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FREUD AND THE RULE OF LAW

From *Totem and Taboo* to psychoanalytic jurisprudence

José Brunner

Introduction

Despite the psychoanalytic discussions of the law that have been published by a number of Lacanian writers in recent years (e.g. Candill 1997; Goodrich and Carlson 1998), it still may seem somewhat outlandish to invoke Freud's name in relation to the rule of law. By providing a detailed picture of the complex and provocative perspective on the origins and logic of the rule of law that Freud's writings offer, this essay aims to show that contrary to appearances, it is not so strange to have recourse to them in this context.

Traditionally, legal theorists speak of the rule of law as an impersonal body of rules, norms and prohibitions ordering social life, articulating and formalizing community standards of justice, fairness and moderation. The rule of law is endowed with an aura of transcendence, giving it authority over legislators and judges, denying the latter the status of creators, and relegating them instead to the role of interpreters. Often a capitalized Rule of Law is opposed to a 'rule of men', under which one has to be afraid of arbitrary uses of power by individuals in positions of authority, such as legislators, police, leader figures and judges (Sharone 1994: 330). It is the law's transcendent status, beyond the 'rule of men', which is supposed to provide it with the capacity to safeguard the rights and liberties of all and impose duties in an equitable manner. As Richard Epstein puts it: 'To attack the Rule of Law is to risk condemning ourselves to the arbitrary power of other individuals, who may be bound by nothing more than their own endless capacity of self-interest and personal gratification' (quoted in Sharone 1994: 331). Epstein's statement points to a broader cultural meaning of the rule of law ideal that always accompanies its narrower, legal uses. It indicates that the rule of law can also be taken to mean the rule of reason, in contrast to the unbridled and hence dangerous rule of passion, which in the last instance is bound to lead to coercion and oppression.

As long as reason is conceived as an independent and powerful force in the mind, and perhaps also in society, the representation of its struggle against the passions is fairly straightforward. However, things become more complicated when reason is not seen as an autonomous player and when it is assumed that reason always remains, and should remain, a slave to the passions, as David Hume postulated in his famous dictum. In such visions reason appears as incapable of being the cause of law on its own. Instead, the origin of the rule of law is located in an interplay of passions. As Hume pointed out, under such circumstances the restraint that legislation imposes on the passions cannot be 'contrary to these passions; for if so, it cou'd never be enter'd into, nor maintain'd; but it is only contrary to their heedless and impetuous movement' (Hume 1964 [1740]: 489). Hume also mentioned that, ironically, the presence of law may sometimes have the effect of increasing passions rather than harnessing them; for 'we naturally desire what is forbid, and take a pleasure in performing actions, merely because they are unlawful' (Hume 1964 [1740]: 421).

While Hume thought that humans would learn self-restraint by experience, Rousseau assumed that control over unruly passions could only be established by the intervention of a charismatic leader, who would teach the people the principles of a disinterested, higher form of legislation. In his chapter 'On Law' in *The Social Contract*, Rousseau explained that just civil law – i.e. the rule of law – has to be composed of principles ordained by the whole people for the whole people. They have to be abstract and cannot refer to any particular object or represent a particular will (Rousseau 1968 [1762]: 81). However, Rousseau did not believe that 'a blind multitude, which often does not know what it wants' could discover the principles of universalistic legislation. Therefore he assumed that there was a need for a 'lawgiver', towering above the common people and capable of understanding 'the passions of men without feeling any of them'. For Rousseau, the rule of law can arise only in a 'superior intelligence' characterized by the absence of passion. However, though such a rule of law is the product of pure reason, it has to mobilize the passions to gain authority. As he explains, reason cannot establish itself by its own merits. The law has to rely on deceit, a fictional origin in God's will and irrational fears of punishment, 'thus compelling by divine authority persons who cannot be moved by human prudence' (Rousseau 1968 [1762]: 84).

Freud's genealogy of the rule of law in *Totem and Taboo* and *Moses and Monotheism* belongs to this tradition of thinking, which regards the rule of reason and the law as inevitably dependent upon the passions. Moreover, like Hume, Rousseau and other modern thinkers before him, Freud addresses the rule of law only in the broader sense of the term, in which it is portrayed as arising from desire and yet pitched against it. He never expresses himself on more narrow legal issues (cf. Sharone 1994: 369). Thus, when he mentions the rule of law (*Recht* or *Rechtsordnung* in the original German) in *Civilization and its Discontents*, he clearly uses the term in its cultural meaning:

Human life in common is only made possible when a majority comes together which is stronger than any separate individual and which remains

united against any separate individuals. The power of this community is then set up as 'right [*Recht*]' in opposition to the power of the individual, which is condemned as 'brute force'. The essence of it lies in the fact that the members of the community restrict themselves in their possibilities of satisfaction, whereas the individual knew no such restrictions. The first requisite of civilization, therefore, is that of justice – that is, the assurance that a law [*Rechtsordnung*] once made will not be broken in favour of an individual. This implies nothing as to the ethical value of such a law. The further course of cultural development seems to tend towards making the law [*Recht*] no longer an expression of the will of a small community . . . The final outcome should be a rule of law [*Recht*] to which all . . . have contributed by a sacrifice of their instincts [*Triebpöffe*], and which leaves no one . . . at the mercy of brute force.

(Freud 1930: 95)

It is the argument of this essay that, nevertheless, Freud's vision of the rule of law may be worthwhile pondering by legal scholars. It can heighten awareness of its unconscious dimensions and point to a variety of ways in which the law functions as part of culture or civilization, rather than as a system with its own rules.

The first two parts of the essay seek to reconstruct Freud's notion of the rule of law as a dialectical or paradoxical civilizational force, restraining the passions even though they drive it. These two parts retrace Freud's genealogy of the law's prehistoric origins and unconscious dynamics, which can be found in *Totem and Taboo* and, in summary form, in *Moses and Monotheism*. Then, the third section critically assesses the problems and limitations of some of the uses legal scholars made of Freud's genealogy. Finally, the essay returns to the intellectual context of Freud's conception of the rule of law, concluding with the claim that a Freudian perspective implies, in fact, that legal studies should be conceived as cultural studies.

Dialectics of desire

As has been mentioned, Freud develops his genealogy of the rule of law in *Totem and Taboo* and restates it in *Moses and Monotheism*. Among many other themes, these texts contain a myth of origins that serves Freud to explain the emergence of impersonal and commonly accepted rules of conduct governing society and keeping its fabric more or less intact. In the early period of humanity with which *Totem and Taboo* deals, strong males are said to have taken females as permanent sexual partners in order to ensure that their sexual needs will be satisfied on a regular basis. According to Freud women agreed to provide men with sexual satisfaction in order to guarantee their own safety as well as that of their children; they do not seem to have had any sexual desires of their own. Primordial women are supposed to have traded sex for their lives as well as the lives of their children. Freud argues that primal patriarchs jealously kept to themselves as many women as they could obtain and support, and oppressed their children by means of physical force. They deprived

their sons of all sexual satisfaction and punished opposition with death, expulsion or castration. As Freud recapitulates in *Moses and Monotheism*, '[t]he strong male was lord and father of the entire horde and unrestricted in his power' (Freud 1939: 81; cf. 1912-13: 141).

By imposing a pleasure-denying law on his sons but exempting himself from it, thus being both inside and outside the law at the same time, the primal father constituted himself as a primal sovereign; for while the sons were totally excluded from sexual satisfaction, the law remained confined to them. According to Freud, the primal father's ability to make the law autocratically and impose it on his sons originated not so much in his superior physical strength than in his exclusive possession of females, which frustrated the sons and made them emotionally dependent on their father. Thus, the hypothetical prehistoric legal order of the primal horde established a composite relationship of prohibition, obedience and punishment between the law and those affected by it. Those who abode by the father's command saved their lives. Disregard was punished with castration or death. The primal father lived a life of pleasure in excess of the law. However, in the long run his excessive pleasure, combined with the excessive sexual repression that the primal law imposed upon the sons, brought about his violent death.

According to Freud, the intolerable demand for sexual abstinence prompted the sons to escape. Removing themselves from their father's control and regrouping into a community of outlaws living beyond — that is, in excess of — his law, the sons created what Freud describes as the first egalitarian social order in history. Liberating themselves from their emotional dependence on their father by homosexual satisfaction, they got ready for what *Totem and Taboo* depicts as the first collective action in history: patricide for the sake of incest (Freud 1912-13: 144). As we see, Freud's tale presents human sexuality from the very beginning as a polymorphous, variable desire with no fixed object. Outside the realm of the father's law, homosexual satisfaction can lead to liberation as well as heterosexual pleasure, especially since the father had outlawed both of them.

Ultimately, however, the sons returned to kill their father and have sex with their mother. Freud fails to explain why young tribal males, who were no longer sexually frustrated, should have been ready to kill for an older female, even if she was their mother. Of course, at the time he promoted the Oedipus complex as the shibboleth of psychoanalysis. However, since he does not specify any reason for the primordial sons' desire for their mother, the only logic that can be found in the story itself is one in which the father's monopolization of the mother and his prohibition of her turns her into such an immensely desirable sexual object. According to this reading, Freud's myth presents the law as sparking off or creating desire, or at least injecting it with force; for rather than as a natural given, incestuous desire is made to appear as the result of the particular socio-legal constellation of the primal horde.

