Another Abraham: Jewishness and the Law of the Father

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Freud seems to project into prehistoric times the constitutional crisis of seventeenth-century England. The primal father is absolute monarch of the horde; the females are his property. The sons form a conspiracy to overthrow the despot, and in the end substitute a social contract with equal rights for all. This anachronistic history directs us to look for the recurrence of the archetype in the seventeenth century.¹

Jewish interpretation is inscribed in the form of the mirror of the Occident in search of the principle of Reason. At the present time, this is not yet understood, owing to the indirect effect of the anti-Semitic scheme. It is patently clear that Jewish interpretation continues to be excluded from reflection on West European jurisprudence, all the while that the entire scholastic system acquires shape and consistency from its very reliance on the ancestral quarrel. Mark this reference to ancestors, so crucial to comprehending the great debate over religious filiation at the interior of a Christianity seeking to found itself upon Judaism, whose interpretation is considered carnal.²

I could conceive of another Abraham for myself—he certainly would have never gotten to be a patriarch or even an old-clothes dealer—who was prepared to satisfy the demand for a sacrifice

¹. NORMAN O. BROWN, LOVE’S BODY 3 (1966).
immediately, with the promptness of a waiter, but was unable to bring it off because he could not get away, being indispensable; the household needed him, there was perpetually something or other to put in order, the house was never ready; for without having his house ready, without having something to fall back on, he could not leave—this the Bible also realized, for it says: "He set his house in order."

INTRODUCTION

"It is an extremely painful thing," writes Kafka, "to be ruled by laws that one does not know." Equally terrible, as so many of his tales remind us, is to submit oneself to laws that contradict one another. The modern European liberal ideal of autonomy—the command from outside to be rulers of ourselves—is perhaps the most imperious and terrible such command we know. Nevertheless that ideal has taken hold to such an extent that it often seems a veritable given of natural law. Still, even an entrenched ideal of autonomy cannot dispense with the inevitability of received authority—that is, of a law beyond self-regulation. Within a theory of identity and rights governed by the ideal of autonomy, received authority is inherently problematic; law, so to speak, is illegitimate.

The allusion to questionable filiation in our vernacular use of the word "illegitimate" is indeed germane here. For in psychoanalysis, the oxymoronic notion of illegitimate law, a central modern theory of identity, is traced through a notion of patriarchy, "the Law of the Father." What is seen as illegitimate in patriarchy is its forceful imposition upon weaker children (the theory in fact speaks only of sons), while the authoritative power of law is seen as grounded in guilt at the sons' rebellion against the Father. In perhaps the most common version of Western liberalism's foundation story, the institution of patriarchy is tied to the religion of the Old Testament.

This Article examines the common notion of a shared source and a privileged historical relationship linking Jewish monotheism, patriarchy as a social institution, and the legal systems of modern Western states. I claim that modern critical identifications of ancient Israelite religion as the source of patriarchal repression actually reflect the ideological dilemma of an impossible ideal of individual autonomy. Furthermore, there are fundamental differences between understand-


dings of the nexus among ancestry, text, and subject in Jewishness and in Protestant modernity. While the psychoanalytic notion of “the law of the Father” points toward the centrality of this nexus, it offers a progressivist and supersessionist account that effectively privileges Christianity.

This Article will therefore press the claim that “the Law of the Father” is particular to Protestant notions of interpretation, selfhood, and authority. We need not deny the patriarchal form of Israelite clan structures in order to insist that the problem of the Law of the Father does not stem in any linear heritage from “The Decalogue,” from “the Old Testament,” from “Moses,” or from “Abraham.” Rather, the question of legitimacy and paternity is the expression in modernity of a constitutive aporia at the heart of Pauline Christianity between, on one hand, the foundationalism of the church, and on the other, the demand for individual autonomy (not just as a “right,” but as an imperative). Furthermore, the rebellion against a presumptively outmoded, “old man” patriarchy is formulated in the Reformation, carried forward into the Enlightenment, and has informed twentieth-century critical hermeneutics of language, gender, and identity.

This Article thus explores how psychoanalysis produces a narrative of mediation between Jewishness and European modernity. Psychoanalysis is understood here both as an important resource for understanding Jewishness and the law of the liberal subject as two contrasting structures of identification and differentiation, and as a cultural form to be analyzed in its own right—a form that emerges to a substantial extent precisely out of the confrontation between Jewishness and liberalism in a period of crisis for both (the decades leading up to World War II). More specifically, I aim to illuminate a teleology elaborated in the Reformation and Enlightenment that fundamentally orients Freud’s account of religion and law, and the danger for criticism if it fails to see that teleology at work.

Because of their failure to take this progressive and liberationist teleology into account, many critical analyses of psychoanalysis and authority share in Freud’s view of ancestral authority as a problem to be overcome through the achievement of autonomy, rather than as a facultative condition of human existence. The view of ancestral authority as a burden is reflected in accounts that claim that genealogies work to naturalize history or impose a retrospective teleology by identification with some founding authorization.5 Alternatively, “genealogy” has been proposed as a method of research

5. For an example of the understanding of genealogy this Article works against, see TIMOTHY BAHTI, ALLEGORIES OF HISTORY 156 (1992) (“A beginning, especially an organic one, a birth, would yield a genealogy and thereby a heritage and a destiny . . . .”).
that uncovers the occluded wellsprings of continuing oppression. This Article relies on a third understanding of genealogy, in which kinship—the relations of generation of the human organism—are both central to and inseparable from language and culture. Thus the idea of genealogy here is introduced in order to resist the positing of an ontological split between biology and language, and hence the repeated impulse to assume some mythical moment of violation when language was superimposed upon a thenceforward helpless biological nature.

Here it must suffice to suggest that, although the Protestant context of the seventeenth-century debate over patriarchalism reinforces the rhetorical tendency to see patriarchy as stemming from the so-called Old Testament, patriarchy is not in fact a distinctively “Judaeo-Christian” phenomenon. On the contrary, “[f]rom Jean Bodin to Lewis Morgan to contemporary scholars, Rome has provided the paradigm of patriarchy in western thought.” Hence, inasmuch as Freud looked to ancient Rome as the very model of Western civilization, the account of the origin of the supposed Law of the Father may also have been motivated by an assumption that such paternal potestas characteristic of Rome was a necessary attribute of civilization. Indeed, the standard Occidentalist account has it both ways: Ancient Rome is both the very model of civilization and the benchmark of progressive Western social evolution away from Roman

6. Thus Nietzsche is described as proposing a genealogical method that “seeks to reestablish [i.e., render visible] the various systems of subjection: not the anticipatory power of meaning, but the hazardous play of dominations.” Michel Foucault, Nietzsche, Genealogy, History, in LANGUAGE, COUNTER-MEMORY, PRACTICE 139, 140 (Donald F. Bouchard ed. & Donald F. Bouchard & Sherry Simon trans., 1977).


