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On law's origin Derrida reading Freud, Kafka and Lévi-Strauss

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1. Introduction

'Before the Law', an essay by Derrida on Kafka's text with the same title, also includes a reading of Freud's *Totem and Taboo*. The latter book repeatedly makes its appearance in Derrida's texts,¹ but in 'Before the Law' we find the most detailed consideration thereof. Freud's *Totem and Taboo* enquires into the origin of religion, morality, social institutions and law. He contends that this origin is to be found in a crime, the killing of the primal father by a band of brothers, followed by the institution of totemism and the prohibition of murder and incest. Freud's psychoanalytical account of the origin of the totem and of the prohibition of murder and incest has been challenged from various quarters. If totemism, thought of as a system, is indeed an illusion, as Lévi-Strauss has perhaps most persuasively shown, should one for that reason dismiss Freud's *Totem and Taboo* and its theory of the primal horde in relation to the origins of law, or is there still some insight to be gained from it? Through a reading of 'Before the Law' as well as a number of other texts of Derrida, it will be contended that Freud's thinking remains of great importance in understanding law's origin, even though it may be necessary to somewhat revise the traditional reading of *Totem and Taboo*. Derrida's texts point to the importance of reading Freud in a specific way, rather than the rejection of his thinking as a whole in this respect, and more specifically, to the need for a reconsideration of the originary nature of the Oedipus complex. In rethinking the origins of law, Freud's study of the universality of the incest prohibition in archaic societies remains of importance, as has been confirmed by anthropological studies on this prohibition as well as on the gift by, amongst others, Lévi-Strauss and Mauss. The focus

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1 See e.g. J. Derrida, *Rogues: Two Essays on Reason*, 2005, pp. 16-17, 57-60; J. Derrida, *Politics of Friendship*, 1997, pp. 279-281; J. Derrida & E. Roudinesco, *For What Tomorrow...A Dialogue*, 2004, pp. 86-87, 188; J. Derrida, *Archive Fever: A Freudian Impression*, 1995, pp. 59, 88, 95.

of this article will be Derrida's reading of these texts, in considering the origins of law. So as to enable us to understand fully Derrida's reading, the article will start with a brief exposition and contextualisation of Freud's contentions in *Totem and Taboo*. This will be followed by a consideration of Lévi-Strauss's structuralist critique of totemism as an institution as well as of the important role of incest in his thinking. We will then be in a position to understand Derrida's problematisation of structuralism and his deconstructive reading of Lévi-Strauss's texts as well as of Freud's *Totem and Taboo* and Kafka's *Before the Law*. In the final section we will briefly consider how Derrida's analysis in 'Before the Law' ties in with his later deconstruction of concepts such as justice, hospitality friendship and democracy, with reference to the notion of originary guilt.

2. Freud's *Totem and Taboo*

A number of Freud's later texts concern themselves with the origin of religion, morality, law and other social institutions. Following the evolutionary thinking in relation to social phenomena which was prevalent around the turn of the 20th century, Freud shared the view of certain anthropologists and sociologists that this origin is to be found in an elementary form of religion, specifically as practised by some Australian aborigines. Freud's views in this regard are expressed primarily in *Totem and Taboo* (1913), where he enquires into the totem and its relation to the Oedipus complex.² Freud in this respect finds a number of similarities between the beliefs in archaic communities, children (especially animal phobias), and neurotic patients as well as the symbolism in dreams. In the view which Freud adopts, the totem in its original form is an animal, which is peculiar to a specific clan and treated with superstitious respect (pp. 103-107). The totem may in general not be harmed, killed or eaten by members of that clan and they are believed to have descended from the totem. Originally the totem is inherited through the female line and restricts the sexual freedom of the younger generation, that is, sexual intercourse between brothers and sisters and between sons and their mothers (pp. 121-122). Freud as a consequence describes exogamy as the 'notorious and mysterious correlate of totemism' (p. 105). At ceremonial occasions, identification of the clan with the totem is emphasised, for example by dressing in the likeness of the totem and imitating it in sound and movement (p. 140). At specific ceremonies the totem is furthermore killed and devoured by all the men of the clan.³ After the consumption of the totem animal, its death is mourned, followed by licentious festivities (p. 140). In an attempt to explain totemism as well as the fact that many of the archaic communities still to be observed at the time consisted of bands of males in totemic clans while concerning themselves primarily with the prohibition of two crimes (murder and incest), Freud (pp. 141-146) posits an 'event' analogous to the 'crimes' of Oedipus as depicted by Sophocles.⁴ In an early age, Freud contends, mankind lived in small hordes with a jealous, primal father in each instance ruling over such horde. The father had exclusive possession of all the women in the horde. If a son would invoke his father's jealousy, he would be killed, castrated or driven from the horde.⁵ The sons – deprived by the primal father from having their sexual desires fulfilled by their mother(s) and sisters – feared, admired, loved and at the same time hated him. One day they

2 S. Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol. XIII, 2001.

3 See Freud, *Standard Edition*, Vol. XXIII, p. 131. Freud, *Standard Edition*, Vol. XIII, pp. 138-139 bases this feature on the observation of a festival in the Sinai desert where a camel is torn apart by all the male members of the clan and consumed raw.

4 In *Moses and Monotheism*, Freud, *Standard Edition*, Vol. XXIII, pp. 23, 81 points out that this 'event' took place over thousands of years and was repeated numerous times.

5 See Freud, *Standard Edition*, Vol. XXIII, p. 81.

decided to rise against him, and then killed and consumed him, so as to gain his strength. Either because no single brother was strong enough to take the place of the primal father or because if one of them were, it led to new battles, they eventually realised that the previous position of a single leader is no longer tenable. For the sake of peace with one another, they therefore decided on the institution of a (totemic) community of brothers, a kind of 'social contract' through which incest and murder (of the totem animal) were prohibited.⁶ In this development lies the commencement of social, moral and religious obligations, according to Freud.⁷ The institution of the totem (the totem being a substitute for the father (p. 141)) as well as the totem prohibitions, served as a covenant between the sons and the totem: the totem granting them everything they could wish for, and they in turn respecting its life. It was also an attempt at self-justification: if the primal father had treated them the way the totem treats them, they would never have killed him, in this way making it possible to forget the event which lies at the origin of the totem (pp. 144-145).⁸ Totemism was thus instituted as an attempt at reconciliation with the father. Freud notes in this respect that immediately after the murder, the feelings of affection they had for him, turned into remorse (pp. 143-145), raising the question of how this could have happened even before the institution of morality.⁹

Did Freud believe that the killing of a primal father actually occurred, and is he therefore, because of a belief in the phylogenetic inheritance of this 'event', to be associated with Lamarckism? On the face of it, Freud can certainly be read in this way, as commentators have argued,¹⁰ although, as Derrida has pointed out, things may be somewhat more complex. The major difficulties with Freud's account perhaps lies in (1) its assumption concerning the universality of the Oedipus complex and tied closely to this, (2) the assumption of the existence of something like 'totemism' from which other institutions subsequently evolved. The latter point was elaborated on by anthropologists such as Alexander Goldenweiser, Alfred Lowie, Franz Boas, Alfred Reginald Radcliffe-Brown and Claude Lévi-Strauss. Although Freud was aware of the various manifestations of the totem in different societies, he believed, as noted earlier, that certain clans of Australian aborigines give evidence of the most original form, totemism having at an earlier stage been a feature of all societies. The criticism of this evolutionary view of society, specifically in relation to the totem, as held by Freud and others around the turn of the 20th century, by Lévi-Strauss, is for our purposes the most important and will be discussed next. The first point (totemism's relation to the Oedipus complex) will be enquired into below in our discussion of Derrida's 'Before the Law'.