In sum, Freud's story pitches various forms of desires and excess against each other. In the first place there is the father's law, deriving from too much sexual desire, allowing him too much pleasure, while leading to too much frustration in the sons, ultimately bringing about the violent destruction of the legal order. Then,

there is the sons' attempt at satisfaction outside — i.e. in excess of — the scope of the father's law, their overflowing aggression, also driven by sexual desire, leading to yet another form of excess: an incestuous and cannibalistic murder.

According to Freud, only the aftermath of transgression and destruction allowed the sons to reflect upon the consequences of their act and realize the impossible nature of their incestuous desire and their deed. They understood that although each of them would have liked to replace the father, none of them could take his place, since such an attempt would lead to a war of all against all and to a complete collapse of all social organization. Thus the sons decided to renounce the satisfaction of all excessive desires and impose on themselves a law that preserved the fundamental prohibitions characteristic of the primal horde, with all the inevitable consequences for both desire and the law. *Moses and Monotheism* provides a succinct summary:

The first form of social organization came about with a *renunciation of instincts*, a recognition of mutual *obligations*, the introduction of definite *institutions*, pronounced inviolable (holy) — that is to say, the beginnings of morality and justice. Each individual renounced his ideal of acquiring his father's position for himself and of possessing his mother and sisters. Thus the *taboo on incest* and the injunction to *exogamy* came about.

(Freud 1939: 82; original emphasis)

A prohibition on murder, too, was imposed at this stage, and thus the nucleus of humankind's first rule of law was complete, if one is to believe Freud. It was both constituted and threatened by desire, as well as preserving it, albeit within limits, allowing no excessive satisfaction and tolerating no exception or exclusion from its norms.

As is the case in other areas of his thinking, the logic of Freud's genealogy is based on the principle of *Nachträglichkeit*, that is, a combination of delay, belatedness and hindsight. The rule of law comes on to the scene of history — or rather, catapults humankind from prehistory into history — not in order to prevent or ban an act as a crime before its occurrence, but because a deed has been carried out, which retrospectively comes to be regarded as a crime. In other words, for Freud the aim of the rule of law is to prohibit the act that lies at its origin.

The taboo on incest and the prohibition of murder can be seen as forming the foundation of the rule of law, since from the very beginning they were presented and accepted as holy, that is, as impersonal, transcendent rules of conduct. However, for the rule of law to become effective, a significant change in the social distribution of power had to take place. As Freud stresses in *Civilization and its Discontents*:

Human life in common is only made possible when a majority comes together which is stronger than any separate individual and which remains united against all separate individuals . . . This replacement of the power of the individual by the power of a community constitutes the decisive step of civilization. The essence of it lies in the fact that the members of

the community restrict themselves in their possibilities of satisfaction, whereas the individual knew no such restrictions.

(Freud 1930: 95)

At first, it appears that the self-imposed renunciation of desire under the rule of law does provide a happy trade-off. The excessive desire of one (male) is given up for the safety and some pleasure of all (males); for although the rule of law always demands a certain degree of renunciation, it also always offers some legitimate avenues to sexual satisfaction. The sons' entry into the domain of the law also safeguards their pleasure.

Dialectics of guilt

So far, this reconstruction has made Freud's account of the origins of the rule of law appear as a narrative in which a 'rule of men' – or rather, of one man, the father – gives way to the rule of law, equality succeeds autocracy, and renunciation replaces excess. This is too good to be true. It is guilt that is still missing from the picture. Freud makes collective reason and its public manifestation, the rule of law, enter the history as supplements of a sense of guilt. As he explains in *Totem and Taboo*, when the murderous brothers were depleted of their aggression, they recalled that their father's presence had not only been punitive, but also protective, and they missed his sheltering force. Thus they started to feel remorse over their deed, which they now regarded as a crime. Freud's argument appears to be that patricide turned into a crime for the sons when they realized that the father's absence not only benefited them, but also harmed them. With time their remorse turned into guilt and to allay the latter they resurrected their father symbolically in the form of a totem, i.e. as an animal deity to whom they attributed the superhuman, protective powers they now wished their dead father had possessed. This father-substitute was turned into the object of their communal worship and subservience, and the clan's ancestor. By becoming a totem, the dead father was immortalized, thus the deed undone and the concomitant guilt relieved.

Of course, Freud assumes that the primordial brothers were not consciously aware of the unconscious layer of meaning that he attributes to the totem. However, as is evident, in the Freudian version of the social contract story the sons not only bound themselves to one another by rational agreement; they also concluded an unconscious, posthumous 'covenant with their father' (Freud 1912–13: 144).

Not only in *Totem and Taboo*, but throughout Freud's writings on culture, history and society, his argument is that humans could not transform themselves into a self-governing community under the rule of law without belatedly submitting to a father substitute – first the totem and then God. The lesson is that what on a conscious, manifest level may appear to be a rational contract among equals, is on an unconscious level a pact of delayed or belated – that is, *nachträglich* – submission to the father. In this sense, then, the rule of law is not so much an antithesis replacing the father's rule, as the latter's masked and transformed continuation.

However, while the father's law was an expression of his desire, the sons' law was a consequence of their guilt; therefore it demanded the renunciation of the very same incestuous desires that previously had been prohibited by the father's law. Moreover, it used the means associated with the father's rule – violence – to require compliance with its prohibitions. Thus, in Freud's story the rule of law became implicated in that which it outlawed; for Freud presents the rule of law as maintained by the two forces it claimed to supersede: violence and submission to authority. Addressing this point in his famous letter to Albert Einstein, he states: 'right [*Recht*] is the might of a community. It is still violence, ready to be directed against any individual who resists it; it works by the same methods and follows the same purposes. The only real difference lies in the fact that what prevails is no longer the violence of an individual but that of a community' (Freud 1933: 205). The rule of law not only originated in violence against an autocratic regime; in order to prevent the latter's recurrence it deploys the very same violent means that safeguarded the father's despotic regime, the difference being only that violence is deployed for the sake of the community. As Freud emphasizes: 'The community must be maintained permanently, must be organized, must draw up regulations to anticipate the risk of rebellion and must institute authorities to see that those regulations – the laws – are respected and to superintend the execution of *legal acts of violence* [*rechtmässige Gewaltakte*]' (Freud 1933: 205, original emphasis).

To sum up, although the rule of law replaces external obedience by self-restraint, for Freud the most fundamental legal relation always is one of prohibition and punishment. His genealogy offers no simple and clear-cut opposition between the rule of law and the father's violent despotism, the former always also conceals a collective form of the latter. Nevertheless, Freud does regard obedience to a self-imposed law as constitutive of the transition from savage beast to moral subject. Since only acceptance of the rule of law turns the brothers from murderous brutes into self-restraining individuals who can form a civilized society, we see that for Freud it is guilt that makes law, and law that makes the moral subject – and not the other way round. As Costas Douzinas puts it: 'we do not repress desire because we have conscience, we have conscience because we repress desire' (Douzinas 1995: 1330).

Freud depicts the rule of law as an *Aufhebung* of that which it forbids, that is, as unconsciously maintaining in the act of negation that which is consciously negated. The rule of law not only abolishes violence in its original form, but also preserves it at the same time, while elevating it from being dangerous excess to the status of legal procedure, thus serving society. A similar dialectic is at work in the relationship between the father's autocratic law and the sons' rule of law. While the latter abolishes the father's sexual prohibitions in their original, autocratic form, it also preserves them by raising them to the higher level of a self-imposed ban on incest that is part of a universally accepted norm.

At the time of *Totem and Taboo* Freud still had no term for the mind's agency that allows humans the internalization of moral and legal principles, and their mental perpetuation after the primal father's demise. Later, of course, he came to use the

term 'super-ego' for it, opening up a whole realm of discourse on what he describes as the mind's "critical agency", performing functions of self-assessment and self-punishment, as well as providing moral ideals and judgments' (Freud 1930: 136). Freud depicts the mind as a whole in analogy to a modern state, conceptualizing the super-ego akin to law-enforcing agencies in the outside world and comparing its role to that of a 'garrison' set up in a 'conquered city' (Freud 1930: 124; cf. Brunner 1995: 45–88 for a detailed elaboration of Freud's mind-state analogy).

Freud's portrayal of the super-ego's origins in the child's mind retraces the argument of *Totem and Taboo*. Again, he presents autonomy and morality as the result of belated submission to the father. Obviously, civilized sons no longer kill their fathers. Instead, Freud explains, 'the boy deals with his father by identifying with him' (Freud 1923: 31). In the wake of the Oedipus complex, the son is said to accept the father's role as sole possessor of the mother and the concomitant prohibition on incestuous desire. From then on all desire that appears to undermine paternal authority and transgress its prohibitions is rigorously suppressed by the super-ego, and all aggression that is directed against the father is turned against the son himself. 'By means of identification [the son] takes the unattackable authority into himself. The authority now turns into his super-ego and enters into possession of all the aggressiveness which a child would have liked to exert against it' (Freud 1930: 129).

Freud's account of the origins of the super-ego provides a second genealogy of the rule of law, in which the real, living father is transposed into a disembodied psychological agency policing the mind. This account is constructed as an individual, ontogenetic parallel to his phylogenetic tale concerning the transformation of the dead primal father into an immortal and superhuman entity governing the fate of humans from a metaphysical realm. In both cases such a father substitute is presented as the necessary catalyst in a developmental process in which an externally imposed law is replaced by a self-imposed rule of law. In Freud's words: '[a]s the child was once under compulsion to obey its parents, so the ego submits to the categorical imperative of its super-ego' (Freud 1923: 48).

However, contrary to the public nature of the rule of law in the outside world, much of the super-ego's intrapsychic law-enforcement and adjudication activities remain unconscious, that is, inaccessible to the subject whose mind is regulated by them. The super-ego enforces not only consciously accepted moral and legal principles, as are articulated in civil and criminal law and moral codes, but also additional, hidden laws, whose unwitting violation may give rise to feelings of guilt, worthlessness and depression. Indeed, Freud's eloquent description of the mental dynamics underlying melancholia or, as we would call it today, depression – in which the super-ego crushes the ego with guilt – portrays it like a judge in a Kafkaesque trial. In such cases, he writes, the super-ego 'becomes over-severe, abuses . . . humiliates . . . threatens . . . as though it had spent the whole interval in collecting accusations and had only been waiting for its present access to strength in order to bring them up and make a condemnatory judgment on their basis' (Freud 1923: 61).

In Freud's discourse, not only depression is marked by such an unforgiving attitude. In his view, 'even ordinary normal morality has a harshly restraining, cruelly prohibiting quality' (Freud 1923: 54). As he also stresses in *The Ego and the Id*, the stricter the super-ego is, the more unyielding it is toward those who break its rules, however minor and insignificant they may be, and the less ready it is to allow open expressions of aggression, the more it stores of it for self-punishment. As he explains, the most moralistic and law-abiding people may be precisely the ones who feel most guilty and punish themselves most violently and excessively for slight transgressions of rules that others may ignore with complacency. Again, we note that in Freud's discourse the law – or, in this case, the mind's adjudicating and law-enforcing agency – has a tendency to excess that is fuelled by feelings of guilt.

As long as such feelings are conscious, Freud regards them as relatively unproblematic; they are, he says, simply 'the expression of a condemnation of the ego by its critical agency' (Freud 1923: 51). Neuroses stem from unconscious guilt that is said not only to make people ill, but also to constitute a most serious obstacle for their treatment, leading to what Freud calls a 'negative therapeutic reaction' preventing patients 'to give up the punishment of suffering' (Freud 1923: 49). Evidently, the mind's internal judge may become sadistic and enjoy the pain it inflicts on the ego.

In fact, *The Ego and the Id*, which introduces the super-ego as a psychic agency, associates it not only with conscience and lawful obedience, but also with crime, self-humiliation, violence and death. Thus, this essay can be read as a catalogue of the many forms of excess in which the super-ego is implicated, listing its various pathological results: obsessional neurosis, hysteria, melancholia, and suicide. Freud even raises the possibility that the guilt instilled by an excessively severe super-ego may make criminals out of moralists: 'In many criminals, especially youthful ones, it is possible to detect a very powerful sense of guilt, which existed before the crime, and is therefore not its result but its motive. It is as if it was a relief to be able to fasten this unconscious sense of guilt on to something real and immediate' (Freud 1923: 52). Perhaps this category of criminals, driven to transgress the rule of law in the *external* world by the unbearable force of an exorbitant and oppressive *internal* rule of law, may be regarded as the ultimate perversion to which the law's hidden dialectic of guilt and excess can lead.

Dialectic of jurisprudence

Freud's work had only a negligible impact on contemporary legal thinking, and in recent years most contributions that may be regarded as psychoanalytic rely on Lacan (cf. Goldstein 1968; Ehrenzweig 1971; Schoentfeld 1973; Sheleff 1986; Kaplan and Rinella 1988; Caudill 1991; Goodrich 1995; Caudill 1997; Goodrich 1997; Legendre and Goodrich 1997; Goodrich and Carlson 1998). Moreover, as will be shown below, the few legal scholars who did deploy Freudian categories in an attempt to demystify the rule of law ideal in jurisprudence, divested Freud's approach of its tragic element.

Published in 1930 – the year in which Freud published *Civilization and its Discontents* – Jerome Frank's *Law and the Modern Mind* is an early but classic example of the jurisprudential application of Freud. Frank argues that contrary to the claims of legal scholars and lawmakers, the law is unstable, vague and tentative. Moreover, Frank holds this to be a good thing, since the fluidity of human relationships cannot be embedded in a rigid legal grid (Frank 1949 [1930]: 6). However, he asks, if instability and uncertainty are both necessary and desirable features of the law, why do judges, lawyers, lay people and legal theorists share in the pretence of a stable and transcendent rule of law?

Relying not only on Freud but also on Piaget, he traces the irrational wish for legal transcendence, such as is attributed to the rule of law, to an early wish for paternal omnipotence. For him, the rule of law serves society as a substitute father akin to the way Freud portrayed the function of the totem and God. Rather than referring to the myth of the primal horde, however, Frank adopts Freud's scheme of early childhood development, which posits that the first days and months of infancy are characterized by an illusion of omnipotence. When the child comes to realize that dependence rather than omnipotence characterizes his or her early life, this illusion is projected upon parental figures, especially the father, who is imagined as an all-powerful protector providing security. Thus, Frank argues, people 'seek unrealizable certainty in law . . . because . . . they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father' (Frank 1949 [1930]: 21, see also 203).

Frank's rhetoric is polemical and critical: presenting itself as a new form of jurisprudence, it aims to relieve legal discourse and legal practitioners of a heavy and unnecessary burden. Like Freud, he states that he wishes to foster humanity's growth into a more rational adulthood, characterized by the 'modern mind' he refers to in the title of his book. Such a mind is supposed to be equipped with a mature view of society and the knowledge that men rule the law, that it is made and remade by appointed officials who decide on what is right and wrong, and does not emerge from the community. As Frank puts it, 'we must face the fact that we are ruled by judges, not abstract law. If that is tyranny or despotism, make the most of it' (Frank 1949 [1930], 136n; cf. Chase 1979: 46–50).

As we see, Frank's attack on the rule-of-law notion is directed against a specific legal doctrine that he regards as childish and illusionary, not against the rule of reason over desire and wishful fantasies. On the contrary, Frank's opposition to the rule of law in the legal sense of the term is animated by his quest to further the rule of law in the wider, cultural sense of the term. Frank is optimistic that humanity will soon grow out of the need for myths and into maturity. He assumes that ultimately both the legal system and the rule of reason may exist without dangers of excess and without being embedded in an unconscious quest for omnipotent father-figures. However, from a Freudian perspective one is bound to wonder whether, if judges were socially and legally accepted as the makers and changers of the law – rather than as its interpreters and adjudicators – would it not be them, rather than the rule

of law, who became objects of fantasies of omnipotence? The projection of omnipotence upon judges and, not the least, their own fantasies of omnipotence that are enhanced by approaches such as Frank's, may be no less infantile and have no less undesirable social effects than the myth of a transcendent rule of law (Schoenfeld 1988). It seems thus that while Frank's argument against the rule of law in the narrower sense of the word is guided by psychoanalytic insights into the dialectics of desire, he does not subject the alternative he suggests to psychoanalytic reflection. His text exhibits none of the scepticism that marks so much of Freud's work in relation to the rule of reason in culture and society. For Frank, the rule of law illusion is one that can be diagnosed and removed without loss.

Recently, Robin West has summoned Freud in defence of the doctrine of the rule of law. Surprisingly enough, she argues that Freud's work can be used to establish a better defence of this ideal than that provided by American liberal legal theorists such as Laurence Tribe, Owen Fiss, Ronald Dworkin and Charles Fried (West 1986: 818). For West, Freud's method is preferable since it is naturalistic in the sense of relying on assumptions concerning human nature and history. She acknowledges that the legal liberals, whose position Freud's work is said to support, are bound to reject his approach as fallacious. According to West, legal liberals cannot suffer a naturalistic line of argument because of their methodological commitment to a strict fact–value distinction, which allows them only to produce arguments for the rule of law that rely on 'intuitively grasped and noncontingent moral truths' (West 1986: 820).

West's argument in favour of Freud is directed against transcendence in legal theory. She supports Freud's position against that of the legal liberals because it is presented as rooted in a factual, historical account. But although she states that 'Freud's analysis is grounded upon facts about our history and nature, while the liberal response is grounded on intuitively grasped moral truths' (West 1986: 844), in the concluding pages of her article she doubles back from this uncritical endorsement, admitting that Freud's assumptions 'about our nature and history may well be false', and that recent scholarship has thrown 'considerable doubt on both the empirical and the historical assumptions of Freud's theory of law' (West 1986: 881). Moreover, she concedes: 'If Freud's account of our nature is wrong, his defense of legal liberal commitments fails' (West 1986: 844). Thus, in West's own terms, Freud leaves us with a failed defence of the rule of law that, nonetheless, is praised for being superior to intuitionist arguments because of its coherence and its grounding in purportedly factual claims.

Clearly, Freud's mythical tale of the origins of civilization is rather a problematic source for anybody seeking to base arguments for the rule of law on facts of human nature and history. In addition, much of West's argument is vitiated by her failure to distinguish Freud's broader concern with the origins of the rule of law in the dialectics of sexuality and aggression, from the narrower, jurisprudential engagement of American legal theorists with constitutionalism and the role of the judiciary. Freud's argument concerning the necessity of a rule of law as a condition of civilization does not necessarily lead to a defence of the rule of law in the legal

sense, which is designed to limit the role of judges and legislators in order to prevent possible undemocratic ramifications of a 'rule of men'. On the contrary, Freud's portrayal of modern society exhibits a striking blindness to the dangers emanating from authority figures. Somehow he seems to have forgotten that—in his own terms—they are heirs to a killing and castrating primal patriarch. Instead he regards them as necessary for social cohesion and the control of 'the masses' whose unrestrained passion he fears. While Freud was an old-style liberal, he was by no means a democrat. In his eyes, the control of the masses necessitates powerful father-figures inspiring the former to renounce desire; for in his view, '[i]t is only through the individuals who can set an example and whom crowds recognize as their leaders [Führer] that they can be induced to perform the work and undergo the renunciations on which the existence of civilization depends . . . it therefore seems necessary that they shall be independent of the crowd by having means to power [Machtmittel] at their disposal' (Freud 1927: 8; see also Freud 1930: 115–16, Freud 1933: 212; Brunner 1995: 166–170). Freud argues that throughout history breakthroughs to higher and more rational cultural stages have been initiated and achieved by outstanding individuals who managed to mesmerize the masses. The biblical Moses, a lawmaker inventing a new code and thus acting as 'an outstanding father-figure' to the ancient Hebrews, provides Freud with the paradigmatic example of a leader moving history forward by his will (Freud 1939: 89).

It is difficult to reconcile such a historical vision with the rule of law ideal in American legal liberalism. Moreover, West seems reluctant to accept that as part of his naturalism, Freud also denies that reason—and therefore law—can ever become fully autonomous from sexuality and aggression. In fact, it appears that driven by her quest to pair Freud with American legal liberals, she underplays this fact. Although she quotes extensively from Freud's texts and arguments concerning the rule of law, she omits from them all instances in which Freud points to the intricate rootedness of law in desire and violence. For instance, she provides a lengthy quote from Freud's letter to Einstein, which has been quoted earlier in this essay as well. However, West leaves out all sentences that refer to the violence immanent in the law, covering the gaps in her quotation by innocent dots. Similarly, her quotation also omits Freud's reference to 'legal acts of violence' (cf. West 1986: 830; Freud 1933: 205).

More than six decades after the publication of Frank's *Law and the Modern Mind*, Ofer Sharone also has recourse to Freud in order to make a stand against what he sees as the deceptions inherent in the rule of law ideal. Following Frank in viewing the rule of law as an abstract father-substitute, he, too, claims that social progress requires the 'exposition and eradication of the rule of law illusion' (Sharone 1994: 329). He agrees with Frank that the rule of law imposes a detrimental rigidity on the work of judges. But in contrast to Frank, Sharone develops his argument by presenting the rule of law analogous to the way in which Freud portrayed religion in *Future of an Illusion*, arguing that the protection offered by the rule of law is equally an illusion. Freud had argued that the decline of religion would enable science to find ways to improve society. Similarly Sharone contends that '[t]he

demystification of the rule of law would . . . allow judges and lawyers to be bold and to experiment in finding ways to optimally reconcile the needs of men and of society' (Sharone 1994: 359). Moreover, he argues that a more activist image of the judiciary will lead to an exposure of the subjective nature of judicial review, making people aware of the power invested in it, thus fostering increased democratic involvement in political decision-making (Sharone 1994: 361).

Like Frank, Sharone suggests to get rid of the rule of law illusion, since this can be done without loss or danger. Since his argument relies on the analogy between Freud's view of religion as a childish illusion and the rule of law, it draws on the optimistic and combative *Future of an Illusion*, rather than on the much more sombre *Civilization and its Discontents*. Thus, like Frank and West before him, Sharone replaces the tragic sentiment of Freud's vision with hopefulness, arguing that Freud's approach 'provides a powerful critique of the rule of law [in the narrow sense of the term] and an optimistic turn toward a society without illusions' (Sharone 1994: 358).

Unlike West, Sharone is aware that the jurisprudential notion of the rule of law he deals with is not the one Freud refers to in *Civilization and its Discontents*. Acknowledging that Freud's idea of the rule of law has nothing to do with 'the law's independence from the leader nor the law's aim to protect society from its leader', he points out that for Freud the rule of law has to do with the renunciation of desire, which can be achieved only by submission to father-figures (Sharone 1994: 369, n. 82). Nevertheless, the parallel between law and religion on which he builds his position, leads him to ignore the tragic element in Freud's vision of the rule of law, which sees the latter as ineluctably embedded in the dynamics of guilt and desire. For Freud the rule of law is not a collective neurotic symptom one can get rid of like religion, but an inevitable part of civilization, whose contradictions have to be suffered and tolerated by all, since the only alternative is social collapse and a war of all against all. Plainly, by constructing Freud's genealogy within the boundaries of legal discourse, legal theorists become blind to the cultural implications of Freud's stance; by 'legalizing' Freud, they abandon the terrain of cultural critique.

Conclusion

As we have seen, Freud's genealogy of the rule of law—in the wider sense of the term—is both dialectical and critical, grounding the law in desire and guilt, and inserting it in a logic of excess. In the first place, Freud claims that the rule of law arises when desire becomes so excessive that it turns against itself, causing suffering rather than pleasure. Thus the law restrains desire for its own sake as well as in the service of survival. In the second place, since the rule of law is driven by guilt and contains the very desire it seeks to constrain, Freud argues that the law, too, is marked by a tendency toward excess.

The aim of this genealogy is to unravel a high-minded moral and legal concept in order to uncover its origins in forgotten violent passions and struggles that are

said to have shaped them and to govern much of their effects. Freud seeks to provoke and disturb by the construction or reconstruction of a past that may throw light on that which has been hidden in official histories of the rule of law in order to be forgotten. His aim is to show that neither the constitutive origins nor the actual workings and effects of the law are subsumed under its declared purpose. He supposes that original conflicts and the forces involved in them can never be entirely nullified. The protagonists of this dialectic are preserved in the unconscious depth of the rule of law, which contains dangerous tendencies toward excess, driven by guilt and desire. Its dark corners are inhabited by a surreptitious tendency to submit to father substitutes and a secret complicity with that which the law forbids. They are populated by hidden but ubiquitous elements of violence and sadistic components.

Friedrich Nietzsche stands out as an intellectual ancestor of Freud's conception of the rule of law. In *On the Genealogy of Morals* Nietzsche endeavours to show that the law originated in *ressentiment*, that is, in a negative passion, hostile to life's overflowing impulses, not unlike the excessive, unconscious guilt to which Freud refers (Nietzsche 1972 [1887]). Nietzsche builds his genealogy upon the assumption of a hypothetical original state of society ruled by 'masters', i.e. humans who were not bothered about what others did and how they did it. Sufficient to themselves because of their surplus passion, they were completely egocentric, affirmed their own deeds as 'good' and dismissed what hindered them as 'bad'. In other words, they behaved not unlike the primal father in Freud's story.

For Nietzsche, the moralizing rule of law that banned acts of the masters as evil was the result of a revolt of 'slaves' who lacked the energetic surplus of the masters, but managed to remove the latter from their superior position, just as the sons did in Freud's tale. Although Nietzsche does not use the term rule of law in *On the Genealogy of Morals*, he traces the origins of the law to slavish concern for what others do and feel, and to the resentful negation of everything that is different from the way the weak are capable of acting and feeling. Thus, he portrays the rule of law as a weapon of those who failed to experience the power of overflowing passion and, out of resentment, sought to exclude such passion by condemning them as evil.

Freud's outlook also shares much with that of the cultural and literary critic Walter Benjamin. Benjamin, a contemporary of Freud whose historical vision was strongly influenced by Nietzsche, published an essay in 1921, which recently has received much attention by philosophers and legal scholars. Like Freud, Benjamin drew attention both to the presence of violence or force at the foundation of the rule of law and to their law-preserving exercise later on (Benjamin 1921; see also Derrida 1990; LaCapra 1995).

Four decades after Freud's death, Michel Foucault developed a tragic and explicitly Nietzschean perspective on the law that seems somewhat like an exaggerated version of Freud's view. According to Foucault, 'the law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of

violence'. Thus, for Foucault '[h]umanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination' (Foucault 1977: 151; see also Hunt 1993; Leonard 1995).

However, as we have seen, the critical edge of this vision of the rule of law, which Freud shares with Nietzsche and other twentieth-century Nietzschean thinkers, is absent from the psychoanalytic legal discourse on the rule of law. The latter recasts Freud's tragic myth in an optimistic mould. Reading Frank, West and Sharone, one is led to the conclusion that much is lost and perhaps not all that much is gained by limiting Freud's conception of the rule of law to jurisprudence. After all, Freud offers no sustained analysis of the legal system and cannot recommend a methodology or prescribe a procedure for legal thinking. But although there is no fruitful 'hard' Freudian contribution to debates on the rule of law in terms of theoretical system building or methodology, his work may offer a 'soft' input, that is, a sensibility to the hidden, unconscious dimensions of the rule of law, on which he has focused. However, Freud's vision of the rule of law can serve critical legal thinking only if the law is seen as part of culture rather than as a self-enclosed system; i.e. only insofar as legal studies are conceived as a form of cultural studies. And, to conclude on the same note on which this essay began, one has to acknowledge that whatever else their shortcomings may be, this is one point in which Lacan and the thinkers inspired by him are right on target (but a comprehensive discussion of Lacan, Lacanians and the rule of law will have to await another occasion).

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