.: 104; 1960: 2; 1985b: 225; 1985e: 81). The savage of totemism lived 'in complete identification with its totem animal' (Freud 1960: 131). As slaves to animal instincts, the 'individual' members of the primal horde were lost in the commonality of the group (Freud 1985a: 155). So total was the savages' lack of differentiation from everything else that they could not distinguish thought from action (Freud 1960: 158-60). The savage believed that his thought is omnipotent and that it can effect all things (Freud 1960: chapter III). In writing of his absorption when working on *Totem and Taboo*, Freud said 'I have just been all omnipotence, all savage' (Gay 1995: 325). The parallels between all this and Freudian notions of the child hardly need elaboration. 'Primitives of our time, our children' were especially significant for Freud in their animal phobias

and their similarity in this to the savages' ambivalent relation to the totem (Freud 1960: 126-32). In all, the animalistic, childlike savage marks within the origin the point of constant and unsurpassable difference or the point of ultimate, ruptural alterity.

Yet, an immense 'yet', the savage has to be quite contrary. Savages 'still living' present 'a well-preserved picture of an early stage of our own development' and this is done by even 'the most backward and miserable of savages, the aborigines of Australia' (Freud 1960: 1). Far from being utterly beyond the originary divide and incapable of ever becoming other than what they are, savages can develop and are always becoming other than what they are. The savage, then, has to be both the same as yet absolutely different from us. Such a riven creature can have no coherent characteristic at all. For example, Freud at one stage would endow the savage with a kind of 'primitive speech' but it is a speech afflicted by 'vagueness and unintelligibility' (Freud 1960: 11). We are left, then, with the diverting idea of unintelligible speech. In all, the savage has to be a protean connection to all that occidental identity is and will be in its impelling and absolute difference to a savagery of ultimate alterity. This identity thus remains connected to a ruptural savagery and the possibility of reversion to a completely savage past has to be constantly guarded against.

So, the ruptural and the protean savage are, in a sense, as one. Much like the dynamic of pre-modern myths or origin, the force originating in the rupture resides in and incessantly propels all that is developing into a universalized modernity. This dark, transgressive dynamic shadows modern civilization and is always more than co-extensive with it. To be different to the universal is to be utterly and irredeemably apart from it. Yet the universal must always extend to and incorporate everything. This is something of an equivalent in modernity to the battle between good and evil but without any prospect of a soteriological resolution. To the extent that Freud would settle the conflict it would be on the

side of evil. 'Even in present-day man purely reasonable motives can effect little against passionate impulses' (Freud 1985a: 225). And 'all the ugly and dangerous impulses against which we are struggling... stand nearer to Nature than does our resistance to them' (Freud 1985d: 358). The achievements of this resistance are ever tenuous and precarious. 'The strengthening of the intellect,' Freud wrote in 1933, is only 'beginning to govern instinctual life' (Freud 1985d: 362).

The difficulty afflicting intellect and, along with it, civilization is a radical one. It is not just that civilization relies on savagery as an antithesis which constantly provokes it into being. Savagery, as we have seen, is also inherent to civilization. This intimate location can be indicated by recalling, yet again, Freud's observation that 'the dead father became stronger than the living one had been' (Freud 1960: 143). The living father was 'unrestricted'. He had 'unlimited power' (Freud 1960: 148-9). The dead father can be stronger than what is unrestricted and unlimited because his power operates in two registers. One follows from the rather literal internalization of the father by ingestion. The sons individually impose that power on themselves. But that is not and cannot be all. Such a self-imposition could be reversed by the decision of any of the sons. It would not, then, be stronger than the unrestricted and unlimited dead father. What happens is that the root of paternal power living and dead, a power which none of the sons could take on individually, is vested in a distinct social register. 'The only real difference' between this social power and the power of the savage, living father 'lies in the fact that what prevails is no longer the violence of an individual but that of a community' (Freud 1985d: 351). The very transposition from savagery to the sacred and social is the result of a savage excess sustained through the repetition of the totemic sacrifice. 'Though later toned down in many different directions, the savagery and excess of the totemic system persist in the social' (Freud 1960: 139). 'The primal horde'

survives in every 'group formation' (Freud 1985a: 155). In so far as civilization endures, the force of the savagery within it is limited but those limits are not and cannot be set within civilization because, as we saw, the savage is always more than co-extensive with modern civilization.

...And Law

The story so far, and that is almost all of it, will now be concentrated on law. In one way, the antinomies of origin seem to attend law every bit as much as they do the origin of society, the individual and the impelling Oedipus complex. If, as seems to be the case, law is for Freud coeval with these things, then like them it would seem to be unresolved in its origin as between its determined difference and its continuing sameness to what went before. And Freud does remark on one location of law specifically before as well as after the originating parricide. He attributes to Atkinson in *Primal Law* the realization:

... that the practical consequence of the conditions obtaining in Darwin's primal horde must be exogamy for the young males. Each of them might, after being driven out, establish a similar horde, in which the same prohibition upon sexual intercourse would rule owing to its leader's jealousy. In course of time this would produce what grew into a conscious law: 'No sexual relations between those who share a common home' (Freud 1960: 126).

But Freud immediately refers to the competing view, which he had himself previously adopted, that it was totemism, the stage of society following on the primal horde, which produced the law of exogamy (Freud 1960: 105). The conflict can, however, supposedly be resolved in 'one single ray of light... thrown by psycho-analytic observation' (Freud 1960: 126). But this ray of light is not immediately illuminating. Freud seems to be troubled at having to depart

from one of his main sources, Atkinson. To centre totemism, he uses an extensive exploration of animal phobias in children, those contemporary equivalents of the savage, showing that the phobias replicate the essentials of totemism. He then further wraps in the totemic feast and then the parricide as the origin and analogue of totemism. And it is this totem-creating parricide which creates the law of exogamy (Freud 1960: 143). As well as this tortuous resolution, Freud's treatment of the parricide as crime suggests he was scrupulously locating law only after it. If he is describing the act in prospect, it is as a killing or an overcoming of the father (e.g. Freud 1960: 141; n.d.: 103). When mentioned in retrospect, it becomes a 'crime'. And he finds that 'the earliest moral precepts' were 'reactions to a deed [the parricide] which gave those who performed it the concept of 'crime'" (Freud 1960: 159).

This is not to deny that law is also affected by the antinomies of the origin. We could begin to accommodate its peculiar relation to them by returning to the Oedipus complex and confronting the intimidating presence of 'two fathers'. There is a flat contradiction in the potency ascribed to these two. As we know, the power of the father in the primal horde is 'unlimited' and 'unrestricted' (Freud 1960: 148-9). Yet, 'the dead father became stronger than the living one had been' (Freud 1960: 143). These two fathers can only stand together if there is some qualitative shift between them and, as we have just seen, such there is. The power of the father in the primal condition was one of complete determination: 'he is all-powerful and cruel to the utmost, an absolute Master for whom there are no limits' (Žižek 1992b: 158). One can, then, readily sympathize with Borch-Jacobsen's ascribing to Freud the view 'that the dominating and jealous male of the Darwinian tribe is no Father', even though Freud repeatedly calls this male the father (Borch-Jacobsen 1991: 72). Indeed, it is difficult to see how such pervasive power could be a distinct entity of any kind, father or otherwise. It is more akin to the mythic undifferentiated force

that inhabits the primal matter of pre-creation - a force which, in instancing it, Eliade also calls the 'absolute master' (Eliade 1965: 19). Somehow this still leaves space, as it were, for an acutely oedipal desire to kill the father and to possess what the father has - exclusive access to females and unlimited power.

The death of the father has now released circumstance and possibility into the world. There is no longer that 'sameness' of savagery, the monotonous unchanging condition of the 'natural' state that so terrified Diderot (see Pagden 1993: 151). The power of the living father had been one of simple and total determination. In its completeness this impossible condition has no connection, no relation to or no 'being with' anything or anyone else. It is the condition of God but a savage god, one paradoxically caught in its completeness and unable to be anything other than what it is. With that full configuring of the Oedipus complex triggered by the killing, the sons recognise their love for the father and in their resulting guilt they 'defer' to him. The power of the father becomes 'irrevocably' integral to the individual members of society (Zizek 1991b: 24). But this does not mean that the sons continue in the same way to be utterly subordinate to the father. The power of the primal father was complete, it was unlimited and unrestricted. Yet the second father 'becomes stronger' than the first ever was. By taking the power of the father on or into themselves, the sons give it an enduring purchase and so ensure the 'dominance of authority' (Freud 1960: 150). But it is they who are doing this. The limits of this individual determination are indicated by Freud in his positing a period of struggle between the sons after the parricide whence they realise that none of them could take the place of the father. It comes to be occupied by a surpassing sociality. The sacred and the totem take on the 'strength' of the primal father who is now 'restored' as the second father. But determination is now effected 'in the name of the father', to borrow an idiom, not as a matter of simple 'brute force' but as an expression of the whole society (Freud 1985c: 284). In order to give this collective expression determinate and recognisable

force, it had to be filtered through social ritual. It could not, as we have seen, be rendered adequately in determinations by any or all of the individuals in the group.

There does remain a problem of accounting for this shift from an individual to a social register. For Freud the father restored is the power and the cohering point of the social. But the mysteriously enterprising sons have, in the parricide, made the power of the father decidedly weaker, as well as stronger. It is only in the killing of the father and the destruction of his ubiquitous power that the sons are able to separate themselves from the father and from the condition of the primal horde. It is thus that they come 'into being' as individuals. Although they ingest the father and make his imperatives their own, they do this to themselves. They do it as differentiated individuals who have broken the father's all-determining hold. Nor can any of their number take on the power of the living father and occupy a realm of complete determination. Freud, as we saw, rendered this in Hobbesian terms as an inability of one individual to pervasively dominate many. There is, however, a more telling reason for a son's being unable to occupy the place of the living father. Simply, the 'unlimited power' of 'the unrestricted primal father' is no more (Freud 1960: 148-9). It is not there for anyone to occupy. To borrow Nancy's poignant apothegm, it is no longer possible to 'be alone being alone' (Nancy 1991: 4). Being, in its very aloneness or in its determined singularity, is thenceforth a 'being-with'. So there is now a new dimension which subsists between the brothers but which is still part of their individual 'selves'.

We have already seen how Freud attempted to settle that new dimension by positing 'a sort of social contract' and we have seen what eventuated:

Thus there came into being the first form of social organization accompanied by a renunciation of instinctual gratification; recognition of mutual obligations; institutions declared sacred, which could not be broken - in short, the beginnings of morality and law (Freud n.d.: 104).

This version of the perennial tale falls prey to the well-nigh standard criticism of its companions: that it relies on the very conduct it is supposed to originate. Not only does Freud rely here on recognition of mutual obligations to create recognition of mutual obligations, but he would also ground the contract in the sociality which the brothers formed in the primal horde - 'the social fraternal feelings, which were the basis of the whole transformation' - a sociality which was not supposed to be possible until originated by the transformation (Freud 1960: 144, 146; n.d. 104). This seemingly vacuous exercise does, however, achieve a condition quite distinct from its consensual dynamic: 'institutions declared sacred, which could not be broken' spring forth, somehow (Freud n.d.: 104). And somehow the totemic society which ensues then becomes another kind of covenant, 'a covenant with the father' (Freud 1960: 144). The father's determining force comes to be effective not just within each of the individual sons 'alone' but also with-in the new dimension which subsists between them in their very aloneness. It is in the form of the totem, the 'father-surrogate', that the father becomes this new dimension, and becomes it in a couple of senses: as coming to be in it and as fitted to it. The father's encompassing power is now vested in the totem's surpassing sociality - a sociality which cannot be rendered in terms of the individuals in the totemic group. And so, that incest and that killing of the father which had 'up to that time been prevented by his actual existence' can now become 'the two fundamental taboos of totemism' (Freud 1960: 143). A taboo is not contractual. It is not ever-contingent on individual consensus. It is, rather, something set apart, sacred and inaccessible (Freud 1960: 18). Since the effectiveness of prohibition is not as invariant as prevention through 'actual existence', the

now-prudent parent can enhance enforcement by lending the process that ultimate 'violence' which prevailed in the primal horde, a violence which is now an expression of the social (Freud 1985d: 351). In all, the father now conjured up by Freud would seem to be not so much 'restored' as never 'deposed', never killed at all (Freud 1960: 150).

Freud can, however, impart an ambivalence even to death. The killing of the unlimited father has enabled others freely to be, but the father persists in a relation to them. What now becomes crucial is the nature of that relation. We could summarize the outcome of the primal parricide by saying that it is the very freeing of the sons in the destruction of the living father's pervasive power which persistently attaches them, both as individuals and as a unified society, to the dead father. The sons are unable to fulfil the liberal fantasy of unbounded liberty. Instead, they free themselves, and self-differentiate, in a relation to the father. They individuate, to borrow that term, in continuing relation to a unity anterior to their own dissipating origin. The dead father, although now limited in a relation, is yet illimitable. And that which is limiting but illimitable is his death. So, palpably, the totem animal can be fully affirmed only by being killed. In the specific, limited quality of the totem, the once 'unrestricted' father now loses something in order to be. For the father's now limited presence in the totem to become all-encompassing, for the totem to embody the social, the totem animal has to be killed and illimitably enter the members of society in the totemic feast. The totem, we may say, has to lose everything in order to be everything and thus sustain 'the dominance of authority' and wreak the 'harsh... revenge taken by the deposed and restored father' (Freud 1960: 150).

The totem thus inaugurates and corresponds to the rule of law (cf. Freud 1960: 20). In the completeness of its rule, law combines the totem's present determination with its illimitable sacrificial capacity to be responsive to everything, to the effect that law can always return to determination and bring

anything within its range. So, the prohibition against the killing of the father or the totem animal responsively expands to include all members of the 'clan' and, much later, 'the prohibition ceased to be limited to members of the clan and assumed the simple form "thou shalt do no murder"' (Freud 1960: 146). Imperatives which were 'sacred' and 'totemic' can be 'broken' after all. They are not simply an affirmation of an always present sameness but 'a result of the changing conditions of life', responding to the constant challenge of what is beyond, other, different (Freud 1960: 143, 145). The very affirmation of invariant order can itself be sustained only in an accommodating responsiveness to what always differs from it:

Thus it became a duty to repeat the crime of parricide again and again in the sacrifice of the totem animal, whenever, as a result of the changing conditions of life, the cherished fruit of the crime - appropriation of the paternal attributes - threatened to disappear (Freud 1960: 145).

The origin, that is, must recur so as to be the origin of the way things now are. And so the originating crime becoming law can never be affirmed as final or closeable. It has repeatedly and dutifully to re-solve the irresolution between present determination and what is ever beyond it.

We can also 'place' this iterative law in a return to the beginning of this paper and to Freud's obsession with the actuality of the Deed. In *Totem and Taboo* and after, Freud repeatedly expressed doubt about whether there really had been a killing of the father. He would do so always briefly and often with feeling - obvious indications of the barely repressed. For Freud's scheme to cohere, the father must be killed and not be killed. There had to be a way of combining a persistent determining force of the living father with that responsiveness beyond determination which was made possible by his death. It is in this imperative combining that Freud's ambivalent origin can be saved from the common charge that it originates nothing at all (e.g. Derrida 1992: 199). Freud,

as we saw, rather blithely located society, the individual and the Oedipus complex before as well as after the parricide which was supposed to bring them into being. But he seemed to have been specifically, even elaborately careful in not placing law before the originating Deed. In the primal horde, the absolute or complete determination of existence by the father can only be ever and absolutely apart from what is beyond it. Here a joinder of determined existence and what may be different to it is impossible. It only becomes possible with the killing and 'restoration' of the father and law is that making possible, combining as it does a putatively determined state with what in any moment or manifestation it could otherwise be.

And so Lacan: in Freud's 'sociology of totems and taboos... the Law is there *ab origine*. It is therefore out of the question to ask oneself the question of origins - the Law is there precisely from the beginning, it has always been there' (Lacan 1993: 83). Here Lacan's kindness to Freud is not entirely inappropriate but Freud also *does* ask the question. Before the origin, before the law, he finds an Oedipus complex imbued with such a hatred for the father that it impels the sons to kill him. The resolution of the complex follows the killing when the sons realize that they loved the father all along and reinstate him as authority. This may pose no problems for Lacan, who would identify the Oedipus complex in terms of the law. But it is a problem for Freud who, in placing the motivating complex before the origin - before the origin of 'individuated', cultivated, knowing being - cannot then know, or not know, that the anterior parricide took place. Hence, again, his oscillation on that question.

What remains at the origin is the question. With the primal horde there is, as we have just seen, an insuperable divide between determined existence and what is beyond it. Each side of the divide is an impossibility by or in itself. The parricide makes each possible in relation to the other. This joinder is the condition of finite 'real' existence, and from it issues forth society, individual

being, and so on. From within that condition, the originating jinder itself cannot be known to have been determined by anything prior to it. It remained always *in* question. The assiduous law, then, is not a Procrustean answer. It is not that 'which could not be broken' (Freud n.d.: 104). The law *does* emerge and endure as necessary - as the necessity of there having to be an answer, continually - but any instantiation of the answer can only 'be' in a relational responsiveness to what is beyond it.

Freud sought a more securely foundational answer in savagery. It was the savage which resolved, in a way, the question of whether the parricide occurred. The savages of 'our day' were the same as the members of the primal horde. Unburdened of any authority save his own, Freud deduced that the contemporary savage could not distinguish thought from action. It would then be enough if, in the condition of the primal horde, there had been a desiring thought to kill and eat the father (Freud 1960: 160). Still troubled, however, Freud seeks ultimate relief in tautology. With 'primitive men' it is also the case that 'thought passes directly into action' (Freud 1960: 161). So, having thought the consuming murder of the father, they would do it - a conclusion which 'may be safely assumed' but 'without laying claim to any finality of judgement' (Freud 1960: 161). And with this precarious hold on the actuality of the deed, Freud ends *Totem and Taboo*.

From its seminal setting, the savage answers the question of the origin, in a way. We can only seek to know what is before the origin in terms of what came after it, and, marvellously, the savage is the same before and after the origin. But what comes before the origin has to be different to what comes after, and a pliant savagery does indeed prove too chasmically different to the civilization it originates. In this scene, law for Freud would not, after all, simply or only 'emerge... from its own absence - literally *ex nihilo*' (cf. Borch-Jacobsen 1991: 73). Freud populates this nothingness with a savagery, a *prima materia* which

precedes yet also monotonously endures beyond the origin. Law's irresolute being in-between the determined and what is ever beyond it can now assume intimations of palpability. Law takes on the savage violence of pre-creation as its *ultima ratio*, even if now 'no longer the violence of an individual but that of a community' (Freud 1985d: 351). And it is precisely as a societal container of savage violence that law comes to be set against savagery and identified with civilization (Freud 1985d: 351). Legality is for Freud 'the first requisite of civilization' (1985c: 284). It has constantly to be *made* applicable, not immediately because of its irresolution but as a defence against savagery's constant challenge to civilization - a savagery which persists in society and the individual alike. Law, however, still seems to assert an ascendancy. Savagery may lend its violent force to law, but it is law which constitutes and contains that force within itself. And whilst savagery may provoke a civilizing law into being, it is law which delineates that savagery by separating civilization from it. But, it goes on, for law to be in its response to savagery, that savagery must remain more than extensive with it. These 'strange loops' will need to be further explored (cf. Hofstadter 1980: chapter XX).

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