

Totem, Taboo and the Concept of Law:  
Myth in Hart and Freud  
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A startling aspect of H.L.A. Hart's *The Concept of Law*<sup>1</sup> is just how profoundly it rests on imaginary anthropology. Hart suggests that the development of "secondary" rules of change, recognition, and adjudication to supplement "primary," or substantive, rules of law is the process by which primitive societies evolve into modern ones.

In fact, like the writers of *Genesis*, Hart actually modulates between two unconnected creation stories. According to one, the rule of law is created after the death of a conqueror, Rex I, to insure the succession of his idiot son, Rex II. In a second story, primitive society loses its direct relationship with primary laws and develops the secondary rules. Hart's founding stories are myths in two senses of the word. First these stories are literally false. They are not based on any serious anthropological study of archaic or primitive societies. Rather, he posits a hypothetical pre-modern society in order to define modernity negatively. In other words, primitive society is nothing but the lack of those traits Hart believes are characteristic of civilization. What makes a primitive society primitive is the lack of some precious token of modernity—in this case, the rule of law and its three secondary rules.

Second, Hart's myth, like all myths, articulates a truth beyond *literal* truth. In his myth, modernity is to be desired because it supplies that which primitive society supposedly lacks. The status quo, despite its flaws, is justified because it gives us the gift of the rule of law.

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<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* (Peter Cane, Tony Honore & Jane Stapleton eds., Oxford Univ. Press 2d. ed. 1994) (1961) [hereinafter HART, *CONCEPT OF LAW*].

Peter Fitzpatrick argues that Hart's mythography fits squarely within classical liberal political philosophy and jurisprudence that relies on a pseudo-scientific evolutionary theory purporting to explain how simplistic, archaic cultures were overtaken by increasingly more complex, sophisticated and, most importantly, superior forms.<sup>2</sup> In this paper, I wish to point out another surprising antecedent to Hart. In Hart's myth of Rex, he envisions a time when a primordial despot, Rex, reigned over a populace without rules. The secondary rules of a developed legal system were only written after Rex's death to create and justify rules of succession. *This* myth bears an uncanny resemblance to a myth told by a theorist who sought to undermine the vision of the rational, autonomous individual that underlies the entire Enlightenment project. This is Sigmund Freud whose myth of the creation of law and culture is set forth in *Totem and Taboo*.<sup>3</sup> Freud, like Hart, envisions a primordial despot who reigned over a primal horde without laws. Laws were only written after his death to explain and justify the rules of succession.

Hart's myth of primitive society is quite a separate account of the origins of civilization. In the myth of primitive society, there is no king. Rather, he posits a society that evolves from primitivism to civilization by creating a priesthood that mediates between the people and the law. This myth also parallels another of Freud's speculative enterprises, *Moses and Monotheism*.<sup>4</sup> In that work, Freud imagines that the ancient Hebrews murdered their law giver—the Egyptian Moses—after which the Levites mediated

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<sup>2</sup> Peter Fitzpatrick goes so far as to insist that Hart's dependence on this anthropology reveals that his concept of law is not law as rules, as Hart would have it, but law as myth. PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 183-210 (1982). Fitzpatrick places Hart within the Enlightenment tradition that stretches from at least Hobbes in the seventeenth century, Locke in the eighteenth, Marx in the nineteenth, and Roberto Unger in the twentieth, to name just a few. It is Fitzpatrick's theory that all major liberal political philosophies and jurisprudences are, despite their differences, united in their reliance on a pseudo-scientific evolutionary theory purporting to explain how simplistic archaic cultures were overtaken by increasingly more complex, sophisticated and, most importantly, superior forms. This is the founding myth of modern Western culture. According to the myth, the dividing line between primitivism and culture is that moment when law supersedes habit and custom.

<sup>3</sup> SIGMUND FREUD, *TOTEM & TABOO* (James Strachey ed. & trans., 1950) [hereinafter FREUD, T & T].

<sup>4</sup> SIGMUND FREUD, *MOSES & MONOTHEISM* (Katherine Jones trans., 1967) [hereinafter FREUD, M & M].

between the people and law. In both stories, societies become dependent on what Hart calls “officials” because the people lost direct contact with the law. The officials, in contrast, can know the law through the application of esoteric, secondary rules.

What both sets of myths have in common is that they see the creation of law as the loss of immediacy. First, the people have a direct relationship with Rex or Father Enjoyment that is replaced with a more complex relationship with law. Second, the people lose their direct relationship to law and must rely on officials. For both Hart and Freud civilization is the replacement of immediacy with mediation.

Although both Freud and Hart readily admit that their accounts are schematic and overly-simplified,<sup>5</sup> they both suggest that something like these tales of transition from a primitive direct rule by a tyrant to a cultural rule of law *must have* happened as an historical matter. Although both Hart and Freud present their theories as descriptive, there is, in fact, a strong prescriptive element. Their myths serve to *rationalize* why law and culture must be the way Hart and Freud think they are.

Jacques Lacan and Slavoj Žižek, Freud’s most original successors, insist on the mythic nature of *Totem and Taboo* and *Moses and Monotheism*.<sup>6</sup> They recognize that neither could conceivably have been true as an historical matter. Nevertheless, we, both as individuals and as a society, seem compelled to continually retell variations on them.<sup>7</sup> Indeed, we do so not despite, but *just because*, of their literal falsity. This suggests that these fairy tales have something “true” to say—not about the

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<sup>5</sup> See *infra* note 10 and accompanying text; see also *infra* notes 79, 84.

<sup>6</sup> See, e.g., Jacques Lacan, *Introduction to the Names-of-the-Father Seminar*, in JACQUES LACAN, *TELEVISION AND A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT* 81, 87 (Denis Hollier, Rosalind Krauss, Annette Michelson & Jeffrey Mehlman trans., Joan Copjec ed., 1990) [hereinafter Lacan, *Names-of-the-Father*].

<sup>7</sup> Lacan insists “[t]he important feature of *Totem and Taboo* is that it is a myth, and, as has been said, perhaps the only myth that the modern age was capable of. And Freud created it.” JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959-1960*, 176 (Jacques-Alain Miller ed., Dennis Porter trans., 1986) [hereinafter LACAN, *SEMINAR VII*]. He says with respect to *Totem and Taboo*. “What’s a myth? Don’t all answer at once. It’s a manifest content.” JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK XVII: THE OTHER SIDE OF PSYCHOANALYSIS*, 113 (Jacques-Alain Miller ed., Russell Grigg trans., 2007) [hereinafter LACAN, *SEMINAR XVII*].

origin of law, but about the fraught relationship between the subject and law.<sup>8</sup>

Freud and Hart's origin myths share a fantasy of a world of direct, immediate relationships prior to the introduction of law. This reflects the fundamental human desire for, and fear of, such relationships. The creation of law is, consequently, seen as a necessary but not unambiguously good development. It is, on one level, felt as a Fall—an imagined *loss* of immediacy.

Lacanian psychoanalysis, in contrast, argues that immediacy is impossible: All human relationships are necessarily mediated by the “symbolic” order of intersubjectivity that includes language, sexual identity, and, most importantly for our analysis, law.<sup>9</sup> Indeed, subjectivity itself comes into being only through the symbolic. Consequently, Hart and Freud's myth of immediate relationships is, therefore, *imaginary*, in the strict psychoanalytic sense of the term.

This paper proceeds as follows. First, I recount Hart's myth of Rex as he presents it in *The Concept of Law*. I then visit Freud's *Totem and Taboo*, both in its original form and as reinterpreted by Lacan and Žižek, and show the striking similarities. I then consider both why Hart feels that his tale helps to elucidate the concept of law, and why Lacan believes that we are drawn to tell such stories about the birth of law. Finally, I will review Hart's other myth—the myth of a primitive society governed by unruly recognition of the primary rules of behavior—and how this separate myth relates to the myth of *Moses and Monotheism*.

## I. ARMA VIRUMQUE CANO

To begin, I sing of arms and a man: the saga of Rex.

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<sup>8</sup> Lacan notes, in particular, that “Freud places at the center of his teaching the myth of the Father . . .” Lacan, *Names-of-the-Father*, *supra* note 6, at 87. Consequently, Lacan partially defends Freud from the criticism that Freud stubbornly clung to his imaginary anthropology despite the fact that science had moved beyond the sources upon which he claimed to rely. “Freud is the living demonstration of the extent to which whoever is functioning at the level of the pursuit of truth can completely make do without the advice of the specialist.” Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>9</sup> JEANNE L. SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* 78-81, 89-90 (2004).

*A. The Beginning*

Once upon a time, Rex ruled a place that “is probably far too simple ever to have existed anywhere.”<sup>10</sup> Rex has reigned “for a very long time.”<sup>11</sup> He controls people through threats, getting them to do things they wouldn’t otherwise do, or to refrain from doing things they’d like to do.<sup>12</sup> Trouble brewed in the early years of the reign, but “things have long since settled down.”<sup>13</sup>

Rex could rely upon his people to habitually obey him. This is not habit, however, in the sense that Englishmen have the habit of driving on the left side of the road instead of the right, or that an individual may have the habit of “reading a newspaper at breakfast.”<sup>14</sup> This type of quotidian habit is non-reflexive.<sup>15</sup> Because obedience may “run counter to strong inclinations . . . our eventual compliance with them, even though regular, has not the unreflective, effortless, engrained character of a habit.”<sup>16</sup> Nevertheless, the behavior of Rex’s subjects has other elements of habit. “To say of a person that he has a habit . . . entails that he has for some considerable time past done [something] and that he is likely to repeat” it.<sup>17</sup> And so, “it will be true . . . at any time after the initial period of trouble [most of the people in our imagined community] have generally obeyed the orders of Rex and are likely to continue to do so.”<sup>18</sup>

Most importantly, “the habit of obedience is a *personal* relationship between each subject and Rex (emphasis added).”<sup>19</sup> Rex is *constituted* sovereign by the personal acts of obedience by each individual member of the population.<sup>20</sup> This is a completely unmediated, direct relationship between master and man. There are “no rules, and so no rights or titles.”<sup>21</sup> But it is not merely that there are no officials to stand between Rex and the subject to

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<sup>10</sup> HART, CONCEPT OF LAW, *supra* note 1, at 53.

<sup>11</sup> *Id.* at 52.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> HART, CONCEPT OF LAW, *supra* note 1, at 52.

<sup>18</sup> *Id.* Presumably, this account is intended to replicate what society would look like if John Austin’s vision of positive law were correct.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 54.

interpret and enforce Rex's orders. There is also no *society*—no intersubjective relationships among Rex's subjects. Life under Rex lacks what psychoanalysis calls a “symbolic order.”<sup>22</sup>

Each of his subjects obeys Rex “for his part.”<sup>23</sup> If many or all of Rex's subjects obey him, it is not because they are acting in concert. Rather, their behavior is contingently “convergent” in the sense that they all just happen to engage in the same activity of obeying Rex.<sup>24</sup> Consequently, “no one in the community need have or express any views as to whether his own or others' obedience to Rex is ‘right, proper, or legitimately demanded.’”<sup>25</sup> In other words, Rex rules as a matter of might, but not as a matter of right. His subjects are not such because they are members of a society or citizens of some country. Rather, they are those individuals who happen to be subjected to his will—there is no *Rexland*, only Rex and his followers.

In this sense, Rex's subjects lack the intersubjectivity constitutive of a developed legal system that Hart rather confusingly calls the “internal point of view.”<sup>26</sup> If this term is supposed to represent the practical power of law over the will of the individual, Hart's comments certainly violate basic notions of free will, and given that “officials” are guaranteed to have it, this cannot be what Hart means by the term. A better reading of Hart (perhaps against his intent) is that the internal point of view refers less to the internal psychological state of an individual,<sup>27</sup> but to

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<sup>22</sup> JEANNE LORRAINE SCHROEDER, *THE FOUR LACANIAN DISCOURSES OR TURNING LAW INSIDE-OUT* 8-11 (2008) [hereinafter, SCHROEDER, *THE FOUR LACANIAN DISCOURSES*].

<sup>23</sup> HART, *CONCEPT OF LAW*, *supra* note 1, at 52.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 53.

<sup>26</sup> This is “the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour.” *Id.* at 98.

<sup>27</sup> That is, the internal aspect should not be confused with the “mere matters of ‘feelings.’” *Id.* at 57. Of course, people with the internal perspective also experience a psychological compulsion to obey rules. “But such feelings are neither necessary nor sufficient for the existence of ‘binding’ rules.” *Id.*

Hart compares the internal point of view with game playing. To play a game is to accept the rules of the game. One legitimately criticizes someone who flouts the rules. *Id.* at 56-57. Note, this is not necessarily a moral reproach. No one thinks that one who follows the rules of chess is saintly and one who doesn't is sinful. However, if one decides to play chess, one implicitly agrees to play by the rules. In the same way, when one agrees, or acquiesces, to belong to a social order, one expressly or implicitly agrees to live by its rules.

the individual's sense of being part of or internal to a group or society—that is, of having mediated, intersubjective relations.

A person with an internal point of view does not obey *merely* because he knows he will be punished if he disobeys. Rather, he believes that disobedience to the rules of a group is a *reason* to punish a member of that group because groups are constituted by their rules. To be member of a group is to agree to follow its rules.<sup>28</sup>

[I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists the regular uniform behaviour which an observer could record.<sup>29</sup>

It is precisely this mediated relationship to rules that Rex's subjects lack.

Hart admits that this situation has “some of the important marks of a society governed by law, at least during the lifetime of Rex” in that it has a “certain unity.”<sup>30</sup> But once again, this is a mere accidental, contingent “unity . . . constituted by the fact that its members obey the same person, even though they may have no views as to the rightness of doing so.”<sup>31</sup> In Hart's terminology, this society does not yet have rules (i.e., instructions that are generally applicable to all members of society), because each individual just has an immediate relationship of habitually obeying Rex. “[F]or the group to have a *habit* it is enough that their behavior in fact converges. Deviation from the regular course need not be a matter for any form of criticism.”<sup>32</sup>

### *B. Rex II*

Tragedy strikes. Rex dies. His son, who wants to be called Rex II, “starts to issue general orders.”<sup>33</sup> The questions then

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<sup>28</sup> “[W]here there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it.” HART, CONCEPT OF LAW, *supra* note 1, at 55.

<sup>29</sup> *Id.* at 56.

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.* at 53.

<sup>32</sup> *Id.* at 55.

<sup>33</sup> *Id.* at 53.

become, will the people obey Rex II and, if so, why?

Hart suggests that both modern law and the internal perspective toward law (i.e., the symbolic order) only come into being upon Rex's death. Rex II's reign will not consist of an immediate personal relationship with each of his subjects. If he rules *as a successor to Rex* then his authority will not be a fact. It will be a *right*—his relationship to his people will not be personal, but mediated by law. This is why he reigns in his father's name: he calls himself Rex II. Rex only retroactively becomes Rex I, when he is remembered as the founder of a dynasty that, in fact, did not exist when he was alive.<sup>34</sup>

Hart emphasizes that just because the people obeyed the individual named Rex does not guarantee that they will obey the individual who styles himself Rex II.<sup>35</sup> When Rex II gives his first order, we cannot yet say that this was the act of a sovereign.<sup>36</sup> “We shall have to wait and see whether such obedience will be accorded to Rex II . . . .”<sup>37</sup> What makes the sovereign *sovereign* is the fact that he is actually obeyed. In Hart's formulation, sovereignty seems to be a brute fact—the effective *power* to cause others to obey. Kingship, in contrast, is a legal status—the recognized *authority* to make law. For the moment, between the death of Rex I and Rex II's first tremulous order, “there will be an interregnum in which no law can be made.”<sup>38</sup> Rex I did make law, but it is not yet clear whether Rex II's word will be law.

Interregnum is a bad thing. Even absolute monarchies need succession rules that makes Rex II king before he announces his first command. If this were the case, then Rex II would have “the *right* to make law on his father's death, and when his first orders are issued we may have good reason for saying that they are already law . . . .”<sup>39</sup> Suppose a law of succession exists. Upon Rex's death, Rex II is recognized as king. He issues his first order. But before he can see whether the people obey or not, Rex

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<sup>34</sup> Hart does not refer to Rex as Rex I until after he announces Rex's death. *Id.* at 53 Of course, this is correct. We cannot know whether or not he is the founder of a dynasty until his son is not merely obeyed, but is recognized as Rex II, Rex's successor.

<sup>35</sup> HART, CONCEPT OF LAW, *supra* note 1, at 53.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 54.



II dies of apoplexy. Without the fact of obedience, “his orders may be law” because “he may have had the *right* to make law.”<sup>40</sup>

Hart asserts that “mere habits of obedience to orders given by [Rex] cannot confer on [Rex II] any *right* to succeed . . . and give orders in his place.”<sup>41</sup> One might ask oneself, why can’t Rex say during his life, “Obey my son when I die?” He cannot precisely because the relationship between Rex and each of his subjects is personal and immediate. This immediate relationship is broken when Rex dies.

Hart’s point seems to be not that the people *will not* obey Rex II, but rather that, if they decide to do so *because Rex I told them to*, then the people’s relationship to Rex II is fundamentally different than their relationship to Rex I. This difference is the birth of law. Hart’s project is to explain the nature of this difference.

To reiterate, each individual’s relationship with Rex is personal and immediate. However, if a subject were to obey Rex II *because Rex told him to do so*, the subject’s relationship with Rex II would not be immediate, but mediated by Rex’s word.

This transforms the situation which we first depicted in terms of mere habits of obedience to Rex; for where such a rule is accepted Rex will not only in fact specify what is to be done but will have the *right* to do this; and not only will there be general obedience to his orders, but it will be generally accepted that it is *right* to obey him.<sup>42</sup>

This dynamic is illustrated in the scene in Shakespeare’s *Richard II* when Henry Bolingbroke demands that Richard “voluntarily” hand over the crown. Richard answers:

[A]y, no; no, ay; for must nothing be;  
Therefore no ‘no,’ for I resign to thee.  
Now mark me, how I will undo myself;  
I give this heavy weight from off my head  
And this unwieldy sceptre from my hand.<sup>43</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 54-55.

<sup>42</sup> HART, CONCEPT OF LAW, *supra* note 1, at 58.

<sup>43</sup> WILLIAM SHAKESPEARE, RICHARD II act 4, sc. 1.

Žižek translates this “into a modern idiom, in the mode of the (in) famous and sometimes quite delightful John Dubrand[.]”<sup>44</sup>

No and no, no! OK, if you insist, I’ll do it, but first I would like to draw your attention to a slight problem: your demand involves an untenable pragmatic paradox! You want me to give you the crown and thus make you a legitimate ruler, but the very situation in which you put me reduces me to nobody and nothing and thus deprives me of the very authority that would make the gesture you want me to perform a working performative! So, since you call the shots and hold me in your power, why not, I’ll just give you the damned crown—but I warn you, this act of mine is merely a bodily gesture, not a true performative that would make you a king!<sup>45</sup>

In other words, by saying “Henry is king” out of obedience to Henry, Richard ceases to be king and his words become meaningless. If Richard *still* retained authority after speaking these words, then Henry’s kingship would be dependent on, and subservient to, Richard. Consequently, although Bolingbroke eventually rules England as Henry IV, he is a usurper, not a successor.

For well we know no hand of blood and bone  
Can gripe the sacred handle of our sceptre  
Unless he do profane, steal, or usurp.<sup>46</sup>

At least at the beginning of his reign, Henry is more like Rex I than Rex II. After a period of troubles, Henry established a personal relationship with the nobles who, thereafter, habitually obeyed him. He (or at least his idiot grandson, Henry VI) would come to resemble the uncertain Rex II.

So if the people accept even the most simple rule of succession—such as rule by Rex’s eldest child<sup>47</sup>—their

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<sup>44</sup> SLAVOJ ŽIŽEK, HOW TO READ LACAN 71 (2007).

<sup>45</sup> *Id.*

<sup>46</sup> WILLIAM SHAKESPEARE, RICHARD II act 3, sc. 3.

<sup>47</sup> Of course, patrilineal succession is hardly simple or natural. The identity of fatherhood is, obviously, always fraught which is why psychoanalysis

relationship with Rex II is diverse from that with Rex. Moreover, even their memory of their relationship with Rex is now retroactively changed from an immediate, personal one to a mediated, legal one. The moment the people recognize Rex II as Rex I's *legitimate successor*, Rex I is also recognized as a Rex II's *predecessor*.

Thus we may find it general accepted by the group, during the lifetime of Rex I, that the person whose word is to be obeyed is not limited to the individual Rex I but is that person who . . . is . . . the eldest living descendant in the direct line of a certain ancestor: Rex I is merely the particular person so qualified at a particular time.<sup>48</sup>

That is to say, the subject no longer obeys Rex, whom he feared and perhaps loved. Rather, he obeys the king. The monarch loses his individual status. When he dies, the individual dies. But the herald will not say that the individual died, but will announce, "The king is dead, long live the king!" The role of king continues despite the death of any specific king.

Consequently, Rex is retroactively institutionalized—he was merely the first of many who contingently sits on, no longer *his* throne, but *the* throne. Moreover, his successors rule in his name. Indeed, Hart's example implies the process by which the word "Rex" is transformed from a personal name to a title of king, just as in ancient Rome when the name *Caesar* was transformed from the personal name of the famous Julius, to the title given to the emperor.<sup>49</sup> Kingship is no longer a fact, it is a position or, in Hart's terminology, a "title."<sup>50</sup>

This means that, although Hart introduces Rex as "an absolute

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considers it to be a mediated, symbolic or legal relationship, as opposed to motherhood which, in contrast, is immediate and "real." See *infra* notes 62-63 and accompanying text.

<sup>48</sup> HART, CONCEPT OF LAW, *supra* note 1, at 58.

<sup>49</sup> The Romans tried, only partially successfully, to create a rule of succession based on the symbolic authority of the father. The emperor, as "Augustus" would adopt a successor as his "Caesar," or co-ruler. Upon the Augustus's death, the Caesar was supposed to become an Augustus who would adopt a Caesar, *ad infinitum*. Of course, in practice, succession in the Roman empire was frequently a violent, chaotic "real" affair.

<sup>50</sup> HART, CONCEPT OF LAW, *supra* note 1, at 54.

monarch,”<sup>51</sup> this is technically incorrect because Hart insists that Rex does not have a “title” to rule. Monarch, king, chief, and so forth are all terms given to “legitimate” rulers—persons who a society *recognizes* as having a “right” to his position. The concept of legitimacy (which derives from *legitimates*—to make lawful) only comes about through the adoption of rules of succession—when Rex II is *recognized* as a rex. Each subject did as a matter of fact obey Rex, whether out of fear or love, but did not necessarily care whether his neighbors did. The concept of legitimacy, in contrast, means a subject believes not only that he *should* obey Rex II, *but that his neighbors should do so as well*. Legitimacy entails concepts of right and wrong.

I note in passing here that Hart’s myth of Rex II can be seen as a restatement of the separation thesis that is the heart of his positivist theory. The separation thesis holds that the status of a law *as law* is logically independent from its substantive content.<sup>52</sup> If a law cannot necessarily be identified as such from its content, society must develop another way of distinguishing law from non-law—it must develop rules of recognition.<sup>53</sup> Similarly, the relationship of Rex II (and his fellow successor’s) to the people is not personal. His status as king is logically independent from his personal characteristics. We recognize Rex II as king solely through rules of succession, not through his personal qualities. Rex II, therefore, could be (and, historically, sometimes was) literally an idiot.<sup>54</sup>

Hart’s myth does not explain the exact process by which recognition occurs. The advent of rules simply happens. We need only note that a rule of succession presumes a *social*, inter-subjective, symbolic relationship that Hart calls the internal aspect. Under Rex, each subject personally obeyed Rex on his

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<sup>51</sup> *Id.* at 52.

<sup>52</sup> Although in the *Concept of Law* Hart expressly purports to separate law from morality, I argue elsewhere that the separation is more accurately and strongly stated in terms of a distinction between law’s status and content. SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 34-36 (2008).

<sup>53</sup> *Id.* at 37.

<sup>54</sup> As I argue elsewhere, Hart’s concept of law is what Lacan would call a master’s discourse. In a master’s discourse, one obeys a command not out of fear, as in Astinian positivism, and not because of the personal characteristics of the master or content of the rule, but merely because one decides to recognize the master (or positive law) as such. Indeed, the “master” is functionally an idiot. *Id.* at 12, 38-39.

own part. If others obeyed, that was merely a matter of convergence. But now that Rex is gone, the subjects fear an interregnum. “Such a state of affairs is of course possible and has occasionally been realized in troubled times: but the dangers of discontinuity are obvious and not usually courted.”<sup>55</sup> The only way to avoid the chaos of the interregnum that would prevail until a new strongman is able to take power, by building a personal relationship with each of his subjects, is for individuals to come together and form a society based on a consensus on succession. This allows peace to prevail and law to be made “before any relationship of habitual obedience between him personally and his subjects has had time to establish itself. Indeed such a relationship may never be established.”<sup>56</sup>

To put this more strongly, the *successor* will never be able to establish himself through an immediate personal relationship. To be a *successor* means his relationship with his people is mediated by law. The subjects are no longer obeying an individual; they are following a rule. This is the familiar claim that modernity is the rule of law, and not the rule of men.

For rules to be effective, a sufficient percentage of the subjects must adopt the internal perspective; there must be a working consensus. “[I]f a social rule is to exist some at least must look upon the behavior in question as a general standard to be followed by the group as a whole.”<sup>57</sup>

In this myth, the rules of succession are the first, most primitive mode of mediation. As is well known, Hart will insist that, in a fully developed legal regime, the primary rules of law must be further mediated by the three secondary rules of adjudication, change, and recognition, which are the subject of his second ordinary myth. Ultimately, law will be subjected by yet another level of mediation—the officials who adjudicate, recognize and change the law.

### III. FATHER ENJOYMENT

#### *A. The Name-of-the-Father*

Freud tells the myth of the creation of culture and law in at least two variations, in *Totem and Taboo* and in *Moses and*

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<sup>55</sup> HART, CONCEPT OF LAW, *supra* note 1, at 53.

<sup>56</sup> *Id.* at 54.

<sup>57</sup> *Id.* at 56.

*Monotheism*. In each case, as in Hart's myth, the primal law giver, in fact, does not establish the rule of law. Law *as we know it*—symbolic and mediated—is only retroactively written *in his name* after his death. This is why one of the terms Lacan uses for the symbolic rule of law is “the name of the father.” This also explains why the successor to Rex names himself Rex II (the name of his father) and why Rex can only retroactively become Rex I after his successor takes his name. One needs a successor in order to be a predecessor.

Freud infamously tried to explain the transition from infancy to adulthood through his theory of the Oedipus complex. The child (of either biological sex) initially desires sexual union with the mother and wishes to kill the father, seen as his/her rival who thwarts this desire. Normal sexual maturity is achieved when the child adopts the appropriate mode of sublimating these infantile passions. *Totem and Taboo* is Freud's attempt to retell the individual Oedipal romance on the social level.

According to Freud, once upon a time, humans lived in what Darwin called the primal horde,<sup>58</sup> which was ruled by Father. There was no law, per se. “All that we find there [in Darwin's primal horde] is a violent and jealous father who keeps all the females for himself and drives away his sons as they grow up.”<sup>59</sup>

The primal horde is obviously not merely prehistoric, but pre-social.<sup>60</sup> Moreover, Father is unique and different from modern fathers in that his relationship with each of his people is immediate

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<sup>58</sup> FREUD, T & T, *supra* note 3, at 141.

<sup>59</sup> *Id.* Freud admits that “[t]his earliest state of society has never been an object of observation. The most primitive kind of organization that we actually come across . . . consists of bands of males; these bands are composed of members with equal rights . . .” *Id.* As we shall see, Freud apparently thinks that we have not observed this society because it is almost pre-human. We must interpolate it as a necessary missing link between contemporary primitive men and our simian cousins.

The Darwinian term “horde” is misleading because, at least in English, it is usually reserved for large groups of people, as when we refer to the Mongol horde. Freud reads Darwin as referring to small groups, like extended families or troops of apes.

<sup>60</sup> In Lacan's words: “[t]he primordial father is the father from before the incest taboo, before the appearance of law, of the structures of marriage and kinship, in a word, of culture.” Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>61</sup> Lacan points out that the “murder at the origin of culture . . . [is of a] figure about whom one can say nothing, a fearful and feared as well as dubious

and real.<sup>61</sup> Psychoanalytic theory insists that throughout history “fatherhood” has been a symbolic or legal status as opposed to the fact of motherhood. This is obviously in large part because of the “impossibility” of absolutely proving biological fatherhood before modern science.<sup>62</sup> Indeed, the reason why Lacan calls the symbolic, paternal authority the “Name-of-the-Father” is to distinguish it from the imaginary, mythic, immediate power of the ur-father in *Totem and Taboo*. Freud and Lacan insist that one of the crises of contemporary Western society is precisely that the traditional symbolic conception of fatherhood is being supplanted by a *real* one.<sup>63</sup> This may be good, bad, or indifferent, but it suggests a profound shift in traditional concepts of authority.

Back in the mythic times, when Father spoke, each member of the horde obeyed. There was no rule of recognition. The horde did not recognize Father as a father—a symbolic authority—rather Father was Father. He was unique. That is, his ur-fatherhood was not a role or a title.<sup>64</sup> As Lacan puts it: “Before the Name-of-the-Father there was no father, there were all sorts of other things. If Freud wrote *Totem and Taboo*, it was because he thought he could glimpse what there was, but before the term *father* was instituted in a certain register historically there was certainly no father.”<sup>65</sup> Each member of the horde had an immediate, personal relationship with Father like that which each of Hart’s subjects had to Rex. Father did not give reasons for his orders. The members obeyed out of fear and habit. Father demanded that each of the women have unlimited sex with him,

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figure, an all-powerful, half-animal creature . . .” LACAN, SEMINAR VII, *supra* note 7, at 176.

<sup>62</sup> Consequently, Freud asserts that “[t]he turning from the mother to the father, however, signifies above all a victory of spirituality over the senses—that is to say, a step forward in culture since maternity is proved by the senses whereas paternity is a surmise based on a deduction and a premiss.” FREUD, M & M, *supra* note 4, at 145-46.

<sup>63</sup> This trend has only been exacerbated recently when science has made fatherhood biologically “real” in a way it hadn’t been before. Of course, one might respond, that psychoanalysis should also suggest that this belief that there was ever a time when symbolic paternal authority was not in a state of crisis is itself a fantasy.

<sup>64</sup> As Lacan explains, this is why “Freud should call him a *totem* . . .” Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>65</sup> JACQUES LACAN, THE SEMINAR OF JACQUES LACAN: BOOK III: THE PSYCHOSES 306, 1955-56 (Jacques-Alain Miller ed., Russell Grigg trans., 1993).

and demanded that none of the other men have access to the women of the horde. In Lacanian thought he is sometimes referred to as the obscene Father *Enjoyment*.

Under the reign of Father Enjoyment, only Father enjoyed.<sup>66</sup> He raped the women and children and oppressed the men.<sup>67</sup> “The father is the head of that hoard [sic] whose satisfaction, in accordance with the animal myth, knows no bounds.”<sup>68</sup>

Eventually, for reasons unknown, the sons gained the courage to band together. They rose up and killed Father so that they too could enjoy.<sup>69</sup> But that was not what happened next.

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<sup>66</sup> In *Totem & Taboo*, Freud’s attitude towards homosexuality is, as always, fraught—both admitted and denied. Freud does not even mention the obvious that, if Father Enjoyment was, in fact, the obscene enjoyer of his imagination, he would have raped the men and children as well as the women. That Freud recognized homosexual desire prior to the imposition of societal taboos can be seen in the fact that he recognizes that the sons, who rose up and killed the Father, may have had homosexual relations with each other.

Of course, from a twenty-first century feminist (or Lacanian) perspective, one of the things most striking in his original retelling of the myth is the complete passivity, to the extreme of non-humanity—of the women in this narrative. Indeed, at one moment, Freud suggests that the oppressed sons might have had “polyandrous” relationships with a lone female that they had captured to satisfy their lusts; there is no suggestion that the females may have exercised any input into the choice of mates. This latter point belies Freud’s claim that his description of the primal horde is follows Darwinian science; Darwin insisted on the crucial rule of female choice in evolution.

<sup>67</sup> As Freud recounts:

The strong male was the master and father of the whole horde, unlimited in his power, which he used brutally. All females were his property, the wives and daughters in his own horde as well as perhaps also those stolen from other hordes. The fate of the sons was a hard one; if the excited the father’s jealousy they were killed or castrated or driven out.

FREUD, M & M, *supra* note 4, at 102.

<sup>68</sup> Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>69</sup> One day the brothers who had been driven out came together, killed and devoured their father and so made an end of the patriarchal horde. United, they had the courage to do and succeeded in doing what would have been impossible for them individually. (Some cultural advance, perhaps, command over some new weapon, had given them a sense of superior strength).

FREUD, T & T, *supra* note 3, at 141-142.



With Father dead, they did not know what to do. They felt lost. They felt guilty, because they loved Father as much as they hated and feared him.<sup>70</sup> But how could they be guilty when there was no law to transgress?<sup>71</sup> Without Father to give orders, the sons had to write a law to tell themselves what to do. In the name of the dead father they wrote the law. The first law was “thou shalt not kill Father.” The second was “thou shalt not enjoy women.”

They revoked their deed by forbidding the killing of the totem, the substitute for their father; and they renounced its fruits by resigning their claim to the women who had now been set free. They thus created out of their filial sense of guilt the two fundamental taboos of totemism, which for that very reason inevitably corresponded to the two repressed wishes of the Oedipus complex. Whoever contravened those taboos became guilty of the only two crimes with which primitive society concerned itself.<sup>72</sup>

That is, the horde transformed the fact of Father’s power into a set of rules. These laws explained why they retroactively felt guilty—they killed Father to get access to the women in violation of his orders.<sup>73</sup> Consequently, they would agree that they would

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<sup>70</sup> [W]e need only suppose that the tumultuous mob of brothers were filled with the same contradictory feelings which we can see at work in the ambivalent father-complexes of our children and of our neurotic patients. They hated their father, who presented such a formidable obstacle to their craving for power and their sexual desires; but they loved and admired him too.

*Id.* at 143.

<sup>71</sup> As St. Paul puts it, “the law entered in so that transgression might increase . . .” *Romans* 5:20 (New American Bible).

<sup>72</sup> FREUD, T & T, *supra* note 3, at 143.

<sup>73</sup> As Lacan points out:

All the mystery is in that act. It is designed to hide something, namely, that not only does the murder of the father not open the path to *jouissance* that the presence of the father was supposed to prohibit, but it,

be permitted access to women only in accordance to rules. The band of brothers promised each other that if they obeyed these laws they would be rewarded in the future.<sup>74</sup> Each would be given access to one or more specific woman as a wife with the possibility of becoming not *Father*, but *a father*.<sup>75</sup> This was a law of succession through which one could achieve a legal status.

Although the sons wrote the law in the name of the father, the law was not Father's law. Father did not write laws; he merely gave orders.

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in fact, strengthens the prohibition. The whole problem is there; that's where, in fact as well as in theory, the fault lies. Although the obstacle is removed as a result of the murder, *jouissance* is still prohibited; not only that, but the prohibition is reinforced.

LACAN, SEMINAR XVII, *supra* note 7, at 176.

<sup>74</sup>

But the second rule, the prohibition of incest, has a powerful practical basis as well. Sexual desires do not unite men but divide them. Though the brothers had banded together in order to overcome their father, they were all one another's rivals in regard to the women. . . . The new organization would have collapsed in a struggle of all against all, for none of them was of such overmastering strength as to be able to take on his father's part with success. Thus the brothers had no alternative, if they were to live together, but—not, perhaps, until they had passed through many dangerous crises—to institute the law against incest, by which they all alike renounced the women whom they desired and who had been their chief motive for despatching their father. In this way they rescued the organization which had made them strong . . . .

FREUD, T & T, *supra* note 3, at 144.

<sup>75</sup>

Lacan states:

That is to say that the myth is more like a fable. And then, they all decide, with one mind, that no one will touch the little mummies. Because there is more than one of them, to top it off. They could exchange, since the old father had them all. They could sleep with their brother's mother, specifically, since they are only brothers through their father.

LACAN, SEMINAR XVII, *supra* note 7, at 115.

The dead father became stronger than the living one had been . . . . What had up to then been prevented by his actual existence was thenceforward prohibited by the sons themselves, in accordance with the psychological procedure so familiar to us in psycho-analysis under the name of ‘deferred obedience.’<sup>76</sup>

The real Father Enjoyment who, in fact, ruled and enjoyed, had been replaced by the symbolic role of fatherhood.<sup>77</sup> Just as in Hart’s account where Rex II claimed to be the *legitimate* ruler, in Freud’s story men claimed to be the legitimate fathers of their children. The ur-Father’s relationship with his children was like motherhood—immediate and real. In contrast, until very recently, fatherhood has been only a legal status that cannot be known, but only recognized through legal rules. It is a status that was originally recognized by the populace, most notably by the wife and kinfolk. As time went on, however, the rights and obligations of fatherhood became more complex. Society organized itself into monarchies and adopted religion, so that legal relations were mediated by kings, officials, and priests. “In thus guaranteeing one another’s lives, the brothers were declaring that no one of them must be treated by another as their father was treated by them all jointly. They were precluding the possibility of a repetition of their father’s fate.”<sup>78</sup>

I note some crucial aspects of Freud’s original story. First, Freud argues that the myth of *Totem and Taboo* is historically true about societal development in the same way that the Oedipal complex is biographically true of childhood development.<sup>79</sup> That

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<sup>76</sup> FREUD, T & T, *supra* note 3, at 143.

<sup>77</sup> Lacan explains this in terms of the men’s new understanding of their relationship to one another. When they killed the father “it is incredible—they discover that they are brothers. Well, that may give you some idea of what brotherhood is about . . . .” LACAN, SEMINAR VII, *supra* note 7, at 114.

<sup>78</sup> FREUD, T & T, *supra* note 3, at 146.

<sup>79</sup> He states:

An essential part of the argument is that all primeval men, including, therefore, all our ancestors, underwent the fate I shall now describe.

The story is told in a very condensed way, as if what in reality took centuries to achieve, and during that long time was repeated innumerable, it had

is, although we can never prove it, something like it *must* have happened to explain how we came to be what we are.<sup>80</sup> Accordingly, as the name of the title indicates, Freud includes it as one essay in a book analyzing anthropological studies of contemporary “primitive” people, most notably Australian Aborigines.

Second, the grouping of Father and the primal horde is not social—it is pre-social, if we think of the social in terms of culture. The relationship of each member of the horde to Father is immediate and personal. Freud insists that contemporary “primitives” such as the Aborigines, in fact, live in complex, law-bound societies far advanced over the horde. The primal horde is, actually, a troop of ape men, or perhaps apes.<sup>81</sup> The ur-Father is not one historical man. Rather, Freud depicts Father as the unending chain of indistinguishable dominant males who temporarily impose power over a family group of females and young until supplanted by younger rivals. These alpha males are not successors to each other, in that they only establish their temporary reign through brute force—what Hart alludes to as the time of troubles that existed at the beginning of Rex’s reign and again during interregnums.<sup>82</sup> And, indeed, Freud agrees with Hart that it is precisely the violence that occurred after Father’s murder that led the people to create laws:

It is a reasonable surmise that after the killing of the father a time followed when the brothers quarreled among themselves for the succession, which each of them wanted for himself alone. They came to see that

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happened only once.

FREUD, M & M, *supra* note 4, at 102.

<sup>80</sup> “An event such as the elimination of the primal father by the company of his sons must inevitably have left ineradicable traces in the history of humanity; and the less it itself was recollected, the more numerous must have been the substitutes to which it gave rise.” FREUD, T & T, *supra* note 3, at 155. “After these considerations I have no qualms in saying that men have always known—in this particular way—that once upon a time they had a primeval father and killed him.” FREUD, M & M, *supra* note 4, at 129.

<sup>81</sup> Freud insists that the tale that he first told in *Totem and Taboo*, was a part of pre-history when our ancestors were barely human. FREUD, M & M, *supra* note 4, at 101-02. Indeed, “[i]t is likely that mankind was not very far advanced in the art of speech.” *Id.* at 102.

<sup>82</sup> See HART, CONCEPT OF LAW, *supra* note 1, at 52-53.

these fights were as dangerous as they were futile. This hard-won understanding—as well as the memory of the deed of liberation they had achieved together and the attachment that had grown up among them during the time of their exile—led at last to a union among them, a sort of social contract.<sup>83</sup>

The writing of law is, therefore, not merely the transition from primitive to modern society. It is the evolutionary transition from animal to man, nature to culture. “Thus there came into being the first form of a social organization accompanied by a renunciation of instinctual gratification; recognition of mutual obligations; institutions declared sacred, which could not be broken—in short the beginnings of morality and law.”<sup>84</sup> Consequently, Lacan argues that “[m]ythically, [Freud’s] father—and that is what *mythically* means—can only be an animal.”<sup>85</sup>

The seeds of culture lie in the inexplicable decision of the young males to reject their animal instinct to vie individually for the role of dominant male and *to band together* to kill Father.<sup>86</sup> It is this decision that they must retroactively account for in the subsequent writing of laws. In other words, to Freud, that which makes humans human is the conscious awareness of being part of a society. As we saw, Hart called such an decision to be a member of a society the “internal point of view.” Hart initially averred, like Freud, that an internal point of view is what makes humans human. Infamously, however, he later suggests that perhaps only “officials” have, or need have, an internal point of view, relegating the majority of homo sapiens back to a simian

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<sup>83</sup> FREUD, M & M, *supra* note 4, at 103-04.

<sup>84</sup> *Id.* at 104. One should note here one significant difference between Hart and Freud. Hart suggests an immediate transition from the strong man Rex to a monarchy with rules of succession. Freud argues that the change from the rule of father to modern patriarchal governmental form is a very, very long one. Indeed, in when he repeats his theory first set forth in *Totem and Taboo* more than twenty years later in *Moses and Monotheism* he suggests that there may have been a long period of matriarchy between the primal and the modern patriarchal periods. *Id.*

<sup>85</sup> Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>86</sup> “The next decisive step towards changing this first kind of ‘social’ organization lies in the following suggestion: the brothers who had been driven out and lived together in a community clubbed together, overcame the father . . . .” FREUD, M & M, *supra* note 3, at 103.

state.<sup>87</sup>

One should also note Freud's fantasy of hominid family organization. Relying on his (mis)reading of nineteenth-century Darwinian primatology, Freud assumes that the troop consists of one dominant male, and his harem and offspring.<sup>88</sup> Whether or not this roughly describes troops of gorillas, with their large silverback males, it obviously does not remotely describe those of our other great ape cousins—the complex, familial chimpanzees, the semi-solitary orangutans, or the promiscuous, female-dominated bonobos. It is one of Lacan's points, expressed in his terminology *Father Enjoyment*, that Freud's "anthropology" is not an actual reconstruction of any primitive or simian organization,<sup>89</sup>

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<sup>87</sup> Hart states that "[t]he society in which this was so might be deplorably sheeplike; the sheep might end up in the slaughter-house." HART, *CONCEPT OF LAW*, *supra* note 1, at 117. As Fitzpatrick has pointed out before me, what is so inexplicable about this passage is that, earlier in Hart suggested, that "the internal aspect of rules [is] 'distinctive . . . of human thought, speech and action.'" FITZPATRICK, *supra* note 2, at 200. Accordingly, when Hart calls these people "sheeplike" he is not merely resorting to cliché. By his own definition, persons who lack an internal point of view are not fully human. See *infra* notes 213-14 and accompanying text.

<sup>88</sup> In *Moses and Monotheism*, Freud insisted on the truth of his myth which he claimed was based on Darwinian evolutionary theory and anthropological studies of primitive tribes despite more modern studies that would seem to debunk it.

I still adhere to this sequence of thought. I have often been vehemently reproached for not changing my opinions in later editions of my book, since more recent ethnologists have without exception discarded [the studies on which Freud claimed to rely] and have in part replaced them by others which differ extensively. I would reply that these alleged advances in science are well known to me. Yet I have not been convinced either of their correctness or of [the earlier studies'] errors. Contradiction is not always refutation; a new theory does not necessarily denote progress.

FREUD, M & M, *supra* note 4, at 169.

<sup>89</sup> Lacan insists:

The father of the horde—as if there has ever been the slightest trace of it, this father of the horde. We have seen orangutans. But not the slightest trace has ever been seen of the father of the human horde.

LACAN, *SEMINAR XVII*, *supra* note 7, at 112-13. He continues: "Freud holds

but a fantasy.<sup>90</sup> This fantasy is not a simplistic, adolescent, literal-minded, dream of unlimited sexual activity.<sup>91</sup> It is the more radical nightmare of complete satisfaction, integrity, immediacy, and freedom from constraints. To use the psychoanalytic terminology, Father Enjoyment was the only person, male or female, who was not “castrated.”

Žižek calls Freud’s father, Father *Enjoyment*. On the simple level this is because he is the obscene, nightmare, incestuous father who rapes his children. But, “enjoyment” is a literal, but inadequate translation of Lacan’s term “*jouissance*.”<sup>92</sup> *Jouissance* does not refer to pleasure, or even to experiences which are conventionally enjoyable. *Jouissance* can be a perverse joy in pain that one is driven to repeat. As Freud anticipates, enjoyment or *jouissance* is pre-social *immediacy*—it is a temporary escape from the sometimes unbearable pressures of the social obligations imposed upon us by the symbolic order of law by returning to the “real.” Real is immediacy imagined as joining with the feminine either in the sense of regression back into the maternal womb or of ecstatic sexual union. To achieve *jouissance* is to lose

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that this was real. He clings to it. He wrote the entire *Totem and Taboo* in order to say it—it necessarily happened, and it’s where everything began . . . . Anyway, be that as it may, it has never happened . . . .” LACAN, SEMINAR XVII, *supra* note 7, at 113.

<sup>90</sup> Lacan says “I said that it was the paternal metaphor, whereas this is nevertheless not how Freud presents things to us. Above all he clings strongly to what actually happened, this blessed story of the murder of the father of the horde, this Darwinian buffoonery.” LACAN, SEMINAR XVII, *supra* note 7, at 112.

<sup>91</sup> Lacan questions Freud’s literal-minded notion of Father Enjoyment, “The old daddy had the women all to himself, which already is incredible—why would he have them all to himself?” *Id.* at 114.

<sup>92</sup> Although *jouissance* can be translated as “enjoyment,” translators of Lacan often leave it in French in order to render palpable its excessive, properly traumatic character: we are not dealing with simple pleasures, but with a violent intrusion that brings more pain than pleasure. No wonder, then, that Lacan posited an equation between *jouissance* and the superego: to enjoy is not a matter of following one’s spontaneous tendencies; it is rather something we do as a kind of weird and twisted ethical duty.

consciousness—it is a state that ordinarily an individual can achieve only for an instant. In order to hypothesize a Father Enjoyment who can achieve the impossible—simultaneously remaining conscious while simultaneously experiencing a continuing state of *jouissance* (i.e., “the real”)—we enter the third psychoanalytic order of the “imaginary.” That is, the myths of Rex and Father Enjoyment are *fantasies* in the Lacan’s technical sense.

### *B. Violence in Hart and Freud*

There are many apparent differences between the legal myths of Freud and Hart. For example, whereas Hart’s separation thesis insists that there is no necessary logical relationship between law and morality, Freud argues that the founding crime of parricide leads not only to law, but also to the entire symbolic order including morality and religion.<sup>93</sup> This subject is beyond the scope of this paper.

I do, however, want to address the role of violence in the two myths. At first, they may seem diverse. Freud lets his lurid imagination go *literally* wild and insists that “[c]annibal savages as [the band of brothers] were, it goes without saying that they devoured their victim as well as killing him.”<sup>94</sup> Hart, in contrast, merely states that Rex died. There is no hint of cannibalism in Hart’s tale.

Yet Hart hints, perhaps unconsciously, of violence constantly seething and bubbling under the surface of his myth. It is not only that Rex rules by threat and punishment. We are not told precisely where Rex came from and how he gained power. However, we know that “there was trouble in the early years of the reign”<sup>95</sup> and

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<sup>93</sup> See, e.g., FREUD, T & T, *supra* note 3, at 156 (“I should like to insist that its outcome shows that the beginnings of religion, morals, and society and art converge in the Oedipus complex.”).

<sup>94</sup> *Id.* at 142. In *Totem and Taboo*, Freud is trying to explain the source of a rite that he claims anthropological studies indicate are typical of primitive societies. This is the annual totem feast at which the tribe eats the flesh of its totem animal that is, at all other times, taboo (hence the title of the book). Freud claims that the totem animal is a symbolic father who is the return of the repressed memory of the actual father murdered by the tribe’s ancestors. He opines that the totem feast is the re-presentation of the cannibalization of the father that founded the law of the tribe. Of course, the problem with Freud’s reasoning is that he presumes the historicity of the founding crime in order to explain the primitive rite. As I discuss, Lacan and Žižek realize that Freud’s history is obviously imaginary and asks *why* are we drawn to such stories.

<sup>95</sup> HART, CONCEPT OF LAW, *supra* note 1, at 52.



again, that there was an “initial period of trouble.”<sup>96</sup> This suggests that Rex took the “throne” through violence from some other brute. Similarly, when his “son” seeks to be recognized as Rex II there is a time of uncertainty, “an interregnum in which no law can be made.”<sup>97</sup> This has happened before “in troubled times.”<sup>98</sup> The “dangers of discontinuity are obvious.”<sup>99</sup> It is precisely fear of this violence that caused the monadic subjects of Rex to band together—like Freud’s band of brothers—and agree on rules of succession.

But even during the reign of the recognized king, violence threatens. Although the legitimacy of the king’s authority requires a general consensus, there always exists “a minority of hardened offenders . . . .”<sup>100</sup> The question of how many sociopaths would destroy the king’s authority “need not worry us more than the question as to the number of hairs a man may have and still be bald.”<sup>101</sup> But this would be a constant practical worry of Rex and his minions. Indeed, Hart does consider the possibility that there will be “intermediate confused stages, when it is not clear whether we are faced with a mere insurrection or temporary interruption of the old rule, or a full-scale effective abandonment of it.”<sup>102</sup> As just mentioned, it was one of these “troubled times” that brought Rex to power and occasionally broke out during his reign.

Uneasy lies the head that wears the crown. Even as Rex II tries to assert his authority, Hart warns that “Rex II may himself die immediately after issuing his first orders . . . .”<sup>103</sup> So it seems that Rex’s reign began in violence, and it is possible that his death will again result in violence. This raises the suspicion, one that Freud makes express, that Rex’s reign *did* end in violence. Is Rex II a parricide? Is that one reason why he is so uncertain as to whether the people will accept him?

As noted above, despite Hart’s unfortunate terminology, Rex was not a “monarch” insofar as that term implies a legitimate, recognized status. As Hart himself implies, the concept of a

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<sup>96</sup> *Id.* at 52.

<sup>97</sup> *Id.* at 53.

<sup>98</sup> *Id.* at 53.

<sup>99</sup> *Id.* at 53.

<sup>100</sup> *Id.* at 56.

<sup>101</sup> *Id.*

<sup>102</sup> HART, CONCEPT OF LAW, *supra* note 1, at 59.

<sup>103</sup> *Id.* at 54.

legitimate status—in his terminology a “title”—is itself a mediated, legal term. Rex ruled because he was Rex; Rex II rules because he is every inch a king. Consequently, Lacan, who recognizes that Freud’s primal Father Enjoyment is a totem, a mythic animal, insists that symbolic fatherhood requires “the function of the proper name.”<sup>104</sup> That is “he only becomes the father, as Freud’s myth indicates, once he is dead.”<sup>105</sup>

Rex was merely a strong man—an individual who established a personal relationship over each of his subjects in the time of troubles. This suggests that “Rex” is in fact one of a series of innumerable dominant males who temporarily establish *de facto* power over a submissive tribe (or perhaps more accurately in Freud’s terminology, “horde”). Such a leader would come to power by driving out or killing the previous dominant male, and was cursed to meet a similar fate himself when a more vigorous rival came along. Freud suggests that we see this dynamic in certain species of non-human animals, although it is not clear that his understanding matches modern understanding of the organization of either great apes or any other animal, or how this tells us anything about human societal organization. Hart’s story of the creation of law is *literally* the story of the creation of man. Without law, man does not exist.

Žižek’s reading of *Totem & Taboo* alongside of Freud’s account of the Oedipal complex seeks to explain why Freud fantasized about ghoulish violence. But Žižek’s analysis also suggests why Hart’s noble dream of legitimacy represses the moment of founding violence.<sup>106</sup>

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<sup>104</sup> Lacan, *Names-of-the-Father*, *supra* note 6, at 88.

<sup>105</sup> LACAN, SEMINAR VII, *supra* note 7, at 309. In this sentence, Lacan is referring specifically to the man whom Oedipus killed. However, in this passage, Lacan is explaining the interrelationships between the Oedipus and *Totem and Taboo* myths so that this statement would apply equally to Father Enjoyment.

<sup>106</sup> In his classic study of mythology and folk custom, *The Golden Bough*, James Frazer reveals the widespread custom throughout the world in which a symbolic king is sacrificed at an annual custom. Although Frazer suggests that there was a time when the king was really killed by his successor, this should not be confused with the bloody history that Freud recounts. Frazer’s kings were priests, if not gods, who were thought to embody the spirit of the corn that was “sacrificed” in the harvest and “reborn” through their successors in the Spring crop. This is a highly mediated, symbolic understanding of kingship and fatherhood that is far from the land of Rex and the primal horde. JAMES GEORGE FRAZER, *THE GOLDEN BOUGH* (2009).

Freud and Lacan make express what is implicit in Hart's myth. If rules of succession can only be written after Rex dies, the father in whose name law is founded is always a *dead* father. That is, the rule of law that is the basis for society cannot be written while Rex/Father Enjoyment is alive because to adopt laws is precisely to repudiate the personal relationship between subject and master. Consequently, in order to write the law in the Name-of-the-Father it is not enough that Rex/Father die. He must be murdered in the sense of disowned. As a result, law is never truly the law of the father. It is the law of the parricidal son who takes his name. In Lacan's words:

It is thus there, as I've said a hundred times, that one finds the paternal function. In our theory the sole function of the father is to be a myth, to be always only the Name-of-the-Father, or in other words nothing more than the dead father, as Freud explains in *Totem and Taboo*.<sup>107</sup>

Moreover, Freud and Lacan insist on another aspect of the primal lawgiver's death—one that may shed light on Hart's ambiguous invocations of violence. Freud argues in *Moses and Monotheism* that it is crucial to the myth not only that the primal ruler die before law can be created, but that we also must repress the fact that his followers assassinated him.<sup>108</sup> The law that is written in the name of the father is actually a revolt against the reign of the father. To adopt law is to *repudiate* the personal reign of Rex/Father. When viewed retrospectively from the symbolic, internal position, the immediacy of the dead father's rule seems as detestable as it once was desirable. "What is the true function of the Name-of-the-Father? It is, precisely, to allow the subject to 'symbolically kill' the father, to be able to *abandon* his father (and the closed family circle) and freely set out on his own path to the world."<sup>109</sup>

This is arguably why, in Freud's third, final attempt to tell the Oedipal story in *Moses and Monotheism*, Freud insisted that it is was not merely the Hebrews' murder of the patriarch Moses, but their repression of the truth of this murder, that was the founding

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<sup>107</sup> LACAN, SEMINAR VII, *supra* note 7, at 309.

<sup>108</sup> FREUD, M & M, *supra* note 4, at 57-59.

<sup>109</sup> ŽIŽEK, LOST CAUSES, *supra* note 92, at 83-84 (alteration in original).

moment of the creation of the Law.<sup>110</sup> As Žižek explains:

What the matrix of *Totem & Taboo* accounts for is thus the structural necessity of the parricide: the passage from direct brutal force to the rule of symbolic authority, of the prohibitory Law, is always grounded in a (disavowed) act of primordial crime. That is the dialectic of ‘You can prove that you love me only by betraying me’: the father is elevated into the venerated symbol of Law only after his betrayal and murder.<sup>111</sup>

The psychoanalytic account completely agrees with Hart’s argument against John Austin’s theory of positivism. According to Hart, Austin held that law consisted of habitual obedience created by a fear of punishment. This is the myth of Rex. But, such a direct “personal” relationship of habit and fear between the people and its leader is not sustainable. The authority of law is symbolic, not real—that is, modern authority is mediated by law, rather than an immediate relationship with a leader. The authority of leaders springs from the legitimacy of their succession, which is logically distinct from the content of their personal characteristics.

Nevertheless, psychoanalysis goes beyond Hart to suggest that, to be effective, subjects subjected to the rule of law must (like Austin) repress the purely symbolic nature of leadership and pretend that the leader not merely *has* authority, but that he *deserves* his authority. “What the faithful follower should conceal from the paternal figure of the Leader is precisely this gap between the Leader in the immediacy of his personality and the symbolic place he occupies, the gap on account of which father *qua* effective person is utterly impotent and ridiculous . . . .”<sup>112</sup> In other words, although Rex II only becomes a king when the people allow him to sit on Rex’s throne; to be effective, he must believe that he sits on Rex’s throne because he is a king.

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<sup>110</sup> The differences between *Moses and Monotheism* and both the Oedipal complex and *Totem and Taboo* are very interesting, but beyond the scope of this Article.

<sup>111</sup> SLAVOJ ŽIŽEK, TICKLISH SUBJECT: THE ABSENT CENTER OF POLITICAL ONTOLOGY 316 (1999).

<sup>112</sup> *Id.*

## IV. PRIMITIVE SOCIETY

Interwoven with Hart's myth of Rex is a second myth, that of primitive society. Rex's rule is not primitive society. As we have seen, under Rex each subject obeyed for his own part only, and did not care about whether others did so as well. In contrast, primitives have "pronounced views as to the rightness of obedience . . . ." <sup>113</sup> In other words, they are sane under the *M'Naghten* test: <sup>114</sup> they know right from wrong.

But primitive society has no legislature, courts or "officials of any kind." <sup>115</sup> Like international law, it is a "questionable or challengeable case[] of law . . . because of [its] . . . lack of a legislature, courts with compulsory jurisdiction, and centrally organized sanctions." <sup>116</sup> Hart says that primitive society is pre-legal—like Rex's rule. <sup>117</sup> But it is perhaps more accurate to say that primitive society is proto-legal. It is a society that has primary rules of general applicability, but not a fully developed legal system with officials and secondary rules.

In primitive society, "the only means of social control is that general attitude of the group toward its own standard modes of behaviour in terms of which we have characterized rules of obligation." <sup>118</sup> Hart resists calling these rules "custom." <sup>119</sup> Customary rules are old and are "supported with less social pressure than other rules." <sup>120</sup> Instead, the social structure of primitive society is "one of primary rules of obligation." <sup>121</sup> Primary rules "are concerned with the actions that individuals must or must not do . . . ." <sup>122</sup> These rules are said to be "unofficial." <sup>123</sup> They do not "form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular

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<sup>113</sup> HART, CONCEPT OF LAW, *supra* note 1, at 53.

<sup>114</sup> *M'Naghten's Case* (1843) 10 C & F 200.

<sup>115</sup> HART, CONCEPT OF LAW, *supra* note 1, at 91.

<sup>116</sup> *Id.* at 156. Presumably these last items are intended to apply to international, rather than primitive, law.

<sup>117</sup> *Id.* at 94.

<sup>118</sup> *Id.* at 91.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 91.

<sup>121</sup> *Id.*

<sup>122</sup> HART, CONCEPT OF LAW, *supra* note 1, at 94.

<sup>123</sup> *Id.* at 92.

group . . . accepts.”<sup>124</sup> Modern etiquette is like this. That is, etiquette is not a system, but an ad hoc set.<sup>125</sup> In the language of set theory, primitive law is extensive.<sup>126</sup> Modern law will be intensive—the rule of recognition proceeds the set of primary rules.

One principal of a positivist theory of law is the separation thesis. This is the proposition that the status of a law as law is independent from its moral or other substantive content. In primitive society, however, “there might be nothing corresponding to the clear distinction made, in more developed societies, between legal and moral rules.”<sup>127</sup> This is one reason why it is said to lack a legal system. Nevertheless “some embryonic form” of the distinction exists if some rules are enforced by punishment and others by mere guilt and remorse.<sup>128</sup> Primitive primary rules must address restrictions on violence, theft, and deception. Such rules always exist in “the primitive societies of which we have knowledge.”<sup>129</sup> If the primitives are equal in physical strength, a majority must accept the rules if primitive society is to endure.<sup>130</sup> In other words, the majority or the members of empirical primitive societies have the internal point of view, which binds them to following the rules.<sup>131</sup>

Primitive society requires small communities “closely knit by ties of kinship, common sentiment, and belief . . . .”<sup>132</sup> It must exist in “a stable environment.”<sup>133</sup> Other conditions will destroy the power of the primary rules to control the community. Specifically, if conditions change three defects will become apparent. In each case, society can remedy a defect by adopting a secondary rule. The secondary rules are so called because they are rules about primary rules: “[t]hey specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 92, 234.

<sup>126</sup> On intensive versus extensive theories, see Robert Hackett, *Reflective Intension: Two Fundamental Decision-Points in Mathematics, Law and Economics*, 29 CARDOZO L. REV. 1967, 2076-82 (2008).

<sup>127</sup> HART, CONCEPT OF LAW, *supra* note 1, at 169.

<sup>128</sup> *Id.* at 169-70.

<sup>129</sup> *Id.* at 91.

<sup>130</sup> *Id.* at 92.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 92.

determined.”<sup>134</sup> The introduction of secondary rules might be “considered a step from the pre-legal world into the legal world . . . .”<sup>135</sup> The three secondary rules “are enough to convert the regime of primary rules into what is indisputably a legal system.”<sup>136</sup>

In hypothesizing primitive society, Hart is following the classic strategy of liberal mythography identified by Fitzgerald. Hart believes that modern law is characterized as “a union of primary rules of obligation with such secondary rules.”<sup>137</sup> Consequently, a primitive society must, by definition, lack this hallmark of modernity.

#### *A. The Defect of Uncertainty*

The first defect of the primitives is uncertainty. Primitive society has primary rules, but it is able to recognize them without the aid of rules. Just because there is a set of primary rules does not mean that there is a rule of recognition that organizes them:

For there is no such provision and need be none. It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or “binding” rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity.<sup>138</sup>

Hart suggests that even to suggest there might be a rule of recognition in primitive society is “something comic . . . [i]t is as if we were to insist that a naked savage *must* really be dressed in some invisible variety of modern dress.”<sup>139</sup> We may be persuaded to treat as a basic rule, something which is an empty repetition of

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<sup>134</sup> HART, CONCEPT OF LAW, *supra* note 1, at 94.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 235.

<sup>139</sup> *Id.* at 236.

the mere fact that the society concerned (whether of individuals or states) observes certain standards of conduct as obligatory rules.<sup>140</sup> A rule of recognition for primitive society “says nothing more than that those who accept certain rules must also observe a rule that the rules ought to be observed. This is a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules.”<sup>141</sup>

Somehow doubt arises as to what the rules are. Primitive society forgets how to recognize the primary rules. And so procedure for settling this doubt is needed.<sup>142</sup>

Whence comes this doubt? Hart does not say, but the arrival of doubt coincides with the arrival of writing. That is, Hart suggests that the primitives started writing down the primary rules in a document or carving them into a public monument.<sup>143</sup> Continuity in pre-literate societies must be maintained through primitive feats of memory to sustain an oral tradition. Writing empowers the primitives to forget.

We see this in the Bible.

And the LORD said unto Moses, Write this down in a document, as something to be remembered, and recite it in the ears of Joshua: I will completely blot out the memory of Amalek from under the heavens.<sup>144</sup>

But for the fact that Moses wrote that down, the Amelekites would have been forgotten. It is the very writing that perpetuated the memory against the intent of God.<sup>145</sup>

The advent of writing as the sign of modern society is reminiscent of Jacques Derrida's accusation that western philosophy privileges speaking over writing—called logocentrism.<sup>146</sup> Derrida's idea is that every symbolic communication is mediated by writing—archè-writing, as he calls it. Symbolic communication is therefore marked, and western

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<sup>140</sup> *Id.*

<sup>141</sup> HART, CONCEPT OF LAW, *supra* note 1, at 236.

<sup>142</sup> *Id.* at 93-94.

<sup>143</sup> *Id.* at 94.

<sup>144</sup> *Exodus* 17:14 (New American Bible).

<sup>145</sup> Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, With Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079, 1102-07 (1990).

<sup>146</sup> JACQUES DERRIDA, POSITIONS 24-25 (Alan Bass trans., 1981).



philosophy is guilty of suppressing this mark, which deconstruction exposes to view. The mark in question, however, is an absence, a deferral, a *différance*. In a like sense, Hart's modernity is like Derrida's post-modernity—a deconstruction of primitive logocentrism. Modernity discovers the mark—the writing—that disrupts the immediate relation of the primitives.

Primitive society does not have an authoritative text setting forth the primary rules.<sup>147</sup> Presumably, this is because primitives cannot yet write. Neither does it have “an official whose declarations on this point are authoritative.”<sup>148</sup> Procedures, texts and officials require rules of a different sort than mere primary rules. What is required is a mediating function—a writing that will preserve the primary rules thereby enabling the people to forget them. The Amelekites are like the primary rules. They must be eradicated so they can be forgotten, to be replaced by officials who know the rules by which the forgotten primary rules can be recollected.

The “simplest form of remedy”<sup>149</sup> for the defect of forgetting is the introduction of the rule of recognition. “This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is [a primary rule].”<sup>150</sup> The rules of primitive society originally did “not form a system, but . . . were simply . . . a set of separate standards, without any identifying or common mark . . . .”<sup>151</sup>

Hart has assured us that primary rules have *no* marks in primitive society, and that the authoritative mark is *provided* by the rule of recognition. Therefore, it was not there prior to the rule of recognition. Just as Rex was recognized as the founder of his dynasty and retroactively *re-named* Rex I only *after* his death, so customary practices only become primary rules retroactively, identified by a mark only after they were marked.

Among the marks that might retroactively be found, Hart mentions being a member of the set of things that were enacted by a specific body, or of things followed through long customary practice, or of things having a relation to judicial decisions.<sup>152</sup>

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<sup>147</sup> HART, CONCEPT OF LAW, *supra* note 1, at 92.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 94.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 92.

<sup>152</sup> *Id.* at 95.

Some of these are not appropriate to a society that is in the early stage of transition from primitiveness to modernity. For example, a primitive society will almost certainly not have a legislature that enacts rules nor a judiciary that legislates or at least reports a primary rules. An appropriate mark might be long customary practice.<sup>153</sup>

To illustrate, imagine a small primitive society of cattle herders. Each member would have personal knowledge of which cow belongs to whom—for example, the red heifer belongs to Jeanne while the white bullock belongs to David. Indeed, it could be expected that much of the conversation in such a society would revolve around the cattle, their lineage, and ownership. As the tribe grows larger and its herds increase, it will no longer be possible for each member to have personal relationships with every other member, let alone immediate knowledge of their respective livestock. In order to avoid disputes, it would not be surprising for the tribe to eventually adopt a marking system such as branding.

This adoption could come quickly—the members of society could have a discussion and come to an express agreement that, thereafter, all cattle must be branded. But, it could come about through gradual changes in custom. For example, imagine that Jeanne may just have an idiosyncratic habit of notching her cows' ears in a distinctive way because she thinks it makes them more attractive. Her neighbor might notice that all of Jeanne's cows have notched ears. Jeanne's daughters and granddaughters copy her habit. Over generations this habit becomes the custom of Jeanne's clan. Eventually, the community will recognize not merely that the cows of Jeanne's clan have notched ears, but that having notched ears means that a cow belongs to that clan.

That is, although originally, ownership of each cow was not determined by a mark, *once the cattle have been branded*, ownership is retroactively established by the brand. So the rule of recognition is not induced from the set of primitive primary rules. Rather, the rule of recognition inscribes as well as describes the primary rules.

Customary practice is a possible mark by which primary rules

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<sup>153</sup> For international law, however, custom cannot serve as a rule of recognition. “[I]nternational law simply consists of a *set* of separate primary rules of obligation which are not united [by a rule of recognition]. It is, in the usual terminology of international lawyers, a set of customary rules . . .” *Id.* at

might be recognized. Yet, for the primitives, the law like the cattle was unmarked. The primitives were unaware that their primary rules were venerable. So the introduction of the rule of recognition must also presage an introduction of time itself, whereby primitive society comes to see that the primary rules are not simply omnipresent but somehow diachronic. This idea coheres with the introduction of writing. Writing also implies time. First there were the primary rules; they were written down, and then they were forgotten. What is present today is the writing, not a memory of rules apart from the writing. What is absent is the set of primary rules that can be remembered only through writing. Whereas primitive society's jurisprudence was extensive in nature, modern jurisprudence is intensive.

*B. The Second Defect of Stasis*

The second defect of primitive society is that the set of primary rules is static, or at least subject to “the slow process of growth . . . .”<sup>154</sup> That is, over time, some customs may solidify into law, presumably by some semi-evolutionary process by which simple behavior becomes increasingly complex as society develops. According to this process, conduct that at first was seen as optional becomes habitual, and eventually obligatory.<sup>155</sup> Alternately, other rules might eventually fall by the wayside as conditions change so that violations of certain primary rules that were originally “severely dealt with”<sup>156</sup> become tolerated and then not even noticed—at most existing as vestigial origins like the human appendix.<sup>157</sup> In primitive society, “we must wait and see whether a rule gets accepted as a rule or not . . . .”<sup>158</sup> Meanwhile, there is neither forgiveness nor assignment of payment intangibles in primitive society “for such operations of release or transfer create changes in the initial positions of individuals under the primary rules . . . .”<sup>159</sup> Forgiveness and trading claims require “rules of a sort different from the primary rules.”<sup>160</sup>

The remedy for the second defect is the rules of change.<sup>161</sup>

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<sup>154</sup> HART, CONCEPT OF LAW, *supra* note 1, at 92.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 235.

<sup>159</sup> *Id.* at 93.

<sup>160</sup> *Id.*

These consist in empowering a legislator to change the rules. Where a rule of change exists, a rule of recognition will incorporate the rule of change within itself. A rule of change is therefore subsumed under a rule of recognition.

*C. The Third Defect of Inefficient Punishment*

The third defect of primitive society is inefficiency of detection and punishment. Disputes will exist between individuals as to whether a primary rule has been violated. In the smallest societies, these disputes will disappear; but in anything larger than the smallest society, the disputes will continue “interminably,”<sup>162</sup> unless an agency can determine whether violations have occurred.

In primitive society, punishment is delegated to the wronged party or to primitive society as a whole.<sup>163</sup> The group wastes its time if it tries, unorganizedly, to capture and punish offenders.<sup>164</sup> Vendettas arise.<sup>165</sup> As bad as this might be, the lack of a judge to determine cases is an even more serious defect than the lack of an executioner to catch and execute the offender.<sup>166</sup>

The remedy for the third defect is to empower a judge to determine if the primary rules have been violated, by means of rules of adjudication. These rules will identify the judge and codify procedure. Because a judge must determine whether a primary rule is violated, he must first identify what the primary rules are. So the judge takes over administration of the rule of recognition.<sup>167</sup> By implication, then, rules of adjudication precede rules of recognition. The third defect historically precedes the first defect. Only after the officials come into existence does the processing of forgetting the primary rules begin.

Consequently, the evolution from primitive society is the passage from a time when each member personally knew and cared about the rules with a profound sense of rightness of obedience, to a time when the job of knowing and administering the legal system is left to officials. On the one hand this is a loss—a fall from a state of grace, immediate knowledge of the rules with moral certainty. On the other hand this is a gain. The

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<sup>161</sup> HART, *CONCEPT OF LAW*, *supra* note 1, at 95.

<sup>162</sup> *Id.* at 93.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 93-94.

requirement of moral certainty is a burden. If you stumble, you are not merely a criminal in the eyes of man, you are a sinner in the eyes of God. The officials who mediate between the citizenry and the laws now take on this burden. Eventually, rules of recognition that enable society to separate the status of any specific law as law from its moral content, frees even the official from this burden. By separating legality with morality, the officials no longer have to obey a law because (but only if) it is just. They can now obey just because it is law. The separation of law and morality is the great achievement of the officials who enable the forgetting of the primitive moral code.

## V. MOSES AND MONOTHEISM

The parallels between the myths of primitive society and *Moses and Monotheism* are not as neat as those between those of Rex and *Totem and Taboo*, but they do exist. Both Hart's and Freud's accounts see the law as we know it—as springing from the fact that the populace “forgets” and loses an immediate relationship to the law. This requires the establishment of a professional class of mediators who recognize the law, and replace moral obligation by legalism.

### A. The Egyptian Moses

*Moses and Monotheism* is a deeply strange and controversial work. Freud worked on, but suppressed, his thesis for years, finally publishing it while dying of cancer in London after fleeing Nazi-occupied Vienna.<sup>168</sup> In it Freud—a Jew, who fled persecution because he was Jewish—struck at the very heart of the founding myth of the Jewish people by writing an alternative version of *Exodus* based on the skimpiest of evidence.

The fact that both *Moses & Monotheism* and *Totem & Taboo* (and Freud's theory of the Oedipal complex) concern the creation of law and the murder of a father figure should not distract us from their stark differences. In *Totem & Taboo*, as we have seen, the most primitive law can only be written by the patricidal sons *after* they murdered Father Enjoyment. The law is not written by the father, but written in his name. The writing of this first law is the birth of culture. In contrast, *Moses & Monotheism* takes place in a much later stage in society when laws already exist and

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<sup>167</sup> *Id.* at 97.

culture already flourishes. The father that is killed this time is himself a lawgiver. *Moses & Monotheism*, like the story of primitive society, is a myth, not of the birth of law, but of the development of a more sophisticated, or in Freud's words "spiritual,"<sup>169</sup> symbolic order.

Infamously, Freud posits that Moses, the hero of *Exodus* who liberated the Hebrews from Egyptian bondage, gave them the law, created the Jewish religion, and wrote the Torah,<sup>170</sup> was not the son of Hebrew slaves raised by Pharaoh's daughter. Rather, he was an Egyptian, probably a nobleman.<sup>171</sup> Indeed, it is most likely that he was a prince on the assumption that he was, in fact, the true son of Pharaoh's daughter.<sup>172</sup> Monotheism was not a development of the Hebrew's religion.<sup>173</sup> Moses was a follower of the heretic Pharaoh, Ikhnaton,<sup>174</sup> who was probably his grandfather. Ikhnaton for one generation replaced the Egyptian official polytheistic religion with a strict monotheistic worship of the an austere, distant sun god, Aton.<sup>175</sup> Upon Ikhnaton's death, the priests reinstated the old religion and prosecuted those who still worshiped Aton.<sup>176</sup>

The ambitious Prince Moses, having no future at home, decided to become the founder of a new nation. Accordingly, he fled the country with a small retinue of Aton-worshipping Egyptians and a band of Hebrew slaves whom he adopted as his

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<sup>168</sup> FREUD, M & M, *supra* note 4, at 65-71.

<sup>169</sup> *Id.* at 150, 165.

<sup>170</sup> "Moses was not only the political leader of the Jews settled in Egypt; he was also their lawgiver and educator and the man who forced them to adopt a new religion, which is still today called Mosaic after him." *Id.* at 18.

<sup>171</sup> *Id.* at 13.

<sup>172</sup> *Id.* at 10-13.

<sup>173</sup> "[I]f Moses, who gave them a new religion, was an Egyptian, then the surmise cannot be rejected that this other new religion was the Egyptian one." *Id.* at 18.

<sup>174</sup> To use Freud's. The Pharaoh's name is more usually transliterated into English as Akhenaten, and the god as Aten.

<sup>175</sup> "I venture now to draw the following conclusion: if Moses was an Egyptian and if he transmitted to the Jews his own religion, then it was that of Ikhnaton, the Aton religion." *Id.* at 27. In Freud's description, Moses's religion "is a grandiously rigid monotheism. There is only one God, unique, omnipotent, unapproachable. The sight of his countenance cannot be borne; one must not make an image of him, nor either breathe his name." *Id.* at 18.

<sup>176</sup> FREUD, M&M, *supra* note 4, at 21. Famously, his immediate successor, Tutankaton, changed his name to Tutankhamen—replacing the reference to the sun god's name with that of one of the traditional gods.

people.<sup>177</sup> After writing a harsh law on Mt. Sinai based on an unyielding, universal concept of truth and justice,<sup>178</sup> the people rose up, assassinated the Egyptian Moses, and repudiated his law and his God.<sup>179</sup>

The Hebrews suppressed the fact of this crime and forgot the Mosaic law and religion. They eventually merged with other Semitic tribes wandering the desert and adopted a new leader who brought them a more familiar type of religion and a new god.<sup>180</sup> Unlike Aton, Yahweh<sup>181</sup> was neither the only god, nor a god of universal values. He was probably a volcano deity,<sup>182</sup> “an uncanny, bloodthirsty demon who walks by night and shuns the light of day.”<sup>183</sup> The new leader was not a prince espousing a

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Let us assume that Moses was a noble and distinguished man, perhaps indeed a member of the royal house, as the myth has it. He must have been conscious of his great abilities, ambitions, and energetic; perhaps he saw himself in a dim future as the leader of his people, the governor of the Empire. In close contact with Pharaoh, he was convinced adherent of the new religion, whose basic principles he fully understood and had made his own. With the king's death and the subsequent reaction he saw all his hopes and prospects destroyed.

*Id.* at 31.

<sup>178</sup>

[I]t is probable enough that Moses, trained in Ikhnaton's school, employed the same methods as the king; he gave commands and forced his religion on the people. Perhaps Moses' doctrine was still more uncompromising than that of his master . . . . The Jewish people of Moses were quite as unable to bear such a highly spiritualized religion . . . as were the Egyptians of the Eighteenth Dynasty . . . . But while the tame Egyptians waited until fate had removed the sacred person of their Pharaoh, the savage Semites took their destiny into their own hands and did away with their tyrant.

*Id.* at 57-58.

<sup>179</sup> “[T]he founder of their religion, Moses, met a violent end in a rebellion of his stubborn and refractory people. The religion he had instituted was at the same time abandoned.” *Id.* at 42.

<sup>180</sup> *Id.* at 43-44.

<sup>181</sup> Freud calls this god “Jahve.” I use the more common Anglicization.

<sup>182</sup> FREUD, M&M, *supra* note 4, at 39.

<sup>183</sup> *Id.*

universal law. He was the son-in-law of a Midianite priest<sup>184</sup> to whom Yahweh gave magic, miracle-working powers.<sup>185</sup>

It became necessary to merge the two religions of Moses and Yahweh. One group defined their identity by the exodus from Egypt. The other, wished to instill their leader and god with the prestige of the exodus.<sup>186</sup> Consequently, the priests rewrote history by conflating Yahweh with Moses' God, and the Midianite leader with Moses. Consequently, there were, in fact, two Moseses—the original Egyptian Moses, and the later Midianite leader renamed Moses.<sup>187</sup> It was this latter miracle worker who saw Yahweh in the burning bush and brought the plagues to Egypt—fantastic fairy tales inconsistent with the Aton religion. Yahweh—the personification of the volcano who appears as smoke in the day and fire in the night—was added to the account of the flight from Egypt.

Eventually, after a few generations, the cultural memory of the law reawakened, and the Yahweh religion was supplanted by a renaissance of the spiritually superior monotheism of Aton

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<sup>184</sup> The second leader was the “son-in-law of the Midianite priest Jethro . . . .” *Id.* He was not “an Egyptian and Pharaoh’s grandson, but a shepherd to whom Jahve reveals himself” *id.* at 41, “quite a different person” from the Egyptian Moses. *Id.*

<sup>185</sup> *Id.* at 41.

<sup>186</sup> Since the Moses people attached such great importance to their experience of the Exodus from Egypt, the deed of freeing them had to be ascribed to Jahve; it had to be adorned with features that proved the terrible grandeur of this volcano-god, such as, for example, the pillar of smoke which changed to one of fire by night, or the storm that parted the waters so that the pursuers were drowned by the returning floods of water. The Exodus and the founding of the new religion were thus brought close together in time, the long interval between them denied. The bestowal of the Ten Commandments too was said to have taken place, not at Qades, but at the foot of the holy mountain amid signs of a volcanic eruption.

*Id.* at 48.

<sup>187</sup> I may now express my conclusion in the shortest formula: To the well-known *duality* of that history—*two peoples* who fuse together to form one nation, *two kingdoms* into which this nation divides, *two names* for the Deity in the source of the Bible—we add two new ones: the founding of *two* new religions, the first one outed by the second and yet reappearing victorious, *two* founders of religion, who are both called by the same name, Moses, and whose



(now known as Elohim or Adonai).

Freud's theory does reflect a widely held view among Biblical exegetes that our modern Bible was redacted from a number of sources. It is also almost irresistibly tempting to link together the two examples of monotheism in the ancient world. Nevertheless, most scholars think that Freud's specific surmise is absurd, for no other reason that the periodization makes no sense.

Freud claims that an obscure German scholar named "Ernst Sellin made a discovery of decisive importance. He found in the book of the Prophet Hosea . . . unmistakable traces of a tradition to the effect that the founder of their religion, Moses, met was violent end in a rebellion of his stubborn and refractory people."<sup>188</sup> Most scholars find no textual direct support for this thesis. Freud, in effect, was performing a psychoanalysis of the Biblical text itself—looking for hidden, suppressed meaning. As I shall discuss, Lacanianism will warn against assuming that the stories uncovered are *literally*, rather than *mythically*, true. Most disturbingly, Freud's claim that the Hebrew people came into being through the murder of their greatest prophet seems uncomfortably to echo the most vile claims of anti-Semites that Jews are Christ killers.

Nevertheless, Freud insisted that his extraordinary proposition *must have been true* because it is the only one that could offer a psychoanalytically coherent explanation of the odd events of that book—namely, the writing, forgetting and reinstatement of the law. It is a hidden truth brought out by psychoanalyzing the authors of the Torah. Indeed, Freud goes so far to suggest that this anti-Semitic accusation of deicide might reflect a deep, suppressed cultural memory of the Jew's true crime. That is, just as the murder of Moses was a re-enactment of the murder of Father Enjoyment by the band of brothers, the execution of Jesus was a re-enactment of the murder of Moses.<sup>189</sup>

Freud, a Jew, tries to separate himself from any potential anti-Semitic mis-interpretations of his theory. He believes that Judaism, *after* the reintroduction of the law, constituted a great spiritual revolution in human development. He argues that Christ's murder was the collective responsibility of mankind, but that the Jews, burdened with the cultural memory of their murder of Moses, are alone to be admired for recognizing their own guilt.

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personalities we have to separate from each other. *Id.* at 64.

<sup>188</sup> *Id.* at 42.

### B. Hart with Freud

The core of both Hart's story of primitive society and Freud's of *Moses & Monotheism* concerns the development of law *after* the initial law is written. Both are stories about the process through which a sophisticated legal system supplants a more primitive one. Both envision a society where the people initially have but lose direct knowledge of the law.<sup>190</sup>

#### 1. Forgetting the Law

Unanswered questions in Hart's account are why and how the people forgot the law. Hart just asserts that they just did, obliquely referring to the increasing complexity of society. Nevertheless, the loss of direct knowledge of the law is necessary to Hart because it seems to offer an explanation as to why it becomes necessary that "officials" mediate the law.

Freud's tale, in contrast, is about the forgetting. That is, although *Moses & Monotheism* is a tale of murder, what Freud finds most significant about *Exodus* is not "the execution of the deed, but . . . the doing away with the traces."<sup>191</sup> Indeed, Freud makes a jump—one that he admits is questionable—from his observations of individual psychology to group sociology. Psychoanalytic theory holds that individuals do not just passively forget.<sup>192</sup> Freud here suggests that, perhaps, the same thing occurs with respect to societies.

That is, if a society "forgets" an historic event, it must be because it suppressed a painful memory it does not want to remember or acknowledge. The things that one suppresses are called *traumas*.<sup>193</sup> To over-simplify, for Freud, traumas are terrible things that occur sometime early in the subject's development that the subject has not been able to integrate into her symbolic world and cannot bear to face. They are literally unspeakable in the sense that she cannot figure out how to put them into words.<sup>194</sup>

Freud speculates that if the Hebrew people collectively forgot

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<sup>189</sup> FREUD, M&M, *supra* note 4, at 129.

<sup>190</sup> *See id.*

<sup>191</sup> *Id.* at 52.

<sup>192</sup> BRUCE FINK, A CLINICAL INTRODUCTION TO LACANIAN PSYCHOANALYSIS 76-77, 112-15 (1999).

<sup>193</sup> SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 44-45. *See also* FREUD M&M, *supra* note 4, at 91-94.

<sup>194</sup> SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 109-

the law given to them on Mt. Sinai, it must be because of a shared traumatic event associated with the law.<sup>195</sup> The forgetting of the law must be the community's collective repression of the facts surrounding its origins. Consequently, Freud leaps on Sellin's analysis of traces supposedly hidden in the book of *Hosea* and concludes that the trauma was the revolt that ended in the assassination of the law giver.

There came a time when the people regretted the murder of Moses and tried to forget it . . . . If, however, the Exodus were brought nearer in time to the founding of their religion in the oasis, and one allowed Moses, instead of the other founder, to help in it, then not only were the claims of the Moses people satisfied, but the painful fact of his violent removal was also successfully denied.<sup>196</sup>

As suggested above, although Hart did not explicitly suggest that Rex was murdered by his successor, he suggested both the existence of past violence at the beginning of Rex's reign, and the fear of violence at its end. Freud makes the implicit violence express in *Totem & Taboo*. A direct, personal rule by a strongman like Rex no doubt is established and ended only by a battle to the death.

In *Moses & Monotheism*, Freud suggests that an extraordinary event such as the forgetting of the law can only be explained by trauma. He also suggests that one reason to believe that the trauma that occurred at the writing of a new law was the collective murder of the law giver is precisely because it echoes the primal trauma of the collective murder of Father Enjoyment that sparked the writing of the first law.

In psychoanalysis, a trauma is not merely a bad event. A bad event only has the status of a trauma if it reappears in symptoms. To invoke Freud's metaphor, the subject builds a protective layer of symptoms in a vain attempt to protect herself from the pain of her trauma, in the same way as an oyster builds a protective layer of pearl to protect itself from the pain of an irritant grain of

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<sup>195</sup> "They [the decedents of the murderers] had good reasons, however, for 'repressing' the memory of the fate that had befallen their leader and lawgiver." FREUD, M&M, *supra* note 4, at 85.

sand.<sup>197</sup> Similarly, a classic form of symptom is the performance of repetitive acts that to some extent re-enact the original trauma.<sup>198</sup> Consequently, the murder of Moses was not only a trauma itself; it would be a symptom of mankind's original trauma, the murder of Father Enjoyment. Freud goes so far as to suggest that the later execution of Jesus—who, as interpreted by St. Paul, brought a new reading of the law—is not only another trauma, but a symptom of the two earlier traumas.<sup>199</sup>

Does this suggest that a psychoanalytic reading of Hart's story of primitive society would conclude that another murder must have preceded the people's forgetting of the law and the institution of the rule by officials? No. Indeed, from a Lacanian perspective, Freud is being much too literal-minded.

Lacan agrees with Freud that a trauma must appear through symptoms. But, Lacan's logic is much more radical than Freud's. Freud thinks that traumas cause symptoms. Lacan, in contrast, thinks that causation is retroactive. That is, Lacan argues that when we see a symptom, we hypothesize that a trauma must have occurred. In psychoanalysis, the analysand tries to re-integrate her symbolic order that has been shattered by symptoms by articulating a story that would retroactively seem to explain the symptoms.<sup>200</sup> Once the cause of the symptom has been articulated, the symptom that is its result should dissolve.<sup>201</sup>

In *Moses & Monotheism*, Freud seems to think that the murder of Moses explains the symptoms that he sees in Exodus; ergo the murder must have occurred. Psychoanalysis is not a judicial hearing or an objective scientific inquiry. The story the analysand tells herself is an hypothesis—in the language of logic, it is an abduction (and not an induction or deduction).<sup>202</sup> In

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<sup>196</sup> *Id.* at 58-59.

<sup>197</sup> Ellie Ragland, *The Psychological Nature of Trauma: Freud's Dora, The Young Homosexual Woman, and the Fort! Da! Paradigm*, in 11 POSTMODERN CULTURE: AN ELECTRONIC JOURNAL OF INTERDISCIPLINARY CRITICISM, <http://muse.jhu.edu/journals/pmc/v011/11.2ragland.html> (referring to Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria*, in 7 STANDARD EDITION 3, 83 (James Strachey et al. trans., 1953)).

<sup>198</sup> SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 44.

<sup>199</sup> FREUD, M & M, *supra* note 4, at 109-10.

<sup>200</sup> SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 44.

<sup>201</sup> Lacan learned that, in practice, frequently symptoms do not dissolve even after articulated in a "successful" analysis. This led to his theory of the *sinthome*, which is beyond the scope of this paper. *Id.* at 110-111.

<sup>202</sup> Jeanne L. Schroeder, *Abduction From the Seraglio: Feminist Methodologies*

abduction, one confronts a surprising thing and then tells a story that, if it were true, would make the thing no longer surprising. The fact that an abduction is a plausible explanation of the surprising thing is not, however, in and itself proof of its truth. Rather, it is merely a good reason to engage in further investigation. The story an analysand tells in a successful analysis is one that she finds subjectively compelling—in that it helps her make sense out of her life. It is her *myth*. However, psychoanalysis is not in a position to judge whether any particular story told by an individual analysand is objectively true.

Moreover, although Lacan would probably believe that there are no symptoms without an original trauma, one should not necessarily presume that the trauma is something that someone else would think of as traumatic. Some people are amazingly resilient and can experience horrific events, even at a young age, and remain mentally healthy. Others, in contrast, cannot get over events that seem trivial to outsiders.

In other words, on the one hand, it is not necessary to accept Freud's suggestion that the people's forgetting of the law must have been triggered by a specific violent act of revolution. On the other hand, the replacement of a regime in which the people have immediate knowledge of the law by one in which only the officials recognize, and have an internal view toward, is itself a profound revolution. It is the repudiation and destruction of one legal regime by another. It is hard to think that such a change in which a primitive equality is replaced by hierarchy with respect to the law would not be traumatic to any society, even if the change took place over a long period of time.

Indeed, Freud suggests something like this when he retells the *Totem & Taboo* myth in *Moses & Monotheism*. Freud hypothesizes that after the brothers killed Father Enjoyment they instituted a new regime governed by three laws. Two laws re-enforced the facts of Father's regime: thou shall not kill your father; and, thou shall not commit incest.<sup>203</sup> The third law is a repudiation of the rule by Father: all brothers are equal.<sup>204</sup> In fact, Freud proposes, it might have taken hundreds or thousands of years before this came about, and it is likely that another regime—possibly a matriarchy—reigned in the interim. Moreover the era of

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and *the Logic of Imagination*, 70 TEX. L. REV. 109, 179-80 (1991).

<sup>203</sup> FREUD, T&T, *supra* note 3, at 83-86.

fraternal equality eventually was to be replaced by patriarchy.

In any event, although Hart passes over the reason why the people forgot the law, the process by which they forgot must have been traumatic. Of course, this might be why Hart himself cannot bring himself to discuss it.

## 2. Officials and Mediators

Unlike Hart's amnesiacs, Freud's Hebrews eventually recovered their memory of the law. After the group murdered Moses, they gave up the strict Aton religion and the law Moses brought them from Mt. Sinai, merged with other Semitic tribes, adopted the son-in-law of Jethro as their new leader, and adopted the polytheistic Yahweh religion.

In three important points the later Jewish God became identical with the old Mosaic God. The first and decisive point is that he was really recognized as the only God, beside whom another god was unthinkable. Ikhnaton's monotheism was taken seriously by an entire people; indeed, this people clung to it to such an extent that it became the principal content of their intellectual life and displaced all other interests. The people and the priesthood, now the dominating part of it, were unanimous in that point . . . .<sup>205</sup>

Psychoanalysis, however, insists that whatever is repressed eventually returns.<sup>206</sup> The repressed can return subconsciously

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<sup>204</sup> *Id.* at 92.

<sup>205</sup> FREUD, M & M, *supra* note 4, at 79.

<sup>206</sup> [A] development which may be described as a slow "return of the repressed." The term "repressed" is here used not its technical sense. Here I mean something past, vanished, and overcome in the life of a people, which I venture to treat as equivalent to repressed material in the mental life of the individual. In what psychological form the past existed during its period of darkness we cannot as yet tell. It is not easy to translate the concepts of individual psychology into mass psychology, and I do not think much is to be gained by introducing the concept of a "collective" unconscious—the content of the unconscious is

through symptoms, or consciously through the articulation of recovered memories.

Consequently, after a significant period of time monotheism reasserts itself and the Mosaic law is recalled. Isn't this a very different story from Hart's? Yes, but, once again, there are surprising points of similarity. In both, the people lose an *immediate* knowledge of law that is replaced with a mediated relationship. In both, there is a class that remembers and mediates the law.

As mentioned, Freud is wary about the validity of his application of psychoanalysis—the theory of the individual psyche—to sociology and history (theories of collective action). It is one thing to posit that an individual represses certain thoughts so that they are never truly forgotten, and can be recalled in the future. It is quite another to posit that a society that has suppressed certain historical events may *recall* this history generations later.<sup>207</sup> Freud has no use for the concept of a Jungian “collective consciousness.” However, he does suggest that in one sense *all* consciousness is collective in that it is structured by language. In Lacanian terminology, the consciousness is part of

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collective anyhow, a general possession of mankind . . . We must conclude that the mental residue of those primeval times has become a heritage which, with each new generation, needs only to be awakened, not to be reacquired.

*Id.* at 170.

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Two further questions must here be answered. First, under what conditions does such a memory enter into the archaic inheritance; and, secondly, in what circumstances can it become active—that is to say, penetrate from its unconscious state in the Id into consciousness, though in an altered and distorted form? The answer to the first question is easy to formulate: it happens when the experience is important enough, or is repeated often enough, or in both cases. With the father-murder both conditions are fulfilled. To the second question I would remark: there may be a number of influences which need not all be known; a spontaneous course is also possible in analogy with what happens in some neuroses. The awakening, however, of the memory trace through a recent real repetition of the event is certainly of decisive importance.

the intersubjective order of society that includes law and sexuality, in addition to language. Consequently, traces of a society's past can linger in vocabulary, customs, and so forth.

Nevertheless, Freud tries to find a more concrete mechanism by which a society can "remember" a forgotten past. *This* mechanism echoes Hart's solution. The fact that most people forget the law does not mean that everyone forgets the law. Conversely, the continuity, or re-establishment, of a law, does not require that most of the people re-learn it, so long as professionals—the "officials"—recognize it. Moses suggests that the memory of the law was preserved by the Levites.

According to the Bible, the Levites are one of the twelve tribes, descendants of Jacob's son, Levi. They were the one tribe who did not receive land when the Hebrews reached the promised land. This was because they had special religious duties and incomes as temple servants. Not all Levites are priests (*Kohanin*) *per se*, but they assist the priests. Even today, long after the temple was destroyed, Levites have special privileges and obligations in Jewish life and synagogue ritual. Moses is identified as a Levite. It is a subset of the Levites—the descendants of Moses' brother Aaron—who became the *Kohanin*.

Once again, Freud subverts a Jewish precious "myth." Freud suggests that the Levites were not one of the tribes of Israel. If Moses was not a Hebrew, but an Egyptian, and if Moses was a Levite, then this suggests that the Levites were also Egyptians. Freud hypothesizes that they were Moses' original retinue of Egyptian "scribes and servants."<sup>208</sup> The fact that they left Egypt suggests both that they were personally loyal to the Egyptian

*Id.* at 129.

<sup>208</sup> *Id.* at 45. He states:

Among the greatest riddles of Jewish prehistoric times is that concerning the antecedents of the Levites. They are said to have been derived from one of the twelve tribes of Israel, the tribe of Levi, but no tradition has ever ventured to pronounce on where that tribe originally dwelt or what portion of the conquered country of Canaan had been allotted to it. They occupied the most important priestly positions, but yet they were distinguished from the priests. A Levite is not necessarily a priest; it is not the name of a caste. Our supposition about the person of Moses suggests an explanation. It is not credible that a great gentlemen like the Egyptian Moses approached a people strange



Moses, and that they were firm believers in the Aton monotheistic faith. As such, they would not have been offended by the new religion and strict laws that Moses imposed on the Hebrews.

If this were the case, the Levites would not have taken part in the revolt and assassination. As such, they would not have been traumatized, and would have no need to repress the memory of what really happened. Nor would they have acquiesced in the Midianite attempt to appropriate the prestige of Aton and the Egyptian Moses for Yahweh and their own leader. Consequently, they preserved the memory not only of their true origin, but also the law written on Mount Sinai.<sup>209</sup> The Levites, like the officials, recognized the Mosaic law when the people could no longer do so. Eventually, they actually became officials—priests and temple servants. Freud states:

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to him without an escort. He must have brought his retinue with him, his nearest adherents, his scribes, his servants. These were the original Levites. Tradition maintains that Moses was a Levite. This seems a transparent distortion of the actual state of affairs: the Levites were Moses' people. This solution is supported by what I mentioned in my previous essay: that in later times we find Egyptian names only among the Levites. We may suppose that a fair number of these Moses People escaped the fate that overtook him and his religion. The increased in the following generations and fused with the people among whom they lived but they remained faithful to their master, honoured his memory, and retained the tradition of his teaching.

*Id.* at 45-46.

<sup>209</sup> Freud admits that his theory of the Levites' role is more speculative than his theory of the two Moseses. He states:

It is no longer possible to determine the part the Levites played in the final victory of the Mosaic god over Jahve. When the compromise at Qades was effected they had raised their voice for Moses, their memory being still green of the master whose followers and countrymen they were. During the centuries since then the Levites had become one with the people or with the priesthood and it had become the main task of the priests to develop and supervise the ritual, besides caring for the holy texts and revising them in accordance with their purposes.

According to Sellin, the tradition of the murder of Moses was always present among the priests, until at last it was set down in writing, which alone made it possible for Sellin to divine it. Yet it could not have been known to many; it was not general knowledge. And is this form of transmission enough to explain its effect?<sup>210</sup>

At some point in time, the Hebrews became sophisticated and “spiritual” enough that they were drawn to monotheism—the concept of a universal, invisible God of justice and truth. The old law was “remembered”—reintroduced and reinstated.

Here Freud diverges from Hart. Freud does question whether the knowledge of the intermediaries is a sufficient explanation for the fact that the people eventually accepted the law. The people must have been receptive to the law because they themselves must have had a repressed memory of it, perhaps preserved in their language and customs.

Can we credit such a knowledge on the part of a few with the power to seize the imagination of the masses so lastingly when they learn of it? It rather looks as if there were something also in the ignorant mass of the people akin to this knowledge on the part of the few, which comes forward to meet it as soon as it is uttered.<sup>211</sup>

Consequently, he states:

I must admit that I have argued as if there were no question that there exists an inheritance of memory—traces of what our forefathers experienced, quite independently of direct communication and of the influence of education by example. When I speak of an old tradition still alive in a people, of the formation of a national character, it is such an inherited tradition, and not only carried on by word of mouth, that I have in mind.<sup>212</sup>

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*Id.* at 62.

<sup>210</sup> FREUD, M & M, *supra* note 4, at 119.

<sup>211</sup> *Id.* at 119-20.

To put this in Hartian terms, the Hebrew people—in addition to their officials—regained an internal point of view towards the law.

This, however, relates to one aspect of Hart's theory that is most unacceptable to non-Hartians. Hart, at first, argues that the internal point of view towards law is the characteristic trait of humanity. As I have written elsewhere, Lacanian psychoanalysis comes to a very similar conclusion.<sup>213</sup> Nevertheless, Hart later suggests that perhaps a society can have a legal regime if only the officials have the internal point of view. Later in the book he seems to imply that, in fact, only officials have the internal point of view. As Fitzgerald correctly points out, by doing so, Hart has just relegated the people to a sub-human status.<sup>214</sup>

Freud, in contrast, insists on humanity of the Jews. Their repression of their past—loss of the internal point of view—was a very human, neurotic response to a trauma. Just as psychoanalysis seeks to help the analysand recover the true potential of her humanity, the restoration of the law and monotheism restored the Jews to their historic destiny as the Chosen People.

### 3. Mediation

Of course, I have been underplaying the most striking apparent difference between Hart and Freud. In Hart, once the people lose immediate contact with the law, their estrangement is permanent. Thereafter contact with the law must be mediated by officials. Freud, in contrast, suggests that the people's loss of the law was a temporary repression of the trauma. As is the case with successful psychoanalysis, lost knowledge is eventually recaptured.

Upon further consideration, however, it is Freud who plays down the fact that, in his reading, the people's relationship to the law remains mediated even after its re-establishment.

Freud seems anxious to present himself as a defender of Judaism, despite his attack on its precious founding myth. Consequently, Freud asserts that true Mosaic Judaism is that of the prophets who insisted that the way to worship God is through a life of virtue, not in priestly rituals and rules:

[T]he priests, in confining their activities to elaborating the ceremonial for his worship, found

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<sup>212</sup> *Id.* at 127.

<sup>213</sup> SCHROEDER, THE FOUR LACANIAN DISCOURSES, *supra* note 22, at 36-37, 49 n.47.

themselves in opposition to strong tendencies within the people which endeavored to revive two other doctrines of Moses about his God. The Prophets' voices untiringly proclaimed that God disdained ceremonial and sacrifice and asked nothing but a belief in him and a life in truth and justice. When they praised the simplicity and holiness of their life in the desert they surely stood under the influence of Mosaic ideals.<sup>215</sup>

I am not a theologian but will accept this assertion for the sake of argument. Nevertheless, I must point out that the Biblical prophets were haranguing not merely the priests, but the people and the kings—suggesting that it was the people, in fact, who practiced a religion mediated by priests. Moreover, Freud himself argued that it was the Levites, the tribe who would become the priests and temple servants who preserved and re-instituted the Mosaic tradition. That is, the re-established religion as practiced revolved around those things that the prophets condemned: sacrifices in the temple, and elaborate and complicated rules of practice promulgated by priests, i.e., “officials.” He says that “priests, in their rewriting of the Biblical text as we have it, ascribe much too much to Moses. Institutions as well as ritualistic rules undoubtedly belonging to later times are declared to be Mosaic laws, with the clear intention of enhancing their authority.”<sup>216</sup> In other words, by trying to say that the priests betrayed the purity of the original Mosaic law, Freud unintentionally suggests that the Mosaic law as practiced was that law forgotten by the people and recognized by the priestly officials.

## VI. CONCLUSION

Both Hart and Freud try to explain the inexplicable birth of law through myth. I have showed that they both tell a tale by which law first comes into being as a way of assuring peaceful succession after the death of a primordial tyrant, Rex in Hart, and Father Enjoyment in Freud. They also both suggest that in

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<sup>214</sup> FITZPATRICK, *supra* note 2, at 200.

<sup>215</sup> FREUD, M & M, *supra* note 4, at 80.

modern legal systems law must be mediated—recognized by an elite class—because the people have forgotten their immediate knowledge of the law. Freud suggests that the reason why the people forgot the law was because they needed to repress the memory of their traumatic assassination of their law giver. Hart gives no explanation of why the people forgot the law. They just did. Was Hart suppressing the fact that traumatic violence that must accompany the imposition of a new legal regime? The enactment of the first law is, by definition, lawless.