3. Lévi-Strauss on totemism and the prohibition of incest

Lévi-Strauss, in stark contrast to Freud, contends that the notion of 'totemism' is nothing but an illusion, the bringing together of different ideas under one name as a result of Western prejudice

6 Freud was aware of a number of exceptions which can be said to exist to the 'universality' of the incest prohibition, see Freud, *Standard Edition*, Vol. XXIII, pp. 120-121. See further below.

7 See Freud, *Standard Edition*, Vol. XXIII, pp. 82-83.

8 Freud, *Standard Edition*, Vol. XXIII, p. 82 comments that the introduction of an animal to represent the father must be understood in light of the fact that archaic communities (and the position is the same with children) do not draw the same rigid distinctions between man and animal as is drawn in Western society.

9 See also J. Lacan, *Écrits*, 2006, p. 95; C. Douzinas, *The End of Human Rights*, 2000, p. 301, and see further below.

10 See e.g. Freud, *Standard Edition*, Vol. XIII, pp. 157-159, and the commentaries of P. Gay, *Freud: A Life for our Time*, 1988, p. 333; P. van Haute & P. Verhaege, *Voorbij Oedipus? Twee Psychoanalytische Verhandelingen over het Oedipuscomplex*, 2006, pp. 80-81; P. Fitzpatrick, *Modernism and the Grounds of Law*, 2001, p. 19. Cf. Derrida, *Archive Fever*, pp. 34-36.

against people deemed ‘primitives’ or ‘savages’.¹¹ Anthropologists created the impression that there are vast differences between ‘primitive’ societies and Western civilization, with only the latter being characterised by rational thinking. The ‘phenomenon’ of totemism, Lévi-Strauss argued, was a projection of the Western mind, and (in this way aligning himself with Rousseau’s thinking on human nature) an exorcism of the close relation that exists between man and nature. In the traditional Western view of ‘primitives’ and of ‘totemism’, the ‘savage’ was too close to nature, too close to animals, in comparison with the discontinuity evident in the relation which ‘civilised’ (that is, normal, white, adult) man has with nature (pp. 2-3). According to Lévi-Strauss, and in line with his structuralist views, totems function in heterogeneous ways in different clans, with the consequence that totemism cannot be viewed as a system. This is borne out by the fact that the reason for the adoption of a specific plant, animal or lifeless object as a totem differs greatly amongst different tribes and clans.¹² Nonetheless, the different ways in which relations to a totem are structured (*inter alia* matrilineal/patrilineal hereditary transmission; as existing between the group/individual between a species of animal/plant or a specific animal/plant; as well as the different taboos related to a totem) are all different means to give expression to the relation between nature and culture (pp. 16-17). The ‘irregularity’ which exists in this regard does not therefore necessarily mean the non-existence of a ‘structural principle’ (p. 88). The theory which Freud explicitly rejected – that the different totem animals are a way of distinguishing between different clans – finds an important place in Lévi-Strauss’s theory.¹³ According to Lévi-Strauss (pp. 77-78) it is precisely because of the resemblance in relation to the differences between animals and the differences between men that totemic representation takes place. In this respect the myths on which totems are based, reveal, as observed by Radcliffe-Brown, that they have a single theme:

‘The resemblances and differences of animal species are translated into terms of friendship and conflict, solidarity and opposition. In other words the world of animal life is represented in terms of social relations similar to those of human society.’¹⁴

Developing this idea further, Lévi-Strauss concludes that the choice of totem is simply one of the ways in which a structural principle – that of the union of opposites – finds application (p. 88). The relation that is in this way posited between correlations and oppositions can of course take place in a variety of ways, which explains the wide array of totem representations throughout the world. Totemism is thus merely one of the ways in which opposition is made to serve the purpose of integration, rather than being an obstacle thereto (p. 89). Through his analysis of totemism and myth, Lévi-Strauss in essence attempts to show that the ‘savage mind’ is as logical or coherent as the ‘Western mind’, the only difference being the nature of the things to which they are applied.¹⁵ The study of the totem in archaic societies in particular shows the unconscious logical structures of the mind, which is a feature of all of humanity, and which remains beyond human

11 C. Lévi-Strauss, *Totemism*, 1991, pp. 1-2.

12 Lévi-Strauss, *Totemism*, p. 63 points out that in Australia one also finds totems such as laughing, illnesses, vomiting and a corpse. Imaginary creatures elsewhere also serve as totems (p. 78).

13 See Freud, *Standard Edition*, Vol. XIII, pp. 110-113.

14 A. Radcliffe-Brown, ‘The Comparative Method in Social Anthropology’, 1951 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 81, p. 18.

15 C. Lévi-Strauss, *Structural Anthropology*, 1963, p. 230; *The Savage Mind*, 1966, pp. 1-34. One incidentally also finds the use of totems in Western society; see Lévi-Strauss, *Totemism*, pp. 7-8.

control.¹⁶ In different societies, both 'primitive' and 'civilised', one can thus observe the recurrence of the same patterns, as a consequence of the demand for order.¹⁷

According to Lévi-Strauss in his book on the structures of kinship, the prohibition of incest nonetheless remains of importance as it provides the bridge between nature and culture, the latter being born only with the prohibition of incest.¹⁸ This prohibition nonetheless forms part of both nature and culture, seeing that it has the universality of an instinct and is thus part of nature (p. 10) whereas it is at the same time subject to contingent rules and thus part of culture:

'It is a rule which embraces that which in society is most foreign to it, but also a social rule which retains what in nature is most likely to go beyond it. The incest prohibition is at once on the threshold of culture, and in one sense, as we shall try to show, culture itself.'¹⁹

The primary role of culture, as Lévi-Strauss contends, is to ensure the continuing existence of the group as a group, and as in other domains, to replace chance by organisation (p. 32). The rules of exogamy are instituted, as with all classifications, because of the need for order, specifically for the purpose of the continuous existence of the group. It is thus an intervention, but not in any arbitrary sense: 'it is *the* intervention' (p. 32). Formally, as Lévi-Strauss points out, the prohibition is an assertion by the group that in relation to sexual matters one cannot simply do as one pleases (p. 43). The incest prohibition and its inverse, the rules of exogamy, are 'culture itself' because they aim at ensuring that the distribution or circulation of women takes place under the control of the group and are the same for everyone (pp. 42, 45). The incest prohibition, because of its implications (she who may not be taken is given up) in other words amounts to a rule of reciprocity similar to an exchange of gifts (p. 51 et seq.), with women being the most highly prized category of goods (pp. 51, 61-63). The exchange of women, similar to the totem, but more fundamentally so, serves the purpose of integration (p. 25):

'Consequently, exogamy should be recognized as an important element – doubtless by far the most important element – in that solemn collection of manifestations which, continually or periodically, ensures the integration of partial units within the total group, and demands the collaboration of outside groups. Such are the banquets, feasts and ceremonies of various kinds which form the web of social life. But exogamy is not merely one manifestation among many others. The feasts and ceremonies are periodic, and for the most part have limited functions. The law of exogamy, by contrast, is omnipresent, acting permanently and continually; moreover it applies to valuables – viz., women – valuables *par excellence* from both the biological and the social points of view, without which life is impossible, or, at best, is reduced to the worst forms of abjection. It is no exaggeration, then, to say that exogamy is the archetype of all other manifestations based on reciprocity, and that it

16 Lévi-Strauss uses the notion of the unconscious in a different way than Freud. It involves a kind of Saussurean 'deep grammar' or structural unconscious of society.

17 Lévi-Strauss, *Savage Mind*, p. 10.

18 C. Lévi-Strauss, *The Elementary Structures of Kinship*, 1969, p. 24: 'It is the fundamental step because of which, by which, but above all in which, the transition from nature to culture is accomplished.'

19 Lévi-Strauss, *Kinship*, p. 12. Like Freud, Lévi-Strauss was acutely aware of exceptions to the rule, but as he remarks, 'every society is an exception to the incest prohibition when seen by another society with a stricter rule' (Lévi-Strauss, *Kinship*, p. 24). The universality of the incest prohibition is not established by ignoring the 'exceptions' thereto, but by asking the question whether any society exists where no prohibitions on certain types of marriage exists. The answer to this question is 'completely in the negative' (p. 9).

provides the fundamental and immutable rule ensuring the existence of the group as group.’²⁰

The prohibition of incest is therefore not in the first place about not being allowed to marry one’s sister, mother, or daughter because of some intrinsic quality, but about being obliged to give them to others (p. 481). Marriage, Lévi-Strauss (p. 483) concludes, is the archetype of exchange and ‘the woman herself [is] the supreme gift among those that can only be obtained in the form of reciprocal gifts’ (p. 65). The rules of exogamy are furthermore not necessarily tied to the totem in a specific way. In the Inuit, for example, exogamy is practised only in relation to the immediate family, with the consequence that it is not related to totemism.²¹ The latter requires the formation of a system on the social level. Totemism cannot therefore be said to have been a feature of all societies and there cannot be said to be an original form of totemism from which all others derive as Freud believed.²² In some Australian groups the rules of exogamy moreover have no relation to totemic beliefs and customs.²³ For Lévi-Strauss, the incest prohibition, rather than totemism therefore lies at the origin of culture, which (together with their ability of speech) place ‘primitive’ societies on the same level as modern societies.²⁴ Freud’s contention in relation to exogamy and the existence of an intrinsic relation to the totem are thus rejected too. The prohibition against incest is moreover subject to different rules in different societies and one of these (matrilineal) cannot be said to be more originary than the others.²⁵

4. Derrida on Lévi-Strauss

The important contribution of structuralism, according to Derrida in his essay ‘Structure, Sign and Play in the Discourse of the Humanities’,²⁶ lies in its placing in question of the concepts of metaphysics, such as the nature/culture opposition, its abandonment at times of a search for an absolute origin (p. 286), its rejection of an evolutionary approach, and its attempt to undermine the assumptions of Eurocentrism. As we will see, structuralism’s relation to metaphysics nonetheless remains ambivalent and at times it is not vigilant enough about its reliance on the concepts of metaphysics in its critique thereof. In the case of Lévi-Strauss, this is because the full

20 Lévi-Strauss, *Kinship*, pp. 480-481.

21 Lévi-Strauss, *Totemism*, pp. 11-12.

22 Totems, where they are in use, can be said to play a secondary role in the system of exchange which can for now be said to be centred on the prohibition of incest.

23 Lévi-Strauss, *Totemism*, p. 36.

24 J. Derrida, *Of Grammatology*, 1976, p. 108.

25 Lévi-Strauss, *Kinship*, pp. 490-491 believes that Freud’s account of the primal horde gives expression to a dream, the magic and power of which ‘arises precisely from the fact that the acts it evokes have never been committed, because culture has opposed them at all times and in all places. Symbolic gratifications in which the incest urge finds expression, according to Freud, do not therefore commemorate an actual event. They are something else, and more, the permanent expression of a desire for disorder, or rather counter-order’ (p. 491). Lacan’s reading of *Totem and Taboo* shows a number of similarities with the reading of Lévi-Strauss. J. Lacan, *The Other Side of Psychoanalysis: Book XVII*, 2007, p. 123; and J. Lacan, *The Ethics of Psychoanalysis: Book VII*, 1992, pp. 216-218 reads the Freudian myth as a retroactive fantasy-like positing of a father who experiences unlimited *jouissance* in his enjoyment of all the women, in his being his own law, beyond the symbolic order with its accompanying castration or prohibition of *jouissance*. Lacan refers in this respect to the primal father as the ‘real father’ or ‘father of the (impossible) real’ whose killing leads to the institution of the order of symbolic exchange. With his death, his power of prohibition (of the *jouissance* of his sons, i.e. all men) is not limited, but actually increased. J. Lacan, *On Feminine Sexuality, The Limits of Love and Knowledge: Book XX*, 1999 incidentally distinguishes phallic *jouissance*, which women also share, as they are also at least partly subject to the symbolic order, from woman’s or other *jouissance*, which may, according to him, be possible; for a commentary see P. Verhaeghe, ‘Impossibility: Lacan’s revision of the Oedipus complex’, in J. Clemens & R. Grigg (eds.) *Jacques Lacan and the Other Side of Psychoanalysis: Reflections on Seminar XVII*, 2007, pp. 43-44; R. Grigg, ‘Beyond the Oedipus Complex’, in *ibid.*, pp. 58-67; B. Fink, *The Lacanian Subject: Between Language and Jouissance*, 1997, p. 110; C. Shephardson, ‘Lacan and Philosophy’, in J.-M. Rabaté (ed.), *The Cambridge Companion to Lacan*, 2003, pp. 137-147.

26 J. Derrida, *Writing and Difference*, 1978, pp. 278-293.

implications of the idea of a classificatory structure are not as yet grasped and also because of a residual nostalgia for origins and pure presence (p. 292). The notion of a structure, as Derrida points out, has operated since the inception of Western philosophy with the idea of a centre, point of presence or fixed origin, which keeps the structure in place (p. 278). This centre has in addition the role of limiting the 'play' of the structure, the 'field of infinite substitutions', as Derrida also refers to it (pp. 278, 289).²⁷ Within the traditional concept of structure, 'play' in this sense is allowed, but only within certain definable limits. The centre is therefore inside the structure, yet it is also 'outside' of the structure in the sense that it is not itself subject to the play of the structure (p. 278). In structuralism, and specifically in the work of Lévi-Strauss, we see the centre of the structure operating in this sense in relation to the prohibition against incest, which Lévi-Strauss posits at the origin of culture. Derrida here provides a minute analysis of what is at stake in the nature/culture distinction and the role of the prohibition of incest as origin in Lévi-Strauss. As noted earlier, Lévi-Strauss points out in this regard that the prohibition of incest finds itself in the peculiar position that it seems to (1) itself form part of the transparent system of (cultural) differences, and that (2) it at the same time provides the origin of the difference between nature and culture; and is therefore also located outside of the (cultural) system as its condition of possibility.²⁸ The difficulty Lévi-Strauss encounters here ties in with the traditional, metaphysical distinction, which he adopts between nature and culture, and which he views as 'two mutually exclusive orders'.²⁹ In accordance with this distinction, that which is universal and spontaneous, and which is not dependent on a particular culture or determinate norm, belongs to nature, whereas that which depends upon a determinate system of norms, which can vary in different societies, belongs to culture (p. 283). As we saw above, the prohibition against incest is universal and therefore must fall within nature, yet it is also determined by norms, subject to variation, and must therefore at the same time form part of culture (p. 283).³⁰ Lévi-Strauss therefore refers to the prohibition of incest as a 'scandal' as it does not appear to fit neatly into the traditional metaphysical framework.³¹ As Derrida (p. 283) however notes, there is a 'scandal' here only because of the reliance on the concepts of metaphysics, here the nature/culture distinction. Lévi-Strauss, in spite of his awareness of the problem surrounding the nature/culture distinction, is nonetheless prepared to make use of this (metaphysical) distinction as a tool in his analysis or what he (Lévi-Strauss) refers to as *bricolage*. In this respect, Lévi-Strauss can be said to separate method from truth (p. 284). Both in relation to the concept of structure in general and here specifically with the incest prohibition in structuralism, a contradiction is at stake which as Derrida notes 'expresses the force of a desire' (p. 279). In other words, because of the 'play' of the structure, and in order to counter the anxiety that goes along with it, metaphysics responds with a desire for presence.³² We can also express this in a different way: the incest prohibition does not simply produce a scandal to the concepts of metaphysics, but escapes these concepts, precedes them, perhaps as their condition of possibility (p. 283). How does the prohibition of incest relate to this pre-origin of play? Derrida accuses metaphysics of wanting us not to contemplate the origin of this prohibition:

27 The notions of 'play', substitution/supplement and writing bear a quasi-psychoanalytical connotation; see J. de Ville, 'Rethinking power and law: Foucault's *Society must be Defended*', 2011 *International Journal for the Semiotics of Law* 24 (forthcoming).

28 Derrida, *Of Grammatology*, pp. 103-104. Something similar happens with Rousseau in relation to pity, modesty and reason in their relation to boundless passion; see Derrida, *Of Grammatology*, pp. 174-175, 179-180.

29 Lévi-Strauss, *Kinship*, p. 8.

30 See also Derrida, *Of Grammatology*, pp. 104, 263-265. The fact that incest is prohibited or at least avoided also in the 'higher primates' of course further complicates this distinction; see Derrida & Roudinesco, *For What Tomorrow*, p. 66.

31 Lévi-Strauss, *Kinship*, pp. 8-9.

32 See further below on the nature of this anxiety.

‘It could perhaps be said that the whole of philosophical conceptualization, which is systematic with the nature/culture opposition, is designed to leave in the domain of the unthinkable the very thing that makes this conceptualization possible: the origin of the prohibition of incest.’³³

As appears from this passage, the ‘centre’ that is posited by structuralism (here the prohibition of incest) is already a substitute or a supplement, not of some pre-existing presence, or of an absence, but that which precedes the presence/absence distinction. The positing of an origin in other words always goes along with the suppression of its own pre-origin. The origin of this prohibition is explored further in *Of Grammatology* where Derrida discusses this prohibition in relation to the texts of Lévi-Strauss as well as of Rousseau.³⁴ Here we return to the notion of ‘desire’ raised above. The desire for presence follows, as we noted, from the absence or rather abyss of presence, that is, the representational structure which structuralism has exposed and which makes full presence impossible (p. 163). This abyss, which is the pre-origin of representation, is itself a form of desire. What is ‘desired’ is ultimately total enjoyment, absolute expenditure, that is, death, ‘our indestructible mortal desire’ (pp. 152, 183-184, 266) or what Derrida also refers to as arche-writing (the trace left by this ‘desire’ for death).³⁵ This means that the mother and the sister (the objects of incestuous desire) are always already supplements of what is ultimately desired (pp. 156-157, 266).³⁶ The mother (and/or sister) as fundamental signified (in structuralism) is thus herself in the position of signifier and does not escape play (p. 266). This in turn means that the genealogical relation and social classification which Lévi-Strauss analyses in his texts are themselves what Derrida refers to as ‘the stitched seam of arche-writing’ (p. 125). They are in other words secondary attempts at bringing to an end, at arresting unlimited play. The relation between unlimited play or the desire for death and the gift is explored further by Derrida in *Given Time*.³⁷ The relation between the circular exchange of women (and goods) on the one hand, and the gift on the other, recognised by Lévi-Strauss and Mauss, is here repositioned, reinscribed in relation to the perfect gift.³⁸ As shown in this text, the perfect gift does not involve exchange (as then it would no longer have the value of gift) and provides the condition of possibility of all circular exchange in accordance with the applicable rules of exogamy (in relation to women). The prohibition of incest which Lévi-Strauss posits at the origin of society is in other words itself made possible only by a restriction of absolute desire, of the perfect gift,

33 Derrida, *Writing and Difference*, pp. 283-284.

34 This text of course also concerns itself with the speech/writing opposition which ties in closely with the matter under discussion. For reasons of space, we will not analyse this aspect here; suffice to note that Lévi-Strauss’s nostalgia for a lost origin is tied to the perceived absence of writing in the communities living in seeming harmony with nature (Derrida, *Of Grammatology*, pp. 119, 136). If one views writing in the broad way as Derrida does (the trace left by the desire for death, as we will see just now) Lévi-Strauss’s view comes across as somewhat naïve, as does his depiction of these communities (in light of the seeming absence of writing) as innocent and non-violent, despite clear evidence to the contrary; see *Of Grammatology*, pp. 110, 120.

35 In *Meno 77c-d* Socrates defines desire as ‘to secure for oneself’ so that ‘desire’ needs to be placed here in inverted commas; see Plato, *Complete Works*, 1997, pp. 870-897.

36 Auto-eroticism and hetero-eroticism play a similar supplementary role; see Derrida, *Of Grammatology*, p. 155.

37 J. Derrida, *Given Time: I. Counterfeit Money*, 1992. For an analysis, see J. de Ville, ‘The gift and the meaning-giving subject: a reading of *Given Time*’, in A. Wagner & Jan M. Broekman (eds.) *Prospects of Legal Semiotics*, 2010, pp. 79-105.

38 In Lévi-Strauss’s critique of Mauss’s *The Gift*, as Derrida, *Given Time*, pp. 74-76 notes, Lévi-Strauss reduces the gift to exchange and thereby effectively annuls the very possibility of the gift. Derrida’s analysis ties in closely with that of Bataille, *Eroticism*, 2006, pp. 197-220, who investigates the link between the prohibition of incest in Lévi-Strauss and eroticism, the latter being intimately linked with death.

of the pre-origin.³⁹ We will now see how all of the above feed into Derrida's essay 'Before the Law'.

5. Before the law⁴⁰

In Kafka's *Before the Law* (*Vor dem Gesetz*)⁴¹ a man from the country comes to seek access to the law, but a doorkeeper indicates that at the moment, the man is prohibited from entering. The man, upon peering through the open gate, is told by the doorkeeper that should he manage to enter without his permission (i.e. that of the first doorkeeper) there are many other doorkeepers much more powerful than himself. The man waits for many years, but the doorkeeper, despite the man's repeated attempts to gain admission (also through bribery and later even by begging the fleas in the fur collar of the doorkeeper), never allows him in. The doorkeeper on a number of occasions asks him questions about his home and other things, but in an indifferent manner, like great lords ('*grosse Herren*') do. When he is about to die, the doorkeeper tells him in answer to his question that no-one else sought to enter through this door as it was meant solely for him (the man from the country), and says that he will now shut it. How does Kafka's *Before the Law* tie in with the earlier discussion of totemism and the prohibition of incest? In Derrida's essay, dating from 1982, this relation is posited through a quasi-psychoanalytical reading of *Before the Law*.⁴² Freud's originary tale is itself read by Derrida as 'literature' (understood here in its strict sense, as will be explained), in that an event is narrated which is actually an event of nothing and consequently cannot be said to speak of an 'origin' as is usually thought. We will in addition see in Derrida's reading of these two texts allusions to the notion of 'play' and to the perfect gift as discussed above.

Derrida alludes to the idea of the play of the structure in his discussion of the title of Kafka's *Before the Law*.⁴³ When deciding whether a text such as this is of the literary type, the text would effectively be brought 'before the law'. However, as Derrida points out, the text at stake here (Kafka's *Before the Law*) already stages this procedure, it enfolds it within its structure; it questions the law itself which would arrogate to itself the power to question it (p. 188). Derrida's text, bearing the same title, can be said to repeat this gesture. As we will see, it lays down the law (or condition of possibility) of laws (as well as of literature (p. 36)). Usually we would assume from the title (here: *Before the Law*) that it refers to the subject-matter of the story. The title in other words heads the story and refers to what will be happening in the story. The title gives the story an identity and is important in the determination of property rights, more specifically, copyright. By making law (referring here to law or a legal system which traditionally

39 In Derrida, *Glas*, 1986, pp. 136, 191-200 we find a similar type of analysis in the context of Hegel and Genet, of the relation between marriage, incest and absolute pleasure. In the case of blood relations, the individuals, Hegel contends, do not have 'any personality proper to themselves' (p. 199a); behind incest thus appears to hide a 'bare self-hunger', a desire for 'an absolute self-having' (p. 198c).

40 The word 'law' as it appears in the English version is in every instance a translation of the French '*la loi*' which Derrida uses throughout the text. Where Derrida uses '*droit*' it is consistently translated as 'right'. In the French original the text has the title *Préjugés: Devant la loi* and includes a reflection on the work of Lyotard. These parts do not appear in the English translation and have, as far as I am aware, not as yet been translated into English.

41 Published for the first time in the journal *Selbstwehr* (Prague), IX, No. 34 (Sept. 7, 1915). See <<http://www.pitt.edu/~kafka/biblio.html>> (last visited 21 November 2010) for references to this and subsequent publications of *Vor dem Gesetz*; my thanks to Howard Cagill for alerting me to these versions. The text also forms part of Kafka's *The Trial*, where it does not appear under this title.

42 J. Derrida, *Acts of Literature*, 1992, pp. 183-220. Derrida refers to his essay on Kafka in 'Force of Law' (J. Derrida, *Acts of Religion*, 2002, pp. 235, 270), to indicate that he has for a long time been concerned with the question of justice, and in associating the man from the country before the law with the revolutionary moment where the law (*loi*) is still undetermined, yet to come.

43 Later on, Derrida, *Acts of Literature*, p. 212 refers to 'the effect produced by the play of the title' and of literature as being able to 'play the law', 'playing at being the law' and 'deceiving the law'.

accords a legal title to a story) part of the title of the story, the question is raised as to what gives law the right or what entitles the law to do so. In other words questions whether literature is to be understood only in the sense in which it is defined and circumscribed by law, that is, as having a certain identity (unity), an author and entailing the narration of events.⁴⁴ Kafka's text, a singularity which is 'before' the law, as Derrida shows in his reading, can indeed be said to not have a unity or an identity. Before exploring this further, it is necessary to first give attention to the meaning of 'before' in the title. The title names a space: *before* the law. Derrida refers in this regard to a singularity, but this should not be understood as positing an opposition between the singular (the individual(s) appearing before the law) and the general (the generality of law's rules).⁴⁵ The word 'before' in the title does not only refer to someone appearing *before* or *in front of* a judge in a court, but also to that which *precedes* law, the condition of possibility of law (p. 216).⁴⁶ At stake here is what Derrida will, with clear reference to Freud's topology of the mind, refer to as a 'differential atotology' (p. 208). Derrida notes in this respect that the man from the country (as is the case with literature) is not only *before* the law, but also *prior to* the law in a certain sense (p. 216). He is both a subject of the law, and outside of the law, an outlaw (p. 204). As we will see below, this follows from the man's non-identity with himself. He furthermore gives himself the law and in that sense is outside of, *precedes* the law, apart from his being subject to the law. Kafka's text does something similar insofar as it can be said to be a 'pure story, or story without story' (p. 209). Kafka's text can moreover be described as 'literature' in the strict sense, non-identical to itself, essentially unreadable, intangible, or as Derrida puts it, '[i]t is the law, makes the law and leaves the reader before the law [*Il est la loi, fait la loi et laisse le lecteur devant la loi*]' (p. 211).⁴⁷ It bears witness to and shows respect for the law before the law.⁴⁸

Derrida notes that of the law itself, apart from its name, nothing is said in *Before the Law*; it (the law) is silent (p. 208). The law, *das Gesetz*, is of course capitalized like a proper name in the original German (*Vor dem Gesetz*). We do not know what, who or where it is. We do not know whether it is 'a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding *itself* in order thereby to become something or someone' (p. 208). *Das Gesetz* is furthermore neuter, annulling the opposition between masculine and feminine, indeterminate, leaving the man from the country to freely determine himself (pp. 204, 206-207). This self-determination is nevertheless at the same time cancelled out through the prohibition of entering the law. We are again concerned here with the question of identity, both of the man from the country and of Kafka's text. As Derrida notes, neither the identity nor the non-identity of a text is natural; it is the result of a juridical performative. Although this can be said of all texts, it is uniquely the case with Kafka's *Before the Law*, as it –

44 Derrida explores similar themes in *Acts of Literature*, pp. 221-52 ('The Law of Genre') with reference to Blanchot's *The Madness of the Day*.

45 The introduction to the essay by the editor of the collection, Derek Attridge, and specifically the assertion that Kafka's essay deals with the 'problematic relation between the singular and the general' (p. 181) should be treated with circumspection. Beardsworth's analysis of the essay (R. Beardsworth, *Derrida and the Political*, 1996, pp. 25-45), which is excellent in many respects, unfortunately also leans in the direction of such an interpretation (pp. 25, 41-43). See R. Gasché, *Of Minimal Things: Essays on the Motion of Relation*, 1999, pp. 297-298, who shows an appreciation for the complexity that is at stake here.

46 Derrida also refers in various places throughout the essay (pp. 186, 218) to his own arraignment before the law in Prague, on a charge of drug trafficking, thereby including himself as one who is 'before the law' in the double sense that this phrase bears.

47 See also J. Derrida, 'Women in the Beehive: A Seminar with Jacques Derrida', 2005 *Differences: A Journal of Feminist Cultural Studies* 16, pp. 149-150. Gasché, *Of Minimal Things*, p. 294 refers to the law at stake here as a 'quasi-transcendental (legal) fiction'.

48 See also Beardsworth, *Derrida*, pp. 34, 37, 38.

'poses before us, preposes and proposes a text that lays down the law, and in the first place with respect to itself. In its very act, the text produces and pronounces the law that protects it and renders it intangible. It does and says, saying what it does by doing what it says.'⁴⁹

Kant's Second Critique (the *Critique of Practical Reason*) plays an important background role in Derrida's analysis.⁵⁰ As Derrida points out, for law as such (pure morality) to have authority, according to Kant, it is required that it does not have a history. The law (as such) must present itself as 'an absolutely emergent order, absolute and detached from any origin' (pp. 191, 194). The condition of possibility of laws, that which makes them laws, the law of laws, the law itself, thus remains concealed, and for this reason is enticing, or as Derrida puts it, involves letting 'oneself be tempted by the impossible' (p. 192). When one does tell stories about law's origin, these at best deal with its modes of revelation. The law itself cannot be made present; one cannot reach it or enter into a relation with it. Derrida suggests that the same can be said of Kafka's man from the country as well as of the characters in Freud's primal horde insofar as none of them gain entry into the law itself.⁵¹ Freud's mythical tale, which as we know was preceded by self-analysis (a smelling out of the origins of law, as Derrida (p. 194) puts it), seeks to uncover law's origin through what appears to be a historical account. Freud can in broad terms be said to have believed that the origin of law is to be found in repression (p. 192). Yet as suggested above, Freud's narrative is an uncanny one, similar to Kafka's *Before the Law* (pp. 210-211), as no event in the ordinary sense is related. Even though the father is killed by the brothers, the father now becomes more alive, more powerful than before. The crime is thus totally useless as nobody is actually killed (p. 198). Freud furthermore notes that the brothers felt remorse immediately after the deed and thus already *before* the institution of morality and law by them.⁵² As Derrida points out, the events (a 'quasi-event' or a 'pure event') as recounted by Freud inaugurate nothing 'since repentance and morality had to be possible *before* the commission of the crime' (p. 198).⁵³ What Derrida is suggesting here is that Freud's account (a simulacrum of narration) implicitly points to a 'law' or condition of possibility that must have preceded and made possible the institution of law and morality, similar to Kafka's *Before the Law*.⁵⁴ This 'pre-origin' of morality and law is, as we will see, closely related to the 'desire' referred to earlier and of course to a Kantian 'pure morality' as well as the perfect gift.

There are clearly a number of similarities between Kafka's *Before the Law* and Freud's attempt to understand the psyche.⁵⁵ In relation to Kafka's text, Derrida for example remarks that it does not point to any actual experience (p. 191) and, similarly, that it opens 'on nothing, before

49 Derrida, *Acts of Literature*, p. 212.

50 For a more detailed consideration of Kant in the legal context, see Derrida's essay 'Privilege' in J. Derrida, *Who's Afraid of Philosophy? Right to Philosophy I*, 2002, pp. 1-66.

51 See also J. Derrida, *Psyche: Inventions of the Other*, Vol I, 2007, p. 128.

52 Freud, *Standard Edition*, Vol. XIII, p. 159. Freud (p. 143, note 1) comments in this respect that 'failure is far more propitious for a moral reaction than satisfaction'.

53 Freud, *Standard Edition*, Vol. XXI, pp. 131-133 appears to acknowledge this to a certain extent when in 'Civilization and its Discontents' he traces the feeling of guilt to 'the eternal struggle between Eros and the instinct of destruction or death', although he still views this relation in oppositional terms.

54 See also J. Derrida, *The Beast & The Sovereign*, 2009, p. 245; and Beardsworth, *Derrida*, p. 31 who notes that for the brothers to have felt remorse, there should already have been in place a prior law which they breached (and not produced) by committing the murder.

55 Derrida, *Acts of Literature*, p. 192 notes that it is well known that Kafka read Freud. His subsequent remark (p. 192) that 'this relation is of little interest to us' and remarks to similar effect (e.g. p. 195) should clearly not be taken at face value, but as itself an attempt at 'deceiving the law'; see note 43, *supra*.

nothing, the object of no possible experience' (p. 212).⁵⁶ Derrida furthermore refers to the abundance of hair – natural as well as artificial – in *Before the Law*, as well as to the nose of the doorman (symbolising the genital zone), itself adorned with hair on the inside. Freud's letters to Wilhelm Fliess, incidentally an ear, nose and throat specialist and Freud's close friend until around 1900, indicates that Freud was concerned not only with repression as origin, but with what he referred to as 'knowledge of the essential thing *lying behind it* [i.e. 'behind' repression]'.⁵⁷ Freud at the time expressed the idea that morality comes from man's uprightness, the distancing that this entails from the sexual zones. This uprightness ensures '[d]elay, difference, ennobling elevation, diversion of the olfactory sense from the sexual stench, repression' (p. 193). This turning away from the sexual zones, Derrida comments –

'is an upward movement. The high (and therefore the great) and the pure, are what repression produces as origin of morality, they are what is better absolutely, they are the origin of value and of the judgment of value.'⁵⁸

This uprightness is clearly a feature of the doorkeeper who speaks to the countryman like a great lord and who becomes taller as the narrative progresses whilst the man from the country becomes smaller (pp. 207-208).⁵⁹ As Derrida furthermore notes, it is at the sight of the doorman with his abundance of hair and his pointed nose that the man from the country decides rather to wait (p. 195). At stake here, as will appear from the discussion that follows, is an anxiety about absolute pleasure/death, alluded to above in relation to 'play'. As we will see, the doorkeeper can in a sense be said to be 'produced' by the countryman so as to defer entering the door of the law.⁶⁰ Although Derrida does not refer explicitly to Freud's *Beyond the Pleasure Principle*,⁶¹ a text which he (Derrida) gave a detailed reading to in 1980, that is, two years before the first presentation of 'Before the Law', we see in the present essay clear allusions to the conservative drives (the doorkeeper) as the guardians of life, protecting the man from the country from his own desire for death (the law of law) until death (p. 211).⁶² As Derrida notes, the doorkeeper does not prevent by force the man from entering, although as noted earlier, he comments on his own powerfulness as well as that of the other doorkeepers. There is also no absolute prohibition from entering, but only a delay.⁶³ One could say that no obstacle or barrier exists; the door simply

56 'Nothing' here refers to nothing that is present, something without essence, without truth, and is not to be simply equated with 'the nothing' in Heidegger, see J. Derrida, 'The Tragic, the Impossible and Democracy: An Interview with Jacques Derrida', 2010 *International Journal for the Semiotics of Law* 23, pp. 246-247.

57 S. Freud, *The Complete Letters of Sigmund Freud to Wilhelm Fliess, 1887-1904*, 1985, p. 279 (the letter in question is that of Nov. 14, 1897); Derrida, *Acts of Literature*, p. 193. See also J. Derrida, *Specters of Marx: The State of Debt, the Work of Mourning, and The New International*, 2006, p. 26 on the possibility of a step beyond repression.

58 Derrida, *Acts of Literature*, p. 194.

59 With reference to Kafka's *Zur Frage der Gesetze* (The Problem of Our Laws), Derrida, *Acts of Literature*, p. 205 notes that the task of keeping this secret is delegated to the nobility, and they 'are nothing but this'. It would be a great risk for the people to rid themselves of the nobility.

60 It needs to be noted at this point that according to Freud, *Standard Edition*, Vol. V, p. 346; and XV, pp. 158, 159, a door in dreams, together with windows and gates, stands for openings or orifices in the body. In J. Derrida, *Resistances of Psychoanalysis*, 1998, p. 79, Freud is notably referred to, with reference to Foucault, as a doorkeeper.

61 There is nevertheless a reference to the *fort/da* game of Ernst which Freud recounts and which Derrida analyses in 'To Speculate – On Freud'; see Derrida, *Acts of Literature*, p. 208. The accompanying description clearly corresponds with Derrida's analysis of Freud's death drive in that text: 'Guardian after guardian. This differential topology [*topique différentielle*] adjourns, guardian after guardian, within the polarity of high and low, far and near (*fort/da*), now and later. The same topology without its own place, the same atopy [*atopique*], the same madness defers the law [*la loi*] as the nothing that forbids itself and the neuter that annuls oppositions. This atopy annuls that which takes place, the event itself.'

62 The link between death and the law is made inter alia with reference to Saint Paul; see Derrida, *Acts of Literature*, p. 219.

63 Derrida, *Acts of Literature*, p. 202, notes that with this delay, time appears, in the story of course, but also in a more general sense.

marks a limit (p. 203). The man from the country thus effectively prohibits himself from entering (p. 203); as Derrida puts it:

‘He must force himself, give himself an order, not to obey the law [*la loi*] but rather to *not gain access* to the law [*la loi*], which in fact tells him or lets him know: do not come to me. I order you not to come yet to me. It is there and in this that I am law [*la loi*] and that you will accede to my demand, without gaining access to me.’⁶⁴

Derrida (p. 204) refers in this respect to the law of law as ‘itself prohibited, a prohibited place’ (p. 203). The law thus forbids itself, and in that sense contradicts itself and places the man from the country in this contradiction or double bind. One cannot enter into a relation (of respect)⁶⁵ with the law itself; one cannot reach it directly, but only by way of its examples,⁶⁶ its representatives, its guardians. These function at the same time as interrupters (pp. 203-204). Of the law itself, how it presents itself and whence it comes, one must remain ignorant, without knowledge (p. 204). Read with Derrida’s *The Post Card* and Freud’s *Beyond the Pleasure Principle*, the doorkeeper functions as the guardian of life, but also as a satellite of death, as an indifferent zone of *différance*, seeking to ensure that the self dies its own proper death; that the countryman does not go directly towards death.⁶⁷ A desire for the proper dominates therefore, in spite of the fact that the guardians, who seek to assure this, ultimately serve death, via a detour, a delay. The later doorkeepers, that is, the satellites closest to the desire for death/absolute pleasure are, as the first doorkeeper remarks, even more prohibitive and have a greater power of deferral than the first one. This interminable *différance*, Derrida notes, lasts ‘up to the end of (the) man’.⁶⁸ Clearly alluding to, but in an effort to undermine the originary nature of the Oedipus complex (as well as of the prohibition of incest) Derrida points out that what is delayed is not some experience,

64 Derrida, *Acts of Literature*, p. 203 (footnote omitted).

65 Derrida clearly alludes here to Kant’s doctrine of practical reason which is discussed briefly as well as referred to elsewhere in this text (*Acts of Literature*, pp. 190-191, 199, 209, 210). With reference to an earlier seminar, Derrida attempts a reading of pure reason which, as he notes, links it with ‘an unconscious fantastic’ (p. 199). This is tied to the strange relation Kant posits between the moral good on the one hand and the example, the symbol and the type. In respect of the example, Derrida notes that ‘although [respect is] never addressed to things, [it] is nevertheless aimed at persons only insofar as they offer an *example* of the moral law: this respect is due only to the moral law, which never shows itself but is the only cause of that respect’. The reading is furthermore tied to the second formulation of the categorical imperative (‘Act as if the maxim of your action were by your will to turn into a universal law of nature’, emphasis added) which as Derrida (p. 190) notes, ‘almost introduces narrativity and fiction into the very core of legal thought’. The notion of respect is raised a number of times (e.g. p. 200: ‘standing before the law, the doorkeeper enforces respect for it’).

66 The allusion here is again to Kant.

67 J. Derrida, *The Post Card: From Socrates to Freud and Beyond*, 1987, pp. 82, 351, 360-362; Freud, *Standard Edition*, Vol. XVIII, p. 39. The sexual seductiveness of the law of law is also analysed by Derrida, *Acts of Literature*, pp. 247-248 in ‘The Law of Genre’ with reference to Blanchot’s *The Madness of the Day*.

68 Derrida, *Acts of Literature*, p. 204. G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 1998, pp. 49-67; and *Potentialities: Collected Essays in Philosophy*, 1999, pp. 169-171 reads Kafka’s *Before the Law* as portraying the idea of the sovereign exception – the being in force of the law without significance – which has become the rule in modernity. According to Agamben, law in this way becomes indistinguishable from (bare) life. He sees the man from the country as having ultimately succeeded in his aim – of having the door closed, that is, interrupting the law’s being in force without significance. This will allow him (as a messianic figure) to enter, as he can do so only after the law’s being in force without significance has come to an end. Agamben thus sees in the man from the country (as in *homo sacer*) whose life coincides with death, a figure of silent resistance. There are of course a number of differences, but also clear overlaps between this reading and that of Derrida, especially when one compares it with a text such as ‘Plato’s Pharmacy’ and the figure of the *pharmakos* (J. Derrida, *Dissemination*, 2004, pp. 130-135). A more detailed analysis of Agamben’s reading cannot be undertaken here. A comment is however required in relation to Agamben’s remark that Derrida/deconstruction simply exposes this being in force of law without significance and thereby remains inside nihilism (Agamben, *Homo Sacer*, pp. 54, 59, 60; *Potentialities*, pp. 170-171). As should be clear from the present article, this accusation is based on a fundamental misunderstanding of Derrida’s work, specifically in relation to the ultra-ethical at stake there. For a response from Derrida to Agamben’s analysis, although not specifically in relation to this reading of *Before the Law*, see J. Derrida, *The Beast and the Sovereign*, 2009, pp. 315-334.

enjoyment or supreme good, and neither is it the possession or penetration of something or someone:

‘What is deferred forever till death is entry into the law itself [*la loi elle-même*], which is nothing other than that which dictates the delay. The law [*La loi*] prohibits by interfering with and deferring the “ference” [*“férance”*], the reference, the rapport, the relation. What *must not* and cannot be approached is the origin of *différance*: it must not be presented or represented and above all not penetrated. That is the law of the law [*Voilà la loi de la loi*] (...). It is neither natural nor institutional (...).’⁶⁹

According to Derrida, the secret that is guarded is of nothing present or presentable,⁷⁰ and the doorkeeper thus guards nothing (pp. 205, 206).⁷¹ He compares this situation with Hegel’s account of the story of Pompey (106BC-48BC) who enters the innermost part of the tabernacle, finding there however no image of any being as he expected, but only an empty space.⁷² Hegel comments that Pompey ‘concluded from this that the genuine secret was itself entirely extraneous to them, the Jews; it was unseen and unfelt (*ungesehen und ungefühlt*)’ (p. 208). The relation of the secret with sexuality is further explored by Derrida in his analysis of the phrase ‘*ante portas*’ (before the gates), which refers to the place of premature ejaculation and which could also be said to be alluded to in the title of Kafka’s text.⁷³ Derrida however seeks to loosen this expression somewhat from its common meaning and Freudian analysis. At stake here, he notes, is a non-penetration (and non-insemination), whether this is because of premature ejaculation or non-ejaculation. The result would be the same: ‘The tabernacle remains empty and dissemination fatal. Relation to the law remains interrupted, a without-relation’ (p. 209). The doorkeeper, Derrida furthermore notes, is not *ante portas*, but *ante portam*: he guards *the* door, insisting on the uniqueness and singularity of this door (p. 210). Derrida views this as one of Kant’s most acute insights: that the law is always an idiom, and not a universal generality; it is meant for you alone. Nonetheless one cannot succeed in entering it. Like the law of law, the text ‘guards itself, maintains itself (...) speaking only of itself, that is to say, of its non-identity with itself’ (p. 211). The text is ultimately ungraspable, incomprehensible, or impregnable. It is intangible, not only because we cannot, but because we also have no right to touch it (p. 212).⁷⁴

69 Derrida, *Acts of Literature*, p. 205. The Oedipus complex is repositioned especially in Derrida, *Post Card*, pp. 340-341 as only one of the possible, and more precisely, one of the most restrictive effects of *différance*. See also J. Derrida & A. Dufourmantelle, *Of Hospitality*, 2000, pp. 93-121 where Derrida gives a reading to Oedipus at Colonus which ties in closely with the analysis here of Kafka’s *Before the Law*.

70 In his essay on Nelson Mandela, Derrida refers similarly to ‘the law of laws’ and a ‘law beyond legality’ – a law which has not as yet presented itself – in the name of which Mandela challenges the legal system; see J. Derrida, ‘The Laws of Reflection: Nelson Mandela, in admiration’, in J. Derrida & M. Tlili (eds.), *For Nelson Mandela*, 1987, pp. 29, 34; and see also R. Gasché, *Inventions of Difference: on Jacques Derrida*, 1994, pp. 17-20; S. Bischof, *Gerechtigkeit – Verantwortung – Gastfreundschaft: Ethik-Ansätze nach Jacques Derrida*, 2004, pp. 208-209; L. Lawlor, ‘From the Trace to the Law: Derridean Politics’, in P. Legrand (ed.), *Derrida and Law*, 2009, pp. 9-14; R. Bernasconi ‘Politics beyond Humanism: Mandela and the Struggle against Apartheid’, in G.B. Madison (ed.), *Working through Derrida*, 1993, pp. 106-108.

71 The notion of the secret ties in with the question of inheritance referred to above. Derrida, *Archive Fever*, pp. 10-11, 35 suggests that the desire for death does not itself leave an archive – it is archive destroying – but it transits through an archive, a (ciphered) transgenerational memory or archive; see also Derrida, *Post Card*, p. 353; Derrida & Roudinesco, *For What Tomorrow*, pp. 3-6. At stake is therefore an ‘inheritance’ that precedes the biology/culture, body/psyche distinction.

72 See also Derrida *Glas*, pp. 49a-50a. Note further that according to Hegel, as Derrida, *Glas*, p. 49a, notes, ‘space is death’.

73 Derrida also repeats this move in ‘concluding’ his text prematurely a number of times, see e.g. *Acts of Literature*, pp. 209, 212, the text ending only on page 220.

74 On the untouchability of the literary text, see further J. Derrida, *Paper Machine*, 2005, pp. 141-142. The link between untouchability and sexuality is made in *Acts of Literature*, pp. 194-195. See further Derrida, *Post Card*, pp. 341-345 on the relation between ‘literary fiction’ and the (demonic) death drive.

6. Originary guilt and parricide

At this point we are in a position to appreciate the similarities between Derrida's reading of Freud's originary myth and Kafka's *Before the Law*, as well as to see how his analysis ties in with the notion of justice. In the latter respect, it will for now perhaps be sufficient to point out that in 'Force of Law', the notion of justice takes the place of what is here referred to as 'the law of law' (*la loi de la loi*), and is furthermore distinguished from *le droit*. As argued elsewhere, the notion of justice in 'Force of Law' needs similarly to be understood in close relation to Freud's thinking.⁷⁵ The same applies to the discussion of justice in *Specters of Marx*.⁷⁶ The question of guilt, which clearly plays a role in all the texts referred to above, in a sense links all these texts.⁷⁷ Derrida elaborates on the notion of 'originary guilt' in a number of texts, specifically with reference to Nietzsche, Levinas, Blanchot, Freud and Heidegger.⁷⁸ Here one finds, for example, the idea expressed that a rigorous distinction can never be drawn between death and murder.⁷⁹ The survivors, that is, all those living and delaying entering the door of the law, are always already guilty and required to ask forgiveness for their being there which inevitably involves murder.⁸⁰ This originary guilt does not therefore wait for the commission of any particular crime, and gives rise to an infinite responsibility, a duty beyond all debt.⁸¹ In the essay 'To Forgive', Derrida gives expression to this responsibility and duty by tying together the notions of originary guilt, the gift, forgiveness and hospitality, by noting that 'I always have to be forgiven, to ask forgiveness for not giving, for never giving enough, for never offering or welcoming enough. One is always guilty, one must always be forgiven the gift.'⁸² At stake in this notion of originary guilt is thus something arche-ethical, ultra-ethical, or as Derrida also puts it with reference to Heidegger and Nietzsche, 'a pre-ethical, pre-moral, pre-judicial conscience'.⁸³ Originary guilt could, in the present context, be said to lie in the breach of the law itself, the law before the law,

75 See J. de Ville, 'Desire and Language in Derrida's "Force of Law"', 2009 *Archiv für Rechts- und Sozialphilosophie* 95, pp. 449-473.

76 See J. de Ville, 'Rethinking the notion of a "higher law": Heidegger and Derrida on the Anaximander fragment', 2009 *Law and Critique* 20, pp. 59-78.

77 In 'Préjugés' Derrida explicitly makes the link between being before the law and originary guilt; see J. Derrida et al., *La Faculté de Jurer*, 1985, p. 95.

78 See specifically M. Heidegger, *Being and Time*, 1962, p. 332, remarking as follows on the origin of morality: 'This essential Being-guilty is, equiprimordially, the existential condition for the possibility of the 'morally' good and for that of the 'morally' evil – that is, for morality in general and for the possible forms which this may take factually. The primordial "Being-guilty" cannot be defined by morality, since morality already presupposes it for itself.' Derrida, *Post Card*, p. 264 note 10 reads this as a capacity to be responsible before any debt, fault or law in the ordinary sense, as well as beyond subjectivity, knowledge and consciousness.

79 See further Derrida, *Post Card*, p. 363.

80 Derrida, *Acts of Religion*, pp. 383-385. In a number of texts, Derrida derives from this a responsibility not only towards those presently alive, but also towards those who are dead and still to be born; see Derrida, *Specters of Marx*, p. xix; *Rogues*, pp. 54-55. In Derrida, *Beast and Sovereign*, p. 110, this responsibility is specifically linked to the guilt/shame of the sons in killing the primal father: '[I]t is not certain that even in the originary history or fiction of the murder of the primal father according to which the brother-sons subject themselves to the law because, says Freud, the shame of their crime compels them to do so, it is not certain that this shame does not signify, always already, in its possibility, the bond of obligation or debt with respect to the dead.'

81 J. Derrida, *The Gift of Death* 2d. ed. & *Literature in Secret*, 2008, pp. 52-53; *The Work of Mourning*, 2001, pp. 204-205; *Adieu: to Emmanuel Levinas*, p. 6.

82 J. Derrida, 'To Forgive: The Unforgivable and the Imprescriptible', in J.D. Caputo et al. (eds.), *Questioning God*, 2001, p. 22.

83 J. Derrida, *Negotiations: Interventions and Interviews 1971-2001*, 2001, p. 223.

a breach which has always already occurred.⁸⁴ Whereas Kafka's text fairly easily lends itself to such a notion of originary guilt, as we saw, Freud's text calls for a somewhat greater effort.⁸⁵

The above analysis is also important for understanding the notions of friendship and the democracy to come in their relation with sovereignty in Derrida's thinking. From Derrida's reading it appears that in Freud's myth nothing really happens, as the father, after his murder, becomes even more powerful than before. In telling the myth, Freud furthermore continues the tradition of privileging the friendship between rival brothers in the construction of democratic equality, or, as Derrida puts it in *Rogues*, 'the sharing of *kratos* in the *dēmos*'.⁸⁶ Sovereignty, defined by Schmitt as the ability to decide on the exception, thus simply takes a slightly new form in this transition from the violence of one to the violence of the community, as also happens in politics with the transition from monarchy to democracy, both these forms of rule remaining tied to the idea of a sovereign God, a father.⁸⁷ Even modern democracy is thus based on a monarchical principle.⁸⁸ As Derrida however shows in 'Plato's Pharmacy', and as Naas elegantly puts it, the son is 'the father of the father, the father already an effect of the son'.⁸⁹ This is of course because the father is invoked by the son in light of the fear of death.⁹⁰ A more radical parricide (a different kind of revolution) would have to take place than what we find (explicitly) in Freud's myth if we are to displace sovereignty in relation to an originary guilt, instead of viewing guilt as a consequence of the commission of some specific crime.⁹¹ This is indeed what happens in Derrida's reading where Freud's myth is placed in a *mise-en-abyme*, similar to the story of Kafka, without origin or foundation. These texts are effectively (made) unreadable, and in this way deprived of a father who would seek to assure meaning.⁹² They leave us with a concept of law which does not have its origin in the Oedipus complex and which has no essence, but which is instead to be understood as a repetitive search for the proper as a counter-reaction to the 'desire' for death/absolute pleasure, as a 'stricture' of this 'desire' for the perfect gift.

84 See also the first part of G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, 2003, pp. 85-100 where Derrida analyses the reaction to the events of September 11, 2001, in terms of an originary trauma. This ties in closely with Freud's analysis of anxiety. In the 'New Introductory Lectures', Freud, *Standard Edition*, Vol. XXII, p. 59 for example asks, perhaps rhetorically: 'How would it be if these insane people were right, if in each of us there is present in his ego an agency like this which observes and threatens to punish, and which in them has merely become sharply divided from their ego and mistakenly displaced into external reality'. Derrida, *Acts of Literature*, pp. 209-210 also seems to allude to a kind of originary anxiety in his discussion of *ante portas* (see above).

85 Derrida, *Acts of Literature*, p. 218, alludes to his own originary guilt with reference to his experience in Prague, similar to that of K in *The Trial*. The notion of originary guilt raises interesting questions about criminal law. If 'criminals' commit crimes in acting upon this originary guilt, as Freud and Derrida seem to suggest, the attempt to make 'guilt' part of a system of exchange (in terms of which criminals are caught and punished) raises serious questions about the legitimacy of the criminal justice system as a whole; see Derrida & Roudinesco, *For What Tomorrow*, pp. 176-180. This system could be said to inherently not be able to address 'crime' on the level where things actually 'happen'.

86 Derrida, *Rogues*, pp. 16-17.

87 C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 1985, p. 5; Derrida & Roudinesco, *For What Tomorrow*, pp. 91-92.

88 J. Derrida, *Without Alibi*, 2002, p. 260.

89 M. Naas, *Taking on the Tradition: Jacques Derrida and the Legacies of Deconstruction*, 2003, pp. 12-13; see similarly Derrida, *Glas*, p. 56a.

90 Derrida, *Dissemination*, pp. 123-124.

91 See Derrida & Roudinesco, *For What Tomorrow*, p. 83.

92 J. Derrida, *Sovereignities in Question: the Poetics of Paul Celan*, 2005, pp. 146-147; Derrida, *Dissemination*, pp. 82, 126.