8. Peter Goodrich suggests direct derivation from the legendary “destruction of an idol” that founds decalogic law to “the inaugural doctrinal discourses or treatises of common law [that] inherit or replicate the structures of classical Western patriarchic writings . . . .” PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW, at ix (1995). He later reiterates the theme: “It was no accident that in its earliest representation in the decalogue, the icon of law as commandment inscribed in stone was instituted, or founded, upon the destruction of an idol.” Id. at 223. Goodrich claims that the destruction of this idol—the golden calf—effects an “exclusion of difference in its various imaginary forms,” including “the Egyptian, the foreigner or stranger,” “the plurality of sources and of meanings,” and “the feminine.” Id. But Jewishness cannot unequivocally be said to inaugurate any of these rejections. At least in certain of its dominant manifestations, it enjoins welcome of the Egyptian, see Deuteronomy 23:8, Exodus 12:20, and it welcomes a multiplicity of voices and interpretations within an overarching hermeneutic framework, see, e.g., DANIEL BOYARIN, INTERTEXTUALITY AND THE READING OF MIDRASH (1990), and resists Hellenic misogyny, see DANIEL BOYARIN, CARNAL ISRAEL: READING SEX IN TALMUDIC CULTURE (1993) [hereinafter BOYARIN, CARNAL ISRAEL].

9. “Patriarchs,” meaning “father-rulers,” is a misleading translation of avot, the Jewish term that is used to designate Abraham, Isaac, and Jacob, and that means simply “fathers.”


11. See infra text accompanying notes 95-98.
paternal tyranny to "loving care for children in the contemporary family." 12 On the other hand, the same authority insists that the Roman pattern of "[w]aiting until death to transmit the patrimony required testators to place considerable reliance on the legal system and trust in survivors to carry out their wishes." 13 The written will thus survived as the Law of the Father. This provides us with an entirely plausible starting point for a very different account of the relations among paternity, property, and textual Law than the one offered by Freud in Totem and Taboo, which I discuss at length below. For now, however, the evident prominence of patriarchy in ancient Rome must remain the starting point for a different argument from that made here. 14

My discussion of paternity and autonomy in psychoanalysis is grounded in a brief discussion of the English Renaissance with its revolutionary stress on the autonomy of the adult vis-à-vis the law. That notion of radical autonomy was recognized as insufficient for the establishment of society. Yet what was bargained away in return for security was understood as a loss and, as Blackstone stressed much later, it was assumed that the least given away the better: "Political therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the

12. SALLER, supra note 10, at 232. Saller points out that this caricature of the overweening Roman father "from beyond the grave" misses both balancing factors in Roman culture and the demographic contingencies that made early orphanage virtually the norm, thus favoring the elaboration of testamentary devices I mention briefly here. More to the point of this Article, the simple evolutionary model criticized by Saller regarding ancient Rome is analogous to Freud's progressivist account of the transition from primitive taboos to civilized self-reflection and self-regulation. See infra notes 93-94 and accompanying text.

13. SALLER, supra note 10, at 232.

14. The French scholar Pierre Legendre insists on the centrality of the occluded Roman heritage in contemporary Western law. Since Legendre's legal anthropology will be central to claims made toward the end of this Article, his own statement of how he arrived at this conviction bears extended quotation:

I conclude that there exists, from the point of view of jurists nourished by the Western tradition, a prohibited substratum . . . . [This prohibition] aims to dissuade interpretive effort, regarded as illicit, that is to say subversive . . . . My frequentation of medieval glossaries, a stint as a technocrat in the African desert, then an apprenticeship in the great work of psychoanalysis, were to contribute to the clarification of the terms of a debate which was controlled, evaded with hints, [then] experientially reconstituted at Nanterre where the old paradigm of the Law and of its Terror were singularly placed before me: then the text of the [Church] Fathers was reproduced by new clerics installed in the eternal University and speaking comically of liberty, without awareness of what they imitated; admirable scenes where the most antique repertoire was closely sifted, by law students and their professors who instinctively recaptured the liturgies. In the canonical debate, several versions of the Law are recited and the roles of Romans are played.

public."\(^{15}\) It is easy to see why this can be criticized as a mystification, especially since Blackstone himself noted that this "original contract of society . . . [had] . . . perhaps in no instance [ ] ever been formally expressed at the first institution of a state . . . ."\(^{16}\) Blackstone thus explicitly recognizes the notion of the social contract as a foundational fiction.

By contrast, the psychoanalytic foundational fiction of the origin of the law and civilization is tormented by the dilemma of positing simultaneously that its origin myth "really happened" and that its "memory" is instituted as an unconscious explanation of unnatural restraints on individual will. Much of what follows is concerned with examining how the relationship between textual authority and subjecthood in Jewishness on the one hand, and the historical circumstances under which members of Jewish communities were transformed into bourgeois "individuals" in the course of one or two generations on the other, can be correlated with both the divergences and congruencies of the liberal-legal and the psychoanalytic accounts of the tension between the individual and society. Moreover, these correlations are not merely matters of analogy. The figure of "the Jew," the Jewish Bible, and Jewish law are all fundamental terms in the Reformation and Enlightenment debates that found liberalism. Notions of personal autonomy elaborated in those founding debates set the terms by which the emancipation and integration of Jews into liberal Western society was to be accomplished. Freud's psychoanalysis in large part constitutes a disguised commentary on the reform of Jewish personhood\(^{17}\) as part of that emancipation.

Following my discussion of the English Reformation and its Enlightenment aftermath, I turn to that aspect of Freud's work in which he explains the origins of civilized law through the story of the primal horde and the murder of the tyrannical father. The problem that Freud sought to solve in his just-so story of civilization, understood through Jacques Lacan's reformulation as the problem of the imposition of language on human animals, is the starting point for the culminating section, which sketches an anthropology of law and language as foundational to the human species. There I will identify the logical relation between Lacan's Pauline metaphysics and his claim for a paternal, linguistic "repression" of the natural mother-child relation. Moreover, I will contrast to Lacan's account the relation between the claim made by another French scholar, the legal historian

\(^{15}\) 1 WILLIAM BLACKSTONE, COMMENTARIES *121.

\(^{16}\) Id. at *47.

Pierre Legendre, for the importance of Jewish understandings of text and subject and Legendre’s deontologized reference to "separation" between mother and child (rather than "repressive") on the other. The purpose there is to point out how some of the continuing blind spots of psychoanalytic, critical legal, and feminist theory arise from displaced rhetorics of patriarchy and the Law as "Jewish," rhetorics that were both challenged and reinforced in the modern, critical Jewish overlay onto older Christian discourses to the tension between patriarchy and autonomy.

In the last section I develop an argument for the explicit reintegration of genealogy into the discourse about autonomy and legitimacy in the West. Such a reintegration is needed to prevent the continuing discussion of the relations among gender, embodiment, and the law from collapsing back into the discursive blind alley of law's illegitimacy. At the same time, stressing that our law, too, is inseparable from the anthropology of kinship and group identity may further the vexed project of integrating a Western law that seeks universal validity with the broadest range of symbolic authorities to which people respond throughout the world now. This argument about genealogy, anthropology, and law is contained in the final section's heading, "Anthropology-In-Law." A brief Conclusion then restates in summary form my claim regarding the relevance of Jewishness to this expanded view of law in society.

One reference point must be stressed at the outset: Each of these aspects of the Western tension between autonomy and genealogy confronts anew the Pauline "paradoxes of universality." Paul associates the Law with Jewish chauvinism and with carnality—that is, both literalist, "fleshly" reading and the bodily passions aroused by law that inspire us to generate children who are only destined to death. Paul's effort to free Christians from the notion that they should follow the practical dictates of the Torah, of Israel "in the

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18. See supra epigraph accompanying note 2. Legendre's acknowledgment of Jewishness is linked to his recognition of the suppression of Roman models. See supra note 14.
20. Etienne Balibar, Paradoxes of Universality, in THE ANATOMY OF RACISM 283 (David Theo Goldberg ed., 1990). Robert Cover links these paradoxes to "Paul's diatribe against the Law." See Robert Cover, Nomos and Narrative, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 95, 104 n.31 (Martha Minow et al. eds., 1992) [hereinafter ESSAYS OF COVER]. As Robert Paul has recently phrased it, "What for the Jews has been the support for an ongoing social system has been reinterpreted through the lens of the Christian myth as an intolerable condition, one from which a person self-evidently needs to be rescued." ROBERT PAUL, MOSES AND CIVILIZATION 194 (1996).
21. See DANIEL BOYARIN, A RADICAL JEW: PAUL AND THE POLITICS OF IDENTITY 13 (1994) (citing Romans 7:5: "For when we were still in the flesh, our sinful passions, stirred up by the law, were at work on our members to bear fruit for death."). For Lacan's invocation of a nearby verse (Romans 7:7), see infra text accompanying note 172.
flesh,” led to an emphasis on each individual’s spiritual bonding with Christ, followed by the voluntary union of those individuals with each other in the “spiritual body of Christ.” Against the retrospective reassurance of a genealogical inheritance, Paul insisted on faith in the divine Promise, a “future interest” available to every believer. Rather than the “coming of Christ, his crucifixion, and resurrection” constituting events within a saving history, they are “the end—telos, both the finish and the revelation of the meaning—of history,” and the legend of history is now to be read only allegorically, always referring beyond itself, “from the moment of ethnicity to the moment of the universal (spiritual) subject, from natural birth to spiritual rebirth in the Promise.” Paul thus rhetorically undermines the Law as a set of embodied practices, opposes both ascendant and descendant genealogies, and thereby reaches a revolutionary articulation of a spiritualized universalism:

Ye have put off the old man with his deeds, And have put on the new man, that is renewed in knowledge after the image of him that created him; Where there is neither Greek nor Jew, circumcision nor uncircumcision, barbarian, Scythian, bond nor free, but Christ is all, and in all.

Within these phrases may already be seen, if not the seeds, then certainly the analogous impulses to those of radical Reformation within Christianity (a kind of “renewal in knowledge”), and of the Protestant conception of spirituality as “the struggle to be made Christ.” All of these moves entail a stress on the individual as free

22. BOYARIN, supra note 21, at 24. This sequence—individual transformation followed by social union—is analogous to John Locke’s conception of a pre-social “moral” community: “Lockean nature not only allows for a community of interest but also constitutes a moral community defined by the divine precepts embodied in natural law. . . . It is entirely possible for the members of this moral community in the state of nature to be complete strangers to one another!” Stephen L. Newman, Locke’s Two Treatises and Contemporary Thought: Freedom, Community, and the Liberal Tradition, in JOHN LOCKE’S TWO TREATISES OF GOVERNMENT: NEW INTERPRETATIONS 173, 208 n.4 (Edward G. Harpham ed., 1992).

23. BOYARIN, supra note 21, at 31, 33.

24. Id. at 34-35.

25. Id.

26. Colossians 3:9-10. I quote this source, despite the existence of some doubt concerning the attribution of Colossians directly to Paul, because the reference to the “old man” and the “new man” are so germane to the discussions of paternity and supersession that recur throughout this Article. See also:

For you are all children of God through faith in Christ Jesus. For as many of you as were baptized into Christ have put on Christ [saying]: ‘There is neither Jew nor Greek; there is neither slave nor free nor freeman; there is no male and female. For you are all one in Christ Jesus.’ If, however, you belong to Christ, then you are Abraham’s offspring, heirs according to the promise.

Galatians 3:26-29; see also BOYARIN, supra note 21, at 22-25 (discussing this passage).

subject. This stress underlies the repeated crises of law and autonomy that underlie the identity of the West: "[T]his ‘New Individual’ of Western, Pauline Christianity distinguishes itself by a clause stipulating a universal condition; ‘If I Want to,’ between the Institution and itself."\(^\text{28}\)

**THE REFORMATION AND AFTER**

Although the Reformation did come to extol the patriarchal family, its initial success lay in persuading a generation to abandon the faith of its fathers. *Ezekiel* 21:18 became a banner for Protestant reformers: "Do not walk in the statutes of your fathers, nor observe their ordinances, nor defile yourself with their idols."\(^\text{29}\)

This section, focusing on Luther, Locke, and Kant as key figures in the Reformation and Enlightenment, has two purposes. First, it extends the introduction’s exploration of connections between debates about paternity and legitimacy on one hand, and debates about textual authority and hermeneutics on the other. Second, it demonstrates the tension inherent in the Protestant ideal of self-governance in an ordered state.

The modern civilization that, according to Freud’s *Civilization and Its Discontents*, uneasily contains the neuroses of “normal” individuals, problematically relies on an internalization of the law. That process of internalization was perhaps first articulated by Martin Luther in the civil universalization of the Christian idea of calling. This entailed a difficult reconciliation between the internal working of spirit and the recognition of civic responsibility.\(^\text{30}\) Luther inherited from Paul the distinction between the literal, material, externalized Law and the spiritual, internal Gospel,\(^\text{31}\) but he did not renounce order. Rather Luther made “the law” the guardian of conscience; for Luther, what

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30. Luther found it if anything more difficult to reconcile his conviction that Death had been overcome by Christ, with his overwhelming grief at the death of his thirteen-year-old daughter Magdelene. Unable to thank God for removing the girl “from the flesh, the world, the Turk, and the Devil,” Luther wrote to a friend asking the friend to “‘please give thanks to God in our stead.’” *Id.* at 168.

“the law does, according to Paul, is to make sin known.”32 He argued that “the terrifying of the conscience must proceed from the preaching of the Law, to the end we may know that we have offended against the Laws of God.”33 The notion of spiritual “calling,” borrowed from the Gospel, was reconciled with the reality of an externalized Law, or state power. “Calling” was henceforth civilized, associated with a public order distinct from the private realm that is proper to the Gospel. Thus Luther was able to relate the values needed for governance to the spiritual qualities common to every Christian, while preserving both a special place for hereditary nobility and public officials and a special, private realm of conscience.34

The rationalization of the civic realm was accompanied by what Harold Berman describes as “professionalization” of appellate procedure through institutionalized law school faculties in the sixteenth century. That institutionalization contributed toward a profound jurisprudential shift away from “finding” and then declaring the law in a particular case to “applying” the law based on schematized doctrines.35 Packaging and presenting the law in such schematic fashion contributed to the need, felt already in sixteenth-century Germany by the Lutheran jurist Oldendorp, of always matching “law” with equity, “since all law is general and abstract.”36 A good Protestant, Oldendorp derived certain aspects of civil law from various of the Ten Commandments, and the good jurist was enjoined to study both the Bible and his conscience and pray to God before rendering a decision.37 Equity, on the other hand, was to be found inside every man who would search honestly for it; Oldendorp relied on a doctrine of

a God-given, Biblical natural law; through his God-given conscience each person has the capacity to discern it and to observe it. Conscience is, for Oldendorp, indeed a form of reason; it is

33. CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN 125 (1972) (quoting Luther).
34. See Harold J. Berman, Conscience and Law: The Lutheran Reformation and the Western Legal Tradition, 5 J. L. & RELIGION 177, 190 (1987) “[Luther’s] Protestantism placed th[e] responsibility [to reform the secular society] on every Christian, and especially on the prince and the Obrigkeit [civil service corps]. Each was a ‘private person’ in his relation to God, but each had a public responsibility to his calling.” Id. at 194 (citations omitted).
35. Id. at 185-86.
36. Id. at 196.
37. Id. at 195, 198. The implications for contemporary critical theory of this Protestant ideal of self-regulation through an individualized, hermeneutic conscience are sharply and controversially examined in LAMBROPOULOS, supra note 33.
not, however, ordinary human reason, or civil reason (\textit{ratio civilis}), but a divine reason implanted in man, which Oldendorp calls natural reason (\textit{ratio naturalis}). The natural power implanted by God in man's conscience "does not depend on the power of the person. . . . God has written it into your mind. . . ." "Conscience," he wrote, "is an infallible guide."\textsuperscript{38}

The Reformation also posed analogous challenges to the traditional links between political order and theology in England. Church and state were hardly separate in early modern Europe. On the contrary, "... in England from the Reformation to the Enlightenment ... [c]hurch and state formed a single continuum, and political and theological questions were seen as interdependent. Questions about power and legitimacy rested in high degree upon exegetical and interpretative ideas."\textsuperscript{39}

Many of these questions relied in turn on a tradition, dating back to the Anglo-Saxon period, which thought of the nature and destiny of the English as analogous to those of the ancient Israelites.\textsuperscript{40} Questions about authority, genealogy, and progress in the English Reformation thus echoed powerfully in a twofold allegorization of the relations between the contemporary Christian and the figure of the Jew. Reformed Christianity overtly insisted on a literal rather than allegorical reading of the Scripture, an ideology intended to make the message of the Gospel directly accessible to each Christian reader without the need for intercession by those schooled in hermeneutics. Its movement of recuperation and return to the text relied heavily on the tradition of identification with the ancient Israelites. Yet that same movement of reform could not escape the tendency toward an allegorical reading of the relations among the saving history of ancient Israel, the situation of the Christian in the present and the divine promise of spiritual redemption to come.\textsuperscript{41} Where medieval Christian interpretation had seen the ancient Israelites of the "Old Testament" as the immature, now-discarded husk from which realized Christianity had sprung, now it was the "Reformation Christian [who was] seen, not as fulfillment, but as figure of the fulfillment promised—and so deferred—in the world to come."\textsuperscript{42} The reflexive self-making of the Protestant Christian was to replicate, and hence complete, the process

\textsuperscript{38} Berman, supra note 34, at 194 (citations omitted).
\textsuperscript{40} See generally Nicholas Howe, Migration and Mythmaking in Anglo-Saxon England (1989) (discussing Anglo-Saxon period); Reventlow, supra note 39, at 108-11 (discussing Reformation).
\textsuperscript{41} See Luxon, supra note 27, at 26.
\textsuperscript{42} Id.
of prefiguration and realization that summarized the relation between the "Old Testament" Law and the Gospel. The Protestant self was located at the midpoint of an allegorical stutter-step of saving Grace, transcendant by analogy to the Jew (or "Papist") caught in the forms of Law, but still "raw" Jew with regard to the future Redemption.

This double figuration of the Christian in terms of saving history was accompanied by a debate over the validity of paternal authority, both within the family and as the source of legitimate state rule. After the break with Rome, authority was concentrated in the Crown by the promotion of the claim that contemporary law originated in England rather than in Rome, and that royal authority was "the constitutional equivalent in natural and civil law of the absolute power of the father." Thus Filmer's *Patriarcha*, the most famous defense of the thesis linking all law to the King and royal power to paternal power, posits a forgotten royal fiat underlying every customary authority:

[W]hen every Custom began, there was something else than Custom that made it lawful, or else the beginning of all Customs were unlawful. Customs at first became Lawful only by some Superiour, which did either Command or Consent unto their beginning. And the first Power which we find (as it is confessed by all men) is the Kingly Power, which was both in this and in all other Nations of the World long before any Laws, or any other kind of Government was thought of, from whence we must necessarily infer[] that the Common Law itself, or Common Customs of this Land, were Originally the Laws and Commands of Kings at first unwritten.

In turn, the derisive attack on Filmer's *Patriarcha* in John Locke's *Two Treatises of Government* was part of Locke's signal contribution to the general suspicion of received authority in Reformation. After Locke's attack, patriarchalism was so discredited that even enthusiasts of Filmer deprecate the patriarchalist theory of royal legitimacy. Locke did not deny that the family was the probable origin of government, nor the likelihood that the first ruler was a

43. GOODRICH, supra note 8, at 83.
44. SIR ROBERT FILMER, PATRIARCHA AND OTHER POLITICAL WORKS 102 (Peter Laslett ed., Blackwell 1949) (1680).
45. See JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 191 (1993).
46. See GORDON SCHOCET, PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND 2-3 (1975). To this day, "paternalism" carries a pejorative overtone in legal scholarship with regard to such issues as legal protections of contracting parties; attackers of a policy are likely to deem it "paternalistic," while defenders will speak of "public policy."
patriarchal monarch. He did, however, regard that origin as politically neutral and replaced its legitimizing function with a theory of consent based on personal voluntarism. The decisive discrediting of patriarchalism did not leave a void, but was replaced by yet another precise articulation of subjectivity, of "a subject who is calculating and calculable... and the sovereign bearer of rights and duties, subject to and of law from the voluntaristic perspective." This voluntarism is not the same as an atheist or secularist perspective, nor does it disregard the prospect of ultimate divine reward and punishment. On the contrary, Locke's claim is that the rational self, looking to the expectations of the juridical order to determine what actions and self-restraints will maximize its own pleasure and pain, is precisely "the kind of self god [sic] created."

Thus the divine will can be known through what satisfies the individual's well-being, and there is no particular need for paternal governance. Freedom from the need to underpin government by analogy to patriarchal authority facilitated in turn the notion of "progressive revelation." Belief in progress and the repudiation of patriarchy combined to offer the message that "the standards by which the future was to be judged would be generated by the future itself and not derived from some historically remote beginning." They meant that priesthood and ceremony could be dispensed with along with all forms of "idolatry." Locke's belief in progress was linked in turn to a voluntarism that was not merely philosophical, but theosophical, referring to creation of the universe through the workings of God's "omnipotence and his free will, not his reason." It was because the universe reflected God's voluntary designs rather than an underlying rationale in any way recuperable by humans that the pleasure and pain experienced by individuals as a result of their actions was the proper measure for self-regulation.

What is most essential in this prominent moment in the English debate about paternity and authority is, however, the generally overlooked distinction between contract and consent. Filmer, in fact, was not merely an apologist for the English royal line; at least in part, his theory that all authority originally stemmed from fathers (rather than being proper to individuals) was aimed at inadequacies in the

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47. See id. at 259.
48. See id.
49. Id. at 179.
50. TULLY, supra note 45, at 240.
51. SCHOCHEt, supra note 46, at 275.
52. Eldon Eisenach, Religion and Locke's Two Treatises, in JOHN LOCKE'S TWO TREATISES OF GOVERNMENT: NEW INTERPRETATIONS, supra note 22, at 50.
53. TULLY, supra note 45, at 202.
theory of an original contract as the source of government. Filmer denied that an ancestral contract, even if freely drawn, could of itself suffice to bind descendants; "he was ultimately claiming that no one could legitimately give away or limit what belonged to someone else by nature."54 Locke’s theory of consent recognized the same problem in the theory of original contract, but consent as the alternative to patriarchalism "represented the personal and contemporary manner in which individuals could claim the same freedom that had belonged to their fathers before them."55

The foundational tensions constructing understandings of law as the articulation of polity and identity in the Christian West—tensions between obligation and freedom, between law and Gospel, between law and equity—were thus mirrored and renewed in the idea of incompatibility between inherited contract and individual consent. These two forms of authority would no longer be readily reconciled in Western liberalism.

The tensions between contract and consent, explored by Locke, were most powerfully addressed during the Enlightenment in the writings of Kant.56 One recent commentator has even claimed that "no person gave stronger support to Locke’s ‘great bond of society’ than Kant."57 Locke’s discussion of rights and Kant’s elaboration of individualized and universal morality helped rationalize "[t]he fully developed public sphere [that] was based on the fictitious identity of the two roles assumed by the privatized individuals who came together to form a public: the role of property owners and the role of human beings pure and simple."58 That public sphere “arose first in Great Britain,” which was “the model case” for the Continent.59 Generally, Kant shared the English Radicals’ confidence in both the evolution of truth and the revelation of that truth in one’s personal experience.60

54. Schochet, supra note 46, at 262.
55. Id.
59. Id. at 57.
60. For the English Radicals, see Hill, supra note 33, at 286, 297. For Kant, see Immanuel Kant, The Principle of Progress, in Eternal Peace, and Other International Essays 55, 59 (W. Hastie trans., World Peace Foundation 1914). Kant writes:

I will, therefore, venture to assume that as the human race is continually advancing in civilization and culture as its natural purpose, so it is continually making progress for the better in relation to the moral end of its existence, and that this progress, although it may be sometimes interrupted, will never be entirely broken off or stopped.

Id.
Like Luther and Locke, Kant had to articulate a relation between the internalized sources of spiritual and moral knowledge, and the bases of social order. He did this through a distinction between the public and the private drawn differently than Luther’s. Luther identified privacy and inwardness with freedom of conscience and with spirit, as opposed to the coercive and external realm of law that still had its legitimate place. Kant’s distinction, by contrast, ran between the actions of the “private” citizen in the civil sphere, where obedience was due to the monarch, and a “public” discursive freedom where the individual was bound to articulate the dictates of his critical conscience in the service of progressive Enlightenment. Thus Kant’s “private” realm relates primarily to the situation of the bureaucracy, Luther’s *Obrigkeit*, while his “public” sphere is similarly limited to those with the education and wherewithal to publish their opinions on critical issues. The key point is that there is ultimately no possibility of a coherent, purely individualist or private ethics. Even the most famously autonomist of ethical systems must attend to questions of civil authority and their attendant rituals.

It is entirely consistent with the dilemma of autonomy that Kant’s expressions with regard to Jews are ambivalent. Kant praised the Jews for “the sublimity of their moral law,” and especially for their rejection of idols, while rejecting the ceremonialism and externality of practice-oriented Jewish law. Judaism was thus simultaneously a relic and an exemplar to be emulated; as in the English Reformation, the Jew was a double other with polar valences, simultaneously primitive and prophet. Echoes of the Lutheran Oldendorp’s combination of reliance on the supposedly universal and divinely revealed moral aspects of Old Testament legislation with faith in the always new guidance of inspired conscience may also be heard in this double relation.

For Kant as well, the tension between freedom and authority thus appeared once again in the question of the relation of the individual to the state, of the Protestant believer to the God and Law of the Israelites, of the human child to its parents, and of the past to the

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61. See supra text accompanying notes 29-33.
63. Much as the most anti-idolatrist textualism ends up relying on “[t]he text or word [as] no less a sign than the graven image or statue . . . .” GOODRICH, supra note 8, at 42.
64. Jacques Derrida, *Interpretations at War: Kant, the Jew, the German*, 22 NEW LITERARY HIST. 39, 69 (Moshe Ron trans., 1991) (citing Kant’s *The Critique of Moral Judgment*).
65. See IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 116 (Theodore M. Greene & Hoyt H. Hudson eds. & trans., 1960) (“The Jewish faith was, in its original form, a collection of mere statutory laws . . . really not a religion at all . . . [and] directed to absolutely nothing but outer observance.”).
future. His definition of Enlightenment was addressed to the last two of these relations: "Enlightenment is man's emergence from his self-incurred immaturity." In an early essay on pedagogy, Kant elaborated on both this notion of "immaturity" and the possibility of emergence from it by drawing a distinction between human and animal nature:

Humans are the only creature that must be educated. . . . Discipline transforms animality into humanity. An animal is everything it is through its instinct; an alien reason has prepared everything for it already. Humans, however, require their own reason. Man has no instinct, and must plan out his behavior on his own. Because he is not immediately able to do this, coming into the world unformed, others must do it for him.

Taking the two quotes together implies the ideal of an eventual transcendance of childlike dependence. By implication, Kant looks forward to a time when every human person will always already be fully independent and enlightened, free of both the ontogenetic dependency period of individual childhood and the phylogenetic limitations of the period of species-wide immaturity. Kant looks forward to the time when the idea that "every rational being exists as an end in himself" will be a realized fact and not just an exemplary assertion. In the meantime, "others must do it for him." That diagnosis leaves us in the Kantian double bind, which asserts both humanity’s essentially rational and hence self-responsible nature on the one hand, and the immaturity of both the individual child and the species in history on the other.

This section has explored two interconnected themes. One is the revival, invigoration, and expansion of the early Christian idea of self-rule as a cornerstone of both Protestant hermeneutics and Protestant ethics. This ideal was carried forward and developed into classical liberal philosophy by figures such as Locke and Kant. The second theme is the sometimes explicit, often displaced attempt to understand the relation of Christianity to Judaism on the one hand as that of advanced child to benighted father, and on the other as heralding the triumph of individual spirit over carnal and engendered matter. Both of these themes were to inform the modernist theories of Jewish intellectuals such as Freud, who suffered and enjoyed the

truncated process of Jewish emancipation into liberal West European society.

**FREUD: ON THE SIDEWALK**

In this section of the Article, I examine three sources shaping Freud's books about the sociology of religion and civilization—including *The Future of an Illusion, Civilization and Its Discontents, Moses and Monotheism,* and most coherently *Totem and Taboo.*\(^6^9\) The first of these sources is a Victorian anthropology itself shaped substantially both by the first waves of reception of the idea of humans' primate ancestry and by the notion of England as the pinnacle of a species-wide teleology toward civilization.\(^7^0\) The second is Freud's own radical insistence on law and culture as constraints upon "animal" drives inherited by humans from evolutionary forebears. The third is the possibility of, and need for, integration of Jews within a bourgeois, Christian-dominated fin-de-siècle Western Europe. As I will show, for Freud this last concern seemed in turn to require a reckoning of the respective places of Judaism and Christianity in the narrative of the species's struggle to reconcile itself to civilization. Throughout, Freud consistently assumed a hierarchical, developmental dualism in which language is separate from—simultaneously secondary and superior to—animal nature.

More precisely, these works rely on the theory of the "primal horde." According to this theory, and by analogy with the notion of social organization among modern gorillas current when Freud wrote, the original form of the human group consisted of a single, dominant male, whom Freud calls "the Father," all of the adult females as his "wives," to whom he had exclusive sexual access, and the subordinate junior males, who had no sexual access to females.

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 . . . . The violent primal father had doubtless been the feared and envied model of each one of the company of brothers: and in the act of devouring him they accomplished their identification with him, and each one of them acquired a portion of his strength . . . . this memorable deed . . . was the


\(^7^0\) See George W. Stocking, *Victorian Anthropology* (1982).
beginning of so many things—of social organization, of moral restrictions and of religion.\footnote{71}

In remorseful, unconscious commemoration of this deed, the sons banded together as a brotherhood of fellows and bound themselves to be ruled henceforth by the moral, internalized workings of a law attributed to the now-dead Father.

As a feminist commentator has pointed out, Freud explicitly refers to Moses and Monotheism as the story of “a sort of social contract.”\footnote{72} In fact, Freud’s hypothetical reconstruction presents “his accounts of the original pact as (stories) about the genesis of civilization.”\footnote{73} Yet at least two senses of this word “civilization” are operative here. On one hand it is human society tout court, what separates us from the gorillas—in Freud’s story, the moral-legal aftereffects of having actually killed the Father and then experiencing remorse. On the other hand, civilization is European civilization, with very precise notions of civility, Bürgerlichkeit. In this second sense, commentators understand Freud’s theory as responding to his own situation between Jewishness and civility.\footnote{74} Building on those discussions, this section will emphasize further Freud’s progressivist reliance on his own depictions of the childlike primitivity of the past in which God was invented, combined with his faith in the “God Logos” to fulfill human wishes “very gradually, only in the unforeseeable future, and for a new generation of men.”\footnote{75}

At the same time, I want to anticipate my sketch below of an alternate “legal anthropology” by reference to an alternative to Freud’s foundation myth of an imposition of law upon the animal will of early (male) homo sapiens. This alternative starts from a view of law in its largest sense—what we usually call “culture”—as human adaptation.\footnote{76} It may not be immediately obvious how radical a revision of psychoanalytic assumptions about “nature” and “culture”

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71. TOTEM AND TABOO, supra note 69, at 176.

72. CAROLE PATEMAN, THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 41 (1989); see also BROWN, supra note 1.


75. FUTURE OF AN ILLUSION, supra note 69, at 69.

76. See generally PAUL, supra note 20.
(analogous to some extent to "the unconscious" and "the conscious" realms of the individual mind) are called for on the basis of this alternative anthropology. Here I only allude to this alternative in order to stress that the assumption that language is an imposition on the animal nature of men is by no means inevitable. Such an assumption provides one powerful way of explaining the pathos behind Freud's odd myth. This is the approach of the psychoanalytic theorist Jacques Lacan in his summation of the anthropological question haunting Freud:

[H]ow can this system of signifiers without which no incarnation of either truth or justice is possible, how can this literal logos take hold of an animal who doesn't need it and doesn't care about it—since it doesn't at all concern his needs? . . .

How can this have taken hold, how does man enter into this law which is foreign to him and which as an animal he has nothing to do with? It was to explain this that Freud constructed the myth of the murder of the father. 77

My contention, however, is that we will lose an absolutely critical purchase on the analysis of law, language, and morality coming out of this founding myth of psychoanalysis if we assume (as Lacan's quote suggests) 78 that Freud constructed the myth in order to explain a human complex that he had objectively noted. Rather, I want to suggest that part of Freud's emphasis on the Law of the Father (initially tyrannical and then repressive) and his concern for explaining the alienation and struggle at the origin of human society and of civility are inseparable from his cultural-historical situation in between Jewishness and the law of the bourgeois individual.

In the sociological texts, Freud consistently relies on the assumption that ontogeny recapitulates phylogeny—that the pattern of development from conception toward normal human adulthood bears a relation of congruence to the evolution of our species. 79 The

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78. Although Lacan could also be saying that Freud constructed a certain story in order to explain what was for Freud a conundrum about language and animality. In any case, my intention is not to rate Freud, Lacan, or anyone else on progressive scales of enlightenment, but to highlight key instances of a lingering dualist metaphysics separating sign systems from reality.

79. Alternatively, Freud posits the reverse relationship—that the primitive is childlike. Both sets of belief complexes, the primitive and the childish, are present in the adult in "repressed" form:

An uncanny experience occurs either when repressed infantile complexes have been revived by some impression, or when the primitive beliefs we have surmounted seem once more to be confirmed . . . . When we consider that primitive beliefs are most intimately connected with infantile complexes, and are, in fact, based upon them, we shall not be greatly astonished to find the distinction often rather a hazy one.
traditional Jewish principle that "later generations are inferior in wisdom to earlier generations" could only have seemed an anathema to moderns. For Freud, the theory of the troubled relationship between human animality and human culture is thus part and parcel of individual psychology in culture; both are agonistic processes in which normal development can be separated out from pathology. Our ancestors are seen as somehow weaker than we in their immature cultural development, while the proper evolution of civilization is "comparable to the normal maturation of the individual."

Several aspects of Freud's theorizing relevant to the relations among law and religion are directly linked to this reductive assumption of a normal individual development toward adulthood corresponding to the teleological but conflicted advance of the entire species: First, there is an important consequence for the ideal of individual autonomy that Freud shares with liberal theory of law and identity. Freud's dream of achieving autonomy contrasts, however, with the liberal doctrines that proceed from the assumption that it has already been achieved. Blackstone's definition of civil liberty is exemplary in this regard.

Given that classical liberal theory is indeed predicated on a rhetoric that assumes adult male autonomy as a condition already achieved, the attractions of Freudian narratives of doubt and struggle in the twentieth-century crisis of liberalism are readily understood. What should not be missed is that the assumption of autonomy, albeit as a goal rather than a given, remains in place.


81. Civilization and its Discontents, supra note 69, at 52. Freud's analogy between the species-historic development from animal to human on one hand, and the individual's development from animal to human on the other, can be compared with the doctrinal and folkloric Christian accounts of Christianity developing out of Judaism in history and in the development of the individual Christian child. See Claude Fabre-Vassas, La Bête SINGULIERE: LES JUIFS, LES CHRETIENS ET LE COCHON (1994).


83. See supra text accompanying note 15.
Linked to this changed view of autonomy, the concern for the transcendence of religion (as a childish aspect of earlier civilizations) in *The Future of an Illusion* is sharpened in *Civilization and Its Discontents* into a concern for the dangerous process of civilizational maturation to a healthy, rational adulthood. The transcendence of cultural filiation (freeing ourselves from these “ignorant ancestors”) becomes as necessary to the collective as the successful resolution of the Oedipus Complex is necessary to the individual.

Old age—that part of the life cycle beyond the period in which one is the parent of dependent children—seems to be excluded from consideration of the relations between ontogeny and phylogeny in these various texts. Partly this is because the urgency of old people’s sexual “drives” is diminished and therefore what Nietzsche would call their “will” is lessened, making them less problematic and less interesting in terms of the integration of the human “animal” into society. Partly as well, this is because the old in whatever time are tainted with the ignorance of ancestors. Consistent with this, Freud fails to articulate how language, culture, and the symbolic order not only constrain the individual organism with its drives, but expand the possibilities of identification beyond the individual organism. Freud takes the boundaries of the organism as a certain datum indicative of normalcy: “Normally, there is nothing of which we are more certain than the feeling of our self, of our own ego.”

In contrast it must be remembered that generation is not only about birth, not only about childhood and the initial dependency. Indeed, Freud’s analogy between an assumption of civilizational progress (necessary even if not teleologically guaranteed) and a normative description of the dangerous path from dependent infancy to autonomous adulthood has as its complement a wholly negative account of the “instinctual desire for death, destruction, and ‘stillness,”’ which he sees as giving “rise to our aggressive inclinations against both ourselves and others.” Freud expresses this desire for stillness as destructive because he views the death instinct as a negative teleology of individual and society, the counterpart or “underside” to “the instinct to preserve living substance and to join it into ever larger units.”

84. “The form wherein the old Jews were happy no longer offers us any shelter,” LETTERS OF SIGMUND FREUD 318 (Ernst L. Freud, ed. & Tania Stern & James Stern, trans., Basic Books 1960), cited in Daniel Boyarin, “You May Not Tell the Boys: The Diaspora Politics of a Bisexual Jew” (1996) (unpublished manuscript on file with author); “These ancestors of ours were far more ignorant than we are,” FUTURE OF AN ILLUSION, supra note 69, at 33.
85. CIVILIZATION AND ITS DISCONTENTS, supra note 69, at 12.
86. West, supra note 82, at 854.
87. CIVILIZATION AND ITS DISCONTENTS, supra note 69, at 77.
makes available—an account showing that the desire for life and the desire for death are only destructively paired from the perspective of the autonomous individual limited chronologically at birth and death. Within many cultural formations, including Jewishness and those called “primitive,” the problem of organismic extinction has been addressed (not necessarily “solved”) through a construction of transgenerational identity inseparable from the ironic and powerful construction of personhood in and through language. In such cultures, the possibility of dealing with death in this way relates first of all to the absence of an ideal of individual autonomy, and second to the absence of a metaphysics that places language and symbolism at a stage or level ontologically separate and “less real” but “more advanced” than biology or reality, but in any case as a constraint on “nature.”

The consequences of such a dualist metaphysics are clear in Jacques Lacan’s thought. In the Lacanian elaboration of Freud, all the mother does is give birth and nurse. She has no tongue, only das Ding, the primal object, the maternal breast. We might ask: Doesn’t she sing and talk to the child all the while? And if so, couldn’t her singing and talking be as fundamental to the supposed original unity between mother and child as is nursing? The assumption that speech is a matter of separation rather than connection, overlaid on the assumption that Father separates the child from Mother, in effect assigns nature and animality to Mother, language and law to Father, and thus reinforces the metaphysics of language as ontologically separate, posterior, and “higher.” Inasmuch as Jewishness, like primitivity, fails to realize such a progressive development, this metaphysical psychoanalysis of language and identity further supports the common association of fin-de-siècle culture between Jewishness, woman, and the body on one hand, and Christianity, masculinity, and

89. Thus Foucault lucidly summarizes Lacan: The father “creates the distance along which will develop the scansion of presences and absences, the speech whose initial form is based on constraints, and finally, the relationship of the signifier to the signified which not only gives rise to the structure of language but also to the exclusion and symbolic transformation of repressed material.” Michel Foucault, The Father’s “No”, in LANGUAGE, COUNTER-MEMORY, PRACTICE, supra note 6, at 68, 81-82 (emphasis added).
91. See the discussion of maternal subjectivity in JESSICA BENJAMIN, LIKE SUBJECTS, LOVE OBJECTS 19 (1995) (“[V]iewing the earliest experience of the mother from her perspective breaks up th[e] myth [of a ‘harmonious’ maternal ideal], confronting her with the paradoxical necessity of recognizing, while not yet ‘knowing,’ the strange newborn who was once part of her body. Indeed, the struggle for recognition...helps foster a symbolic space within the early maternal dyad between mother and child — a process previously conceptualized exclusively in terms of the oedipal father-son rivalry.”) (emphasis added). Note, however, that this formulation preserves a primary association between symbolization and “struggle.”
spirit or language on the other.\textsuperscript{92} More to the point at this stage of the discussion, assigning language a secondary if rarified status obviates the possibility of a “real,” rather than “illusory,” relation to the dead through language.

The very terms of Freud’s masculinist origin myth thus block a more nuanced and contingent understanding of the relations among generation, death, identification, and perpetuation. Quite the contrary: His materialist progressivism provides a different version of the double bind encountered in Kant.\textsuperscript{93} In this version, what is older must be transcended because it was more “ignorant” than we are and it was “childlike,” yet at the same time the primal animality at the origin of humanity remains the core driving the human animal. Thus, when the sons kill the Father, acquire access to the women, and institute the Law of the Father in remorse for their act, they also gain access to “the pure erotic bliss of the father viewed as primordial.”\textsuperscript{94} Thus the acquisition of infantile eros would also be inseparable from civilization, from acquisition of the internalized Law of the Father. There is a patent contradiction in this schema: The acquisition of that which is “primordial,” instinctive, prior to law and language, is available through and only through that act that results in inheritance of the Law. Eros and civilization are a package deal.

As suggested above, the insertion of a Pauline discourse against the shackles of the Law into a Roman imperial framework guarantees a regime of perpetual Western disease that can be characterized as the pathetic search for a law without Law, or the recognition of the need for law (to control “men” in “society,” expressed by the notion that “‘crimes forbidden by law are crimes which many men have a natural propensity to commit’ ”)\textsuperscript{95} combined with the suspicion that any Law is illegitimate. Hardly surprising, then, that a perpetual ambivalence (\textit{not} an eternal hatred) toward Jews on the one hand and toward

\textsuperscript{92} Pierre Legendre refuses this metaphysics, insisting that human life must be (linguistically) “instituted” and that genealogy is inescapable:

In any culture, it is not enough to produce human flesh; it is still necessary to institute it for it to live, for life to reproduce. To institute the subject is to institute life. Because it is bound to the problematic of language, the juridical system is, originally \textit{[dans son principe]} burdened by the idea of genealogy.

Pierre Legendre, \textit{The Other Dimension of Law}, 16 CARDOZO L. REV. 943, 953 (1995). This acknowledgment, I contend, is linked to Legendre’s recognition of the importance of Jewish difference—\textit{not}, I would insist, because Jewishness is a “chosen” culture, but because of the signal persistence of the Jewish anti-metaphysics in the heart of the Christian West.

\textsuperscript{93} This double bind may be paraphrased as the command to “be true to your father’s law, which consists of being true only to yourself.” For a lucid elaboration of a model rebellion against this double bind, see the discussion of the Schreber case in \textit{ERIC SANTNER, MY OWN PRIVATE GERMANY} (1995).

\textsuperscript{94} Jacques Lacan, \textit{Introduction to the Names-of-the-Father Seminar, in TELEVISION} 89 (Denis Hollier et al. eds. & trans., 1990).

\textsuperscript{95} James George Frazer, \textit{cited in TOTEM AND TABOO}, \textit{supra} note 69, at 153.
genealogy on the other would be constitutive of the West and the subject of special awareness on the part of those who attempt to escape from the presumed parochialism of Jewish genealogical community and Law into the presumed freedom and autonomy of the West.

Freud is thus particularly invested in the general sense of the paradox of Law's illegitimacy. Again and again he tries to reconcile the notion of a founding violence with the notion of functionality. On one hand there is the hint that taboos are per se bad ("there can be no race and no level of culture which has escaped the ill-effect of taboo"), and there is a repeated association of "primitives and neurotics" as those who observe taboos. On the other hand there is a functionalist counter-tendency to explain why taboos effectively manage regulation of social tensions. In any case, in Totem and Taboