Law & The Sacred: Being Original Law and the Insistence of the Sacred

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Introduction

To continue, somewhat presumptuously. This present offering takes up the story where my previous contribution to *Law Text Culture* left off, and that contribution in its turn was a continuation of a prior performance in *New Formations* (Fitzpatrick 1997: 1998). Those two papers can, and will now, be summarized with distressing ease as a prelude to the engagement here with law and the sacred. What the story so far presents is a situated analysis of the question of the origin in modernity -- a question which is simultaneously about where 'we' come from and who 'we' are. And what the story begins to show is how law provides an answer to the question. And, as we will see, that story is already touched with intimations of the sacred. In this paper, the sacred becomes central, the story breaks away from its own beginnings in Freud's myth of origin, the productive parricide first recounted in *Totem and Taboo* (1960), and it assumes a more jurisdical dimension.

The question of the origin, I argue, is heightened rather than disposed of in modernity. Without a resolving reference to some transcendent realm, and thence to some sacred mediation between the transcendent and the profane, the irresolution of the origin becomes manifestly obdurate. We can only come to the origin from where we already are, an origin which is thence the same as us; yet to originate we must emerge as different from an origin which is anterior to and apart from us. Operatively, there has to be some resolution and that resolution is law. We come from the law, a law which is the ever responsive origin of the way we are now. The irresolute dimensions of the origin just sketched out match the dimensions of law. With its combining the quotidian where we are with what is ever apart from us, law is the insistence of the sacred.

The Story So Far

First, then, the story so far and its Freudian beginnings, together with some orientation of it towards the juridical. Freud is often advanced as the parent of a self-conscious modernism, and in *Totem and Taboo* he was particularly concerned to account for the emergence and identity or being of society in its modern, contained sense of not depending on a transcendent reference outside of itself. And for Freud law was central to such a society. On closer observation however, this scenario looks less propitious. It begins with a desolate stasis in which the savage 'primal horde' somehow exists under the complete sway of the father. This is a place of utter fixity where nothing can be other than what it is. Somehow, in this stilled scene, action erupts and the father is killed and consumed by his sons. Circumstance and possibility can now enter the world. Since the position of the omnipotent father is destroyed along with him, it can no longer be occupied. Wearying of the ensuing 'war of all against all', the sons realise they have internalized the authority of the father and they enter into a social contract enshrining foundational taboos and thence attain ordered sociality. That order subsists in the prospect and fear of returning to savagery -- to the condition of the primal horde.

This new world does not initially seem a promising place in which to find law. It comes about as a response to change and creativity. But the modern rule of law, in its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde. For law to rule, however, it must also embrace the opposite attributes. Law, as the rule of law, has to be ever responsive and indeterminate -- capable of extending to the infinite variety which constantly confronts it. This division with-in law is reflected readily enough in the plangent indecision of debates in jurisprudence, philosophy and the social sciences over what law may be -- debates which divide implacably between law's quality of autonomous determination and its dependence on such forces as society and social change -- forces to which it must ever relate and give way. And so law can be seen as matching that double demand of modernity which *Totem and Taboo* serves to identify: the demand for an assured position integrated with a responsiveness to all that is beyond position, a demand to be met now without resort to erstwhile solutions of a transcendent kind.

This is an "impossible union" (Eliot 1974: 213), one which Freud posits obliquely in his obsessive uncertainty, in *Totem and Taboo* as well as in many later works, over whether the primal parricide

actually happened. Again and again, he stridently asserts in scientistic terms that it must have happened, only then to doubt it, before usually returning to its affirmation, if still uneasily. To accommodate this alternation between determined factuality and fictitious possibility, Freud took ultimate refuge in the savage. This he did in labyrinthine ways but the brief point to extract here is that Freud negatively grounds his own epistemological position and the civilized order which he discovers in a savagery constituently opposed to both.

Secured as they may be in their rejection of this savagery, there is yet, to borrow a famous title, a discontent to civilization and to position (Freud 1985c). The savage is also and always within. Firm order and its securing law have to be sustained lest we revert to a savagery of the primal horde which still sounds its siren call. But Freud intriguingly truncates the genealogy of society here. In his own accounting for it, achieved society did not emanate immediately in a denial of savage existence in the primal horde but in the denial of that wild liberty, that perilous time of endless possibility, which followed the destruction of the father's completeness of power. Freud's problem here, if it may be so attributed to him, is that he cannot simply reject this immediately anterior condition of wild liberty since it carries with it that responsive possibility which shattered the inertia of the primal horde and eventually created society. But neither can Freud simply accept this anterior condition into the society it creates because that would undermine his modernist conception of society as predominate order.

It is in this dilemma that we can identify Freud as the mythmaker of modernity with a little more accuracy than is usual. Freud is normally lumped into a long tradition of occidental myth in which civilized sociality can always relapse into the dissipating savagery from whence it came. And Freud does fit into this tradition readily enough through his conceiving society in its radical difference to the disorder preceding it. Yet this society is also, and has to be, the same as what went before. Simple order is the condition of the primal horde. This is order without responsiveness and possibility. And it is the presence of these qualities and their infinite promise within ordered civilization which makes for its discontent. Put more strictly in Freud's terms, this is a 'dis-ease', one which is ineradicable and which ever attends the ordered norm, denying it ease. Freud, in short, produces an allegory of law. He situates law's two extremities, one in the completely determined position of the primal horde and the other in the ensuing chaos where anything can responsively be other than what it is, and he intimates how they are to be combined.

The combination of these extremities in law has a specific imbalance. Any conceivable thing combines determined position with responsiveness to what is beyond position, but what marks law is a predominating orientation towards determination. Law would imperatively bring what is beyond into determined position. Such position, even or especially at its most constant, can endure only in a responsiveness to what impinges on it. Hence the always "insufficient law" (Malouf 1997: 201). The inherent inadequacy which attends law's responsiveness is oriented towards determination by the insistence of pervasive ordering in the name of the social, and this is sustained in turn by the mythic disaster of a savagery which would vertiginously rush in to fill its absence.

Origin

A niggling issue disturbed Freud's story of the origin and would not allow him "a moment's rest" (cf. Freud 1960: 145). Again and again, he returned to the question of whether the originating act, the anthropophagous parricide, had actually happened. It was only at the end of *Totem and Taboo* and in a final resort to the capacious savage -- a savage which, in its own inconsistent being, could accommodate the act having happened and not happened -- that Freud could let the point go, still uncertainly, only to return to it in later work (1960: 159-61). Yet, in a sense, veracity did not matter since, as Zizek tells us, "the Freudian primordial parricide" was something "that should be presupposed (reconstructed retroactively) if one is to account for the existing social order" (1991: 208).

Freud did develop almost the same point. In *Group Psychology and the Analysis of the Ego*, he begins a chapter dealing with 'The Group and the Primal Horde' by referring to his account of the murderous origin, and he then continues:

> To be sure, this is only a hypothesis, like so many others with which archaeologists endeavour to lighten the darkness of prehistoric times -- a 'Just-So Story', as it was amusingly called by a not

unkind English critic; but I think it is creditable to such a hypothesis if it proves able to bring coherence and understanding into more and more new regions (Freud 1985a: 154).

Freud immediately goes on to discern the condition of the primal horde in contemporary 'group formation'. So, even in this most attenuated version of its effect, Freud still wants his myth to impart the force of the origin. Uncertain as it may be, he wants it still to have the potent ability to connect, even correspond with, and thence explain the way we are now. But what could the nature of this connection be? As a 'Just-So Story', on Kipling's original model, the myth comes from a whimsical other world which is not connected at all with ours (Kipling 1992). But Freud then placed his myth in a world darkening as he wrote in 1921 -- a world in which he saw people again conforming to the condition of the primal horde. This condition had persisted incipiently in every 'group formation' (Freud 1985a: 154-5). For the primal horde to so 'survive', as Freud put it in his Lamarckian mode, it had to have been once foundational fact; and indeed by the end of this short chapter he has found that the "coercive characteristics of group formation... may... with justice be traced back to the fact of their origin from the primal horde" (1985a; 155, 160).

In being so torn between fantastic hypothesis about what is beyond our present condition and determined fact, Freud may not have made our divided condition one and explicable, but he did obliquely delineate the terms of that divide and also illustrate how these terms were drawn into the assumed solidity of law and savagery. Law compensated for the intrinsic uncertainty of the origin by bringing the two sides of the divide into an enabling relation with each other. It did so by connecting the determined responsively to what was beyond and by bringing what was beyond into determination. This left law 'itself' undetermined, and it was the persistent condition of the primal horde which positively endowed law with a savage force of violent assertion and negatively confronted it with a pertinacious savagery against which law could always constitute itself (cf. Freud 1985d: 351). It is this constitution of modern law which will be explored in the present paper, its constituent ability as a successor of the sacred to provide a position which must yet ever be 'in question'. And this is done here initially by way of a return to the origin, to that recurrent origin which, rather than our coming from it, seems to come from us.

Totem and Taboo itself can serve to take the question of the origin beyond its setting in that work. In the last two, brief sections of the book, Freud traces the persistence of the parricide and its effects after their early realization in totemism. Here he is largely concerned with the origin of religion, and especially of Christian monotheism. And, again, the antinomy of the origin, or now a variation on the antinomy, is reflected in Freud's approaches to it. He is initially assured by finding that:

> The psychoanalysis of individual human beings... teaches us with quite special insistence that the god of each of them is formed in the likeness of his father... and that... God is nothing other than an exalted father (Freud 1960: 147).

This view from within, from the way we are and are now, then shifts to the view from without when Freud makes anthropology connect us to the force of the origin. From observing a *melange* of gods consorting with or replacing totem animals, and from "the consideration that the totem is nothing other than a surrogate of the father", Freud deduces that "what constitutes the root of every form of religion" is "a longing for the father" (1960: 148 and see Freud 1985b: 225-6). Speculatitive anthropology then gives way to conjectural history in which Freud resumes the story of the murderous sons and, from the inability of any of them to "attain the father's supreme power", concludes:

> Thus after a long lapse of time their bitterness against their father, which had driven them to their deed, grew less, and their longing for him increased; and it became possible for an ideal to emerge which embodied the unlimited power of the primal father against whom they had once fought as well as their readiness to submit to him (Freud 1960: 148).

That same filial inadequacy to attain parental power then translates in religious terms:

> The gulf between the new fathers of a family and the unrestricted primal father of the horde was wide enough to guarantee the continuance of the religious craving, the persistence of an unappeased longing for the father (Freud 1960: 149).

What happens, in sum, is that the 'father-surrogate' of totemism is "abandoned in favour of the superior

concept of God", and so religion is accounted for in the speculative terms of the impelling primal parricide and its consequences (Freud 1960: 150).

But here is another of Freud's productive failures. He reproduces, in the very effort to locate the origin, a reflection of its antinomy. Initially, as we have just seen, Freud comes to the origin of God and religion from within 'individual beings' and their beliefs. But there is nothing in such an approach to indicate why or how this collection of singularities would add up to or otherwise indicate a distinct and unified origin. Next, Freud resorts to a position quite apart from individual beings, one from which he can pronounce anthropologically, historically and 'above all' monadically, on how they come to have these beliefs and how they can thence exist in society. But this itself is a deific position apart, one from which the individual being and society could be seen as made the way they are. Here Freud, rather than accounting for the origin is seeking to occupy the primal completeness before the origin -- before the emergence of sentient knowing existence.

God was acute enough to anticipate Freud's difficulties. In Job we find "him", coming "out of the whirlwind", taunting and interrogating the eponymous hero in this way:

> Where wast thou when I laid the foundations of the earth? Declare, if thou hast understanding.

> Or:
> Hast thou commanded the morning since thy days; *and* caused the dayspring to know his place.

Lacking "understanding" to so declare when we purport to speak of the origin, we can do so, says the god of Job, only "without knowledge". The origin is something "we cannot find... out" (Job 37: 23; 38: 1-2, 4, 12).

God's position is not without its own intriguing uncertainty. This is the same god who cannot be represented, whose name cannot be pronounced, in whose presence mortals face annihilation (cf. Freud 1985a: 158). Yet in Job, and elsewhere in the Bible, we often find an evident and garrulous god. So it emerges that what is inscrutably before the origin can be known. But only, it would seem, in an attenuated way. Direct apprehension is annihilation. In *Job* there is a convenient confusion in God's appearing out of the whirlwind. It is a common mythic expedient for the transcendent to manifest itself in the profane via some sensational act such as lightening or thunder, a great wind or a great flood -- to go no further than the meteorological. These obscuring events accommodate the transcendent to our condition -- a condition in which, as Paul says, "we see through a glass darkly", and in which we "know in part". "But when that which is perfect is come, then that which is in part shall be done away", and then "shall I know even as also I am known" (I Corinthians 13: 10, 13).

Short of that perfect state where 'we knowers' are no longer 'unknown to ourselves', where we can as it were stand outside of ourselves and know ourselves in an encompassing completeness, we are condemned to be 'in part' (cf. Nietzsche 1956: 149). This particularity is often presented in the myth of origin as the consequence of an original sin in which "the unity of the world was broken" (Freud 1960: 153). In the biblical variant, Adam and Eve begin in a wholeness of identification with God. Like the sons of Freud's unlimited father, they somehow still have an ability of independent choice which enables them self-consciously to perform a Deed, eating the fruit of the tree of knowledge -- the fruit of the god (Genesis 3: 22; and see Freud 1960: 161). With this acquisition of knowledge they 'fall' from primal wholeness into a suffering finitude. Their return to the place of this individuating origin, to the "tree of life", is blocked by God's deploying "Cherubims, and a flaming sword" (Genesis 3: 24). And much like the liberated sons of Freud's myth, they now exist in "unappeased longing" for a completeness which they have destroyed (Freud 1960: 148-9).

Life must go on, and the pre-moderns, as they are now reported, enabled it to do so by separating the ordinary, profane and knowable world from a mysterious realm embracing transcendence.1 The sacred was that which mediated between them. Contact with the profane would defile and dissipate the sacred as transcendent and the sacred, in entering the profane, would annihilate it. The two had to be kept apart. But they are nonetheless integrally linked. The sacred is of the profane, continuously creating it and contagiously profuse in doing so. The profane, in turn, comes from and must ever return to the sacred for its renewal: "the profane always needs the sacred, is always pressed to possess it avidly" (Caillois 1959: 23). In this division, the sacred is seen as a place of "energy" and "forces", and the

profane is one of "substance" and "things" (Caillois 1959: 34). The sacred and the profane have, in short, to live together yet apart.

It is these contradictory imperatives which generate the law. This is in part a matter of taboo, of enforcing prohibition, of keeping separate what would otherwise destructively come together. But it is not simply that. In their necessary combining, the sacred and the profane have to be closely regulated and their connections filtered through containing "forms and norms", as Eliade has it (1965: 10). These would endow the sacred and modes of approaching it with some fixity and assumed palpability. They make the sacred effective (cf. Eliade 1965: 11). Rituals of separation, of purification and of sacrifice would affirm the purity and integrity of a sacred order in the face, and at the expense, of contaminating diversity and disruption. Although these forms and norms are cast by most observers as merely conserving, as affirming an invariant sameness in the face of a challenging difference, their very responsiveness toward what is always different involves, in itself, the capacity to change. "The restoration of the disturbed order does not give back its primitive stability or its original purity"; what is involved is "a ceaseless assimilation of new matter" (Caillois 1959: 31).2 In its impossible combining of continuing order with newness, the sacred is aptly mysterious. It is set apart from the quotidian; it is protected and relatively inaccessible.

With modernity, there can be no reference beyond the ordinary to endow meaning and truth. Such an option is not available, or not supposed to be available, in a modern world of uniform and unified truth, a truth that is intrinsically known or knowable. The universal claims of the now-enlightened world cannot be found in anything beyond itself. Put another way, an illimitable modernity cannot come from a limited and limiting origin. There can be no great anterior being or, to borrow Said's term, no "great prior reality" (1975: 74). Origin can only be a matter of autogenesis. Yet, as Said indicates, the resort to a great prior reality remains insistent in modernity (1975: 51-78). Such a demand should not exist. Being modern, and modern being, should expel its very possibility. Perhaps then, to borrow an engaging title, 'we have never been modern' (cf. Latour 1993). Or perhaps we can never be modern in that the claims of modernity cannot be made out in the only terms it can offer. Perhaps, a little more specifically, those claims are incapable of eliminating a pre-modern world which they were so resolutely and, in terms of their self-presentation, so triumphantly set against. Yet how could anything stand before modernity's encompassing assertion of contingency, of the provisional nature of all fact and circumstance? Even the 'sovereign subject' of Enlightenment, the last great anterior being, could not withstand Darwin's sweeping relegation of 'man' to a generality of nature which could be known only scientifically and within itself. And what Darwin had subsumed 'biologically', Freud claimed to have completed 'psychologically' (Sulloway 1992: chapter 7).

But what would seem to have been a pervasive pre-modern demand for origins has, in my argument, been intensified rather than eliminated in modernity. The claim that everything is provisional and contingent must, in its terms, extend to the claim itself. And that claim leaves ever open the prospect of its disproof in the uncovering of an assured and enduring origin. This opening is neither a marginal nor a merely niggling concern, something recalled incidentally in the onrush of promiscuous discovery. Rather, it provides the aim and opportunity, perhaps even the impetus, for a basic orientation of discovery. Such an orientation is admittedly no longer directed towards a great anterior being. It now looks more towards a great anterior event or a great anterior force, or some formulaic resolution of our identity in place of the origin. Modernity then has been attended with a profusion of originary and foundational matter: the cataclysmic *novus actus* usually prehistoric or cosmic, varieties of natural and evolutionary history, intuitions of the natural and the primordial, the Cartesian absolute axiom and numerous equivalents, some ultimately motivating force such as the economic or the psycho-sexual, and so on. The persistence and profusion of these supposed impulsions testify to the irresolution of that which they would resolve. So, the problem of origins not only endures but is heightened in modernity. The origin is what lies beyond. It is radically or rupturally apart from what it originates. Because of some originating act, passage or force, what before was not, now is. The ability to know the origin of what is modern -- the origin of the totality and of what partakes of the totality -- is now explicitly, inescapably contained within. Put another way, such an origin can *only* ever be approached in terms of what is originated.

Early in the game, Herder perceived modernity's problem with origins (1966 [1772]). He was taking part in the once multitudinous debates over the origin of language. In those debates language was almost invariably seen as having animal origins and as marking a shift to what was distinctively human. The problem with these debates, as Herder saw it, was that they located origins of language in a form of life

intrinsically incapable of language. Hence the shift from the animal to the language-user, or to the human, could not occur. The alternative was to argue that this other form of life, if less than human, was at least not completely devoid of language. In which case language was already there before its origin and so such an account would not reveal an origin at all.

The outcome, then. Coming from within our present existence, we can only know the origin as the same and then the result is merely circular. We find something corresponding or 'almost' corresponding to the way we are and not that which was 'before' and originated the way we are. To know the origin as different is no more propitious. If the origin is a 'true' origin, if it is not the same and is completely different to us, there would be no possibility of adequate relation to it in order for us to know it. So, borrowing from another context, the subject invested with knowledge of the origin would have to be "present as a pure gaze before its own conception or, more precisely, at the very act of its own conception" (Zizek 1991: 197). Darwin's 'man' would provide an example. Such a man is no longer the sovereign subject, a surrogate deity quite outside of creation. If man now as part of creation is to be in a position to know 'his' origin, he has to be projected beyond or outside the evolutionary process of creation which endowed his whole being, and endowed what ability he has to know that being (cf. Foucault 1970: 313-4). What is left then of the putative position from which knowledge of man's origin can be sought? Quite simply, it is a position that is limited but with limits which cannot assuredly be known.

Such a conclusion is, of course, starkly opposed to another claim of modernity -- one besides the rendering of everything provisional and contingent. This is the claim to completeness or universality. Such a claim rules out any containing relation of modernity to an origin which would limit or particularize it. Origins can no longer be located in an identification with some explicit or transcendent model, with a limit that is either positive or without. Origins become now, as I will instance shortly, an illimitable negation within. Short of a professed Manichaeism, there is a difficulty in accommodating negation within. Since the claim of modernity is one to universality, it must even and ever extend to negation. Yet that same universality in its completeness or absoluteness could only recognise an origin opposed to it as completely or absolutely opposed. There results, in short, an 'originary doubling' (see Gasche 1986: 227; Lukacher 1986: 47). An example: the Darwin drawn on by Freud would locate 'man' in the animal world and detect a continuity between the behaviour of this man and "the habits of the higher apes" (Darwin 1871: 362-3 - II; Freud 1960: 125). Yet such a connected, protean origin is simultaneously a negative and ruptural one since it endows man precisely in opposition to the animal. Another example of this doubling: for Freud, as we saw, civilized man originates in opposition to the savage but the savage is also the connected, protean, and ultimately uncontainable progenitor of this civilized man and persists within 'him'.

All these powerful pretensions of modernity -- to do with origins, knowledge and universality -- leave us with an ambivalence in the origin between what is connected, protean and seen in terms of the same and what is different and disjunct. Origins are simultaneously in and out of reach. The claim to universality would bring the origin ever within, but what it would thereby bring within cannot be known and contained and, so, it contests the universality, the completeness and coherence of modernity. The origin, then, is rendered both proximate and threatening (cf. Dollimore 1991). Freud's savage, for example, is not only an origin immensely beyond civilization; it is also an origin proximately and constantly challenging and constituting it. I will now develop these lines of argument within an elaboration of the sacred and relate this integrally to modern law.

The Sacred And The Modern

There is a preliminary, and, I hope to show, productive issue involving the meaning to be given not just to Freud's myth of origin in *Totem and Taboo*, but also to the anthropological evidence on which it is based -- evidence which Freud found boring at times because it confirmed what he already sensed (Gay 1995: 324). This was the evidence provided by a comparative anthropology which burgeoned in the nineteenth century and declined drastically in the twentieth. The utter confidence of Freud's generalizations about the totem and its sustaining taboos could now be starkly set against myriad ethnographies which, in sum, would confine Freud's idea of totemism to a very few small groups of people and would quite confound his notion of taboo.

If in Freud's scientistic terms meaning has been drained out of his conceptions of totem and taboo, how

are we now to understand them? For Freud and for some of his sources these conceptions would have a reality as 'survivals' -- as contained, irrational traces of a formative but now superseded past. For example, Freud saw the Eucharist as a continuation of the ritual eating of the totem (1960: 155). But ultimately for Freud both the totem and its taboos were not minor anomalies persisting perversely into the present time. Rather, Freud adhered to that prevalent view in comparative anthropology that in 'simpler' societies we see the lineaments of our own. Even though our society was fundamentally more complex and was greatly advanced, it remained connected to its primitive predecessors, a connection seen causally in evolutionary terms. But the kind of society given such primal significance by Freud was taken by him to be the same as those in which ethnographic science no longer finds Freud's notions of totem and of taboo. The question then remains of where we are now to find some such meaning, or impetus for meaning.

An immediate answer provided by a revisionist anthropology would locate attributed meaning of this kind in the observer rather than the observed. In comparative anthropology, the primitives compared were the same because they were seen to be the same, and it is this sameness which founds the universal quality of totem and taboo. What was seen, then, was not out there in the primitive societies themselves but, rather, a projection onto them of qualities found in the observers' societies. So, Franz Steiner uncovers "the *problem* of taboo as a Victorian invention", as something which goes "to produce the *summum bonum* of the late nineteenth-century bourgeoisie" (1967: 51, 93 - his emphasis). Somewhat similarly, meaning could be located through the constant fascination in 'advanced' societies with Freud's myth of origin and through its numberless psychoanalytic rareifications there.

But such a return to Freud returns us also to the question of position, a question mirrored in the irresolution of Freud's own attitude to his potent tale.3 If my argument about position earlier in this paper is brought to bear here, then it could be said that we cannot resort to an original position apart, to a position from which some arrogating view can encompass and render what is other to it. The effort to do so produces a projection of that which is of the observer and not a distinct quality of the observed. Saying *that*, however, itself demands an impossible position apart, a position from which we can assuredly know ourselves as observer and know that what we know is only of us and not of the other. Furthermore, to know what is definitively of us and to know it as not being of the other is to assert that same encompassing knowledge of the other, the rejection of which initiated the revisionist enquiry locating meaning in the observer. With this circularity, the irresolution persists.

The sacred can be seen as a mode of extrication from that irresolution or, in a vein which is more sympathetic to the sacred, it could be seen as the experienced distillation of the irresolution. So, bringing well-rehearsed accounts of the sacred into play here, it could be said that the sacred is that which confers reality on an otherwise precarious profane existence, and it does so through the hierophantic elevation of the profane: "the outstanding reality is the sacred; for only the sacred *is* in an absolute fashion, acts effectively, creates things and makes them endure" (Eliade 1965: 11 - his emphasis). In so being dynamically positive and productive, the sacred opposes chaos, wildness, nothingness. But it is not utterly distinct from such things. The sacred is, rather, constituently related to them. It goes to and brings from them form and order. The sacred, in short, participates in its own transgression. This is often put as an element of danger or contagion in the sacred. The sacred is, then, something mixed and ambivalent.

Since the ambivalence of the sacred is central to the rest of my argument, and as this characterization of it has recently been questioned by weighty authority (Agamben 1998: 75-80), it would be as well to say a little more about it. It does at first seem evident that transgression and the sacred have gotten on well together. "The sacred period of social life", writes Caillois, "is precisely that in which rules are suspended and license is in order" (Caillois 1959: 100; and e.g. Foucault 1979a: 197). The excess, the abandonment, the saturnalian reversal, the world turned upside down -- as all these, the sacred is transgressive in its dissolution of the norm, in its being always beyond the containment of the normal and the profane. But the sacred is more that what Blanchot would call a "facile transgression" (1993: 433). When first encountered in Freud's company, we were shown the sacred as 'the great crime' destroying the over-mighty autochthon of the primal horde, but in so doing the sacred shattered a static fixity, originated life and in 'the totemic system' repeatedly assured its continuation. To carry the 'terrible force' of 'newness' yet bring it to a profane world, the sacred must be ineffable yet 'trapped' within a limit (Libertson 1982: 62; Bataille 1987: 68). Or, wresting the point from the obscurity of the archaic and the 'primitive', it could be said that the sacred is the union of these things.

The sacred is limited always in its appetency for the profane. It may be a place of danger and irresolution, of visionary fervour and ecstatic excess, but the sacred is not ultimate dissolution. Much as "the profane always needs the sacred, is always pressed to possess it avidly" (Caillois 1959: 23), the animating power of the sacred can in its turn only 'be' in the profane. There must always be a place for the sacred to leave from and to come to.4 This place, in turn, is never in its brush with the sacred 'restored' to a 'primitive stability' (Caillois 1959: 31). "Transgression", or the sacred as transgressive, "is complementary to the profane world, exceeding its limits but not destroying it" (Bataille 1987: 67). But for the ineffable to be veritable, for the transgressive to enter the norm without dissolving it, the sacred must assume some restraining form. After all, in mythic terms, the sacredness of the origin lies in its giving form to life, in its trans-forming the chaos of pre-creation, in its giving what is beyond a purchase on the profane. But such a form of the sacred has to be one which 'in itself' is ever responsive to the formless. This will be a form which, again in mythic terms, can 'eternally return' to the origin and its regenerative newness. But it will do so in the sheltering solemnity of ritual which, with its 'forms and norms' (Eliade 1965: 10), not only holds the sacred at a distance from the profane but also protects the profane from the dissolution which would follow the unimpeded entry of the force of the sacred. But even with its containing connection to the profane, and even with its imperative 'return' to determinative form, the sacred can never take on the fixity it endows on the profane and still remain vibrantly sacred. Neither totemic consumption nor theophagy can be a consummation. The totem animal and the gods numinously persist despite and because of their repeated ingestion. The sacred, in short, is "opposed to a world of substance" (Caillois 1959: 34).

We could begin to relate this account of the sacred and its ambivalence to a superseding modernity by returning to that considerable denial questioning the ambivalence which I mentioned a short while ago. Agamben is concerned with the emergence of a particular conception of life in modernity (the content of which conception resists summary), and he finds origins for this conception in "an enigmatic archaic Roman legal figure" of *homo sacer* (Agamben 1998: 80). He wants to rescue the 'sacred' in this designation from the linguists of Latin who would attribute the ambivalence in the sacred to it. This rescue should be quite daunting given the by-now-standard attribution of the ambivalence to the Latin *sacer*. It would, however, be presumptuous to challenge Agamben on this. More intriguingly for present purposes, he finds that the impressionable linguists were led astray by the ethnographers of taboo. This charge involves him in a specific genealogy of the ambivalence of the sacred in the comparative anthropology of the nineteenth century and its extensions into the early twentieth century (Agamben 1998: 75-80). It is here that Franz Steiner's more expansive account of the ethnography of taboo can re-enter. Although in his account taboo and the sacred are more varied and less simple than Agamben would have them, Steiner does provide expansive support for Agamben's particular genealogy (Steiner 1965). So, if with Steiner we find that the ethnographic observation of numerous 'others' does not provide a uniform notion of taboo and of the part it plays in the ambivalence of the sacred, perhaps the specific genealogy which does provide this uniform notion may have more to do with the observer than with such others.

That tendentious suggestion does indeed prove to be the case. 'Taboo as a Victorian invention' and the genealogy sustaining it begin in ethnographic perceptions of 'semitic' people, perceptions derived primarily from the Old Testament. It is these perceptions which shape the general picture presented by comparative anthropology and, for both Steiner and Agamben, they culminate in Freud's *Totem and Taboo*, but not without continuing effect on significant anthropological and sociological authorities (Steiner 1965: 128-40; Agamben 1998: 78). And these specific perceptions initiating the genealogy are seen by Steiner in very general terms as reflections of modern occidental values (1965: chapters IV-VI).

Compelling as this scenario may be, it has left us with only intimations of the sacred and of its ambivalence. Perhaps no more than intimation is possible within that modern world of unified truth -- a world which, in denying a divide between the transcendent and the existent, denies the sacred also as that which mediates between them. But it may be the case that this standard reasoning does not pay due initial regard to the sacred itself. Being uncontainable, the sacred can be no more than intimated in its explicit presence. And if we are to pursue intimation, then initial resort could be had to one of Freud's sources of the sacred observed, Durkheim's *The Elementary Forms of the Religious Life* (1915). Freud, accurately enough, has Durkheim "arguing" that "the totem... is the visible representative of social religion among the races concerned: it embodies the community, which is the true object of their worship" (Freud 1960: 113). A little more expansively: for Durkheim the totem represented what was in common among members of the society, and for him it could even be seen as identical with the society

itself. Along with its encapsulating of sociality, the totem was "the very prototype of religious things" (1915: 140). In his earlier work, Durkheim would have radically distinguished such a society from a modern one in which totemic commonality would have given way to a solidarity based on individuals and the cumulation of their diverse interactions. But in *The Elementary Forms*, and in other later works, he came to see religion and a common morality as essential to and pervasive in modern society also. And religion together with common morality in any society were equated by Durkheim with the sacred, or he saw them as rendering society sacred. So, if Durkheim's famed elevation of the law as the cohering matrix of the social is extended to a modern society itself now seen as cohering in the sacred, then it may be said that in modern society law corresponds to or at least expresses the sacred.5

The correspondence of law and society and the sacred could be set more closely in the constituent logics of modernity itself. When we looked earlier at the question of the origin, there was a conundrum to do with modernity's ability to subsist as universal without reference beyond itself. Freud's resort to the savage did provide a putative resolution. The civilization equated with modernity was constituted not in exemplary identification with something beyond it but, rather, in an opposition to its antithesis, the savage. This same savage, however, also persisted within the civilized. Attempting something similar to this resolution but in a more generally apodictic vein, it could be said that rather then being established in a positive identification without, modernity constituently asserts a negative identification within. Although constituted by what it is not, being universal, modernity must extend to everything including that which it opposes in its own self-constitution. But anything which stands opposite the universal in its completeness can only ever be utterly different or absolutely 'other' to the universal. And the opposite which provides the constituent negation of the universal must, as it were, be always beyond a universal constantly cued to it. Modernity, in sum, contains yet is exceeded by that which it constituently negates.

This impelling dynamic of modernity can now be mapped onto the ambivalence of the sacred, and for this Freud's generosity can be tapped one more time. In 'pre-modern' terms, what Freud is invoking is the point or, as it is usually put, the time of origin, a time that is both beyond and of 'our' time. The time of the origin is always considered sacred -- again putting this in supposedly pre-modern terms. The antinomic dimensions of this time, being existent yet beyond the existent, match those of the sacred. It is, furthermore, the sacred force of the origin which not only initiates and combines these antinomic dimensions but also propels them forward, giving them continuing and conjoint effect. So, for Freud the Deed, the primordial parricide, both destroys a completely savage state and makes its civilized opposite possible, and trajects a continually transforming force, one which Freud equated with social evolution.

Here, as well, Freud was conforming to a dynamic of myth more usually associated with the pre-modern. In that dynamic, the positively shaping force of the origin is impelled forward whilst remaining set against the condition of chaos or stasis from which it emerged. Its beneficent 'forms and norms' may still revert to that prior condition, a condition which tries ever to prevent their coming into being. For Freud, and others, social evolution provides a modern equivalent to that process. Its transforming progression is connected yet contrary to savage origins. Freud does provide an elegant twist, however. He combines both the positive and its negation in the originating Deed itself. That Deed both unleashed creative possibility and was itself a crime, even if a 'great crime' -- something violent and savage (Freud 1960: 150).

The place of law in all this can be delineated in another Freudian innovation. What Freud does in his story, unconsciously it could perhaps be said, is to combine two types of origin myth. With one the originating act comes from a pervasive stasis. It is stasis which is the condition of the primal horde and which is shattered by the Deed. With this 'great crime', however, vertiginous possibility or chaos supervenes, a Hobbesian 'struggle of all against all' (Freud 1960: 144). Chaos of course is also a common condition of the pre-creation. This chaos is overcome by a kind of social contract which takes form in law which begins its reign with prohibitions against killing fathers and against incest. Possibility, then, is brought into enduring determination by law. That is law's primary orientation. But law also has, somehow intrinsically, the ability to change, to expand and be responsive to what is ever beyond the determined. So, the prohibition against the killing of the father expands to include all members of the 'clan', and 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). The very orientation towards enduring determination demands a responsiveness to "the changing conditions of life", to the constant challenge of what is beyond, other, different (Freud 1960: 143, 145). With this quality of ever-incipient responsiveness, law is transgressive 'in' itself.

Transgression And The Sacred

To test these arguments by transferring them to another setting, and to take some account of an influential modernist version of the transgressive as sacred, I will now consider Foucault's 'A Preface to Transgression', dispiriting as that may turn out to be (1977: 29-52).

Foucault's approach to transgression is aptly ambivalent. In one way he is, as he would want to be, heir to Bataille, and a practicioner of Bataille's 'heterology' -- 'the science of what is completely other' (Bataille 1985: 96-7, 102). This would entail a ruptural transgression marking an unsurpassable divide between itself and the norm. It would occupy "the space of a savage exteriority" (Foucault 1971: 37). It would be utterly apart from yet somehow dissolve the norm (Miller 1993: 28, 154). At the same time, transgression seems to bear some relation to the norm and the limitedness of the norm for it also encompasses and "affirms limited being -- affirms the limitlessness into which it leaps as it opens this zone to existence for the first time" (Foucault 1977: 35). Such an experience of limitation could somehow come, it would seem, from the direction of this ruptural transgression, from the limitless beyond (Foucault 1967: ix). But since "no limit can possibly restrict" transgression, it must be impossible to substantiate either transgression or its engulfing of limitation (Foucault 1977: 36; cf. Derrida 1978). Yet Foucault also wants transgression to be a palpable process, such as

> an action which involves the limit, that narrow zone of a line where it displays the flash of its passage, but perhaps also its entire trajectory, even its origin; it is likely that transgression has its entire space in the line it crosses (Foucault 1977: 33-4).

So, transgression seems drawn to, even to emanate from, the norm. Foucault now appears more a disciple of de Sade, something he would also want to be, in the dull compulsion to transgress all norms. No matter what the impelling force behind it, transgression in this light is always derived from the norm and, in its dependence on the norm, susceptible to use for normalizing purposes. There could hardly be a topic more readily associated with Foucault than the abject use of transgression to create a disciplining normality, and what the topic may have lacked in originality was compensated for by the intensity of its pursuit in Foucault's most popular works (Foucault 1979; 1981; cf. Durkheim 1983: 71-99). Transgression creates and secures the normalized world it supposedly confounds. And even if transgression may yet "leap" into "limitlessness", it is always returned to what is "interior and sovereign" through an enveloping "spiral which no simple infraction can exhaust" (Foucault 1977: 32, 35). With what Foucault sees as its pervasion in modernity, power creates both the transgressive conditions which trigger its assertion and the means of their containment and subordination.

But even whilst transgression is in thrall to the norm, it is a condition of its efficacy in creating the norm that it also remain apart and dangerous. There should no longer be any escape from the tentacular reach of power, but transgressive statuses and practices must escape and be extraneous to that power in order to mark and enliven it. In all, we can extract from Foucault, with some persuasion, a dynamic in which the norm and the transgression confer identity on each other in their mutual surpassing. This alternation takes place across a limit, that same limit in which, as we saw, transgression has its entire space (Foucault 1977: 34). This is the limit at which what is 'inside' it, an identity say, continually forms and transforms. For an identity to subsist, the limit has both to mark it inclusively and open it relationally to all that would impinge on and challenge or deny it. Identity at the limit, then, is divided between an enclosing presence and, beyond it, a disruptive transgression. Yet despite and because of the dissociation, each is also integral to the other (cf. Libertson 1982: 62).

However, Foucault would, as we also saw, want to absolve transgression from having 'its entire space' in the irresolution of the limit. He seeks to confer some distinct presence on transgression itself as an "action" which "displays the flash of its passage"; or, to take another examples, as akin to "a flash of lightning", or as having a visionary or ecstatic impact, or as erotically impelled, or, finally, as something we can strive to convey in language (Foucault 1977: 30, 33, 35, 39-40, 47). The presence or potential presence of transgression in itself is located by Foucault in many sites beyond 'The Preface', and we will pay a short and subdued visit to these shortly, but for now I want to take this divide in Foucault's treatment of transgression, the divide between irresolution and presence, and relate it to the idea of sacred. Of course, the flash of lightning, the visionary and ecstatic, the striving to speak of it, even the erotic and the transgressive itself often accompany the sacred in its pre-modern attributions. And Foucault would aptly discern the sacred before modernity as that which marks the limit and the opening

out at the limit to "the space where the divine functions" (Foucault 1977: 37). But with the death of God, he seeks solace in palpable transgression -- a transgression which now "prescribes not only the sole manner of discovering the sacred in it unmediated substance, but also a way of recomposing its empty form" (Foucault 1977: 30).

The similarity is probably overheralded by now, but what Foucault isolates here are the two dimensions of the sacred which I extracted earlier in their relation to transgression -- that is, the sacred's being ineffable yet 'trapped' within a limit. Foucault, however, wants to still the alternation between these dimensions of the sacred and to endow it with an "unmediated substance" waiting to be "discovered" in transgression (1977: 30). But the sacred is "opposed to a world of substance" (Caillios 1959: 34) -- even if not completely opposed since it has to endow such a world, mediating between it and what lies ever beyond its limit.

Conclusion

In Freud's myth of origin we found law and the sacred sharing that mediative function. Perhaps it could also be said by now that law is of the sacred. True, in its modern guise, law is more readily associated with the profane or the secular and with a determinative fixity. But, as Freud also served to reveal, law could not be just that. It had also to be integrally responsive to possibility -- an ability and an imperative introduced by the great crime with its elimination of encompassing determination. If law were ever completely successful in its determining force there would be a return to the total order of the primal horde and this responsive ability, and hence law itself, would be no more. If that ability is to be sustained, law must remain where Freud managed to place it, tied to the sacredness of the origin, uncontained by anything anterior to it. There law "affirms itself as law and without reference to anything higher: to it alone, pure transcendence" (Blanchot 1992; 25; and cf. Derrida 1992: 191).

All that can 'be' before the law is solely the sacred in its evanescence or the sacred as ever transgressive. Blanchot again:

> Law... exists only in regard to its transgression-infraction and through the rupture that this transgression-infraction believes it produces, while the infraction only justifies, renders just what it breaks or defies (1992: 24).

Foucault on the trail of Blanchot:

> And of transgression. How could one know the law and truly experience it, how could one force it to come into view, to exercise its powers clearly, to speak, without provoking it, without pursuing it into its recesses, without resolutely going ever farther into the outside into which it is always receding (1987: 34)?

And so:

> Let us grant that the law is obsessed with exteriority, by that which beleaguers it and from which it separates via the very separation that institutes it as form, in the very movement by which it formulates this exteriority as law (Blanchot 1993: 434).

But of course law cannot be demarcated in its constant advance on the transgressive unless transgression moves ever beyond law, "attracting the law to itself" (Foucault 1987: 35). What 'unity' there is to law -- the extent to which it is able to link determination with responsiveness -- is achieved in transgression, in a transgression which delimits the law and takes it always beyond that limit.

This legal moment of alterity lets nothing impose on it (cf. Marx 1954: 29).6,7 Yet in Freud's fecund myth of modernity, there was the massive imposition of the savage. We may now see, via Foucault and transgression, how savagery serves to deny the sacred in modernity and joins law in an uneasy occupation of the place of the sacred. Much as Foucault would like to emphasize their difference in other respects, he and Freud have much in common here. Admittedly there is the obvious difference that, despite his reservations about a dreary civilization, Freud saw savagery in negative terms, whereas Foucault positively elevated the "primitive savagery" of transgression (Foucault 1967: 281). But this is little more that a variant on the long partnership between the noble and the ignoble savage.

In either guise the quality of the savage lies not in itself but in the evaluative dimension of the modernity calling it forth. It is the quality 'found' in modernity in each case which triggers its opposite in the savage. The dynamic remains the same for both. Another apparent difference between them could be that Freud resolutely identifies and focuses on the savage in its own right, even if with some extension of the category to children and animals, whereas Foucault populates the transgressive in some apparent diversity. He does certainly locate a specific savagery in the transgressive but he also sees transgression in other ways -- as instinctual and elemental, animalistic and uncivilized, violent and cruel, impulsive and self-abandoned, sensual and licentious, dark and shadowy.8 The listing of like attributes could go on but if one wanted an apt ideograph to encompass these qualities in modernity, what for this purpose could surpass the savage? The concordance with Freud goes further still in that Foucault would see the 'primitive savagery' of transgression repressed in civilization, ever awaiting revival and return (1967: 281-2).9

The savage, then, would provide a 'substance' for modernity, a substance which would match yet deny alterity as that which is ever beyond, and which would match yet still the sacred and substitute for it. In so doing, the savage presents a point of coherence, a putative closure and origin for modernity and its civilization. For this supposed achievement, the savage takes on the same dimensions as the sacred and the origin and reproduces their constituent irresolution. The figure of the savage is both determined in an ordered stasis yet mimetically responsive to all that would impinge on it. Modernity and its civilization can then cohere and originate in the exclusion of the savagely unresolved. But, as we saw, the universalist claim of modernity did not involve only an externalized exclusion of what was other to it. Such a claim also encompassed the other, making it also inexorably interior. And, so, we find the savage persisting 'within' a civilized modernity; or, hopefully, we can now more accurately say that what persists within, albeit occluded or swamped by savagery, is the sacred.

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Footnotes

1 Putting this 'as reported' is an evasion, which I come back to later. There are protracted debates in anthropology, and elsewhere, over 'our' ability to assume knowledge of pre-modern 'others' in this way. Generalized and comparative statements, divorced from the intense study of a particular group, are especially maligned. They are more likely to be specular accounts of occidental concerns than feasible and accurate. With the 'position' I outline in this, we cannot know them to be either.

2 This rendition of the sacred likewise 'assimilates' it to law as elevated 'order', as something 'held sacred'. The sacred is, however, also associated with dissipation and with a lowering and disruptive transgression. This seeming ambivalence will be explored later after this initial foray into the sacred.

3 I appreciate that what follows could be read as an insensitive compression of decades of methodological and existential debate in Anthropology.

4 This moving beyond and return is beautifully portrayed in Gearey 1997. The lack of effective connection to a profane world can make resort to the sacred bathetic. For example, Bataille arranged "a human sacrifice in Paris as a way of 'loosing the sacred' and paving the way for a revolution which would flood the streets of the city with blood". However "the victim was to sign a presacrificial agreement absolving his murderers of legal responsibility. The legal considerations finally thwarted the plan..." -- presumably because such an agreement would not have been legally effective owing to the 'public policy' of the very order to be swept away in the sanguinary deluge (Torgovnick 1990: 108).

5 An extension of the argument to incorporate law in Durkheim's later scheme of things is derived from Cotterrell's creative and cogent reading (see Cotterrell 1999: chapter 4).

6 A similar dynamic of mutual surpassing can be extracted from Foucault's less apocalyptic variations on the theme of resistance (see Fitzpatrick 1999: 51-5).

7 The 'Afterword to the Second German Edition' of *Capital*.

8 These specific and related instances can be gathered with unfortunate ease from Miller 1993. My point does not entail a moral condemnation of the transgressive activities Foucault elevates. It is an objection to the quality of resolving savagery he attributes to them.

9 It is difficult to know what quiddity to accord Foucault's 'savagery'. Like other naturalist attributions of his such as 'the body', savagery could be an historical construct which may disappear and relieve its suppression of the sacred (see Foucault 1977: 153; Miller 1993; 115). But it could also be said cogently

that, say, 'the body' is for Foucault something of more enduring 'substance', an 'irreducible element' (see Stanley 1993: 211, referring to Foucault 1981: 138-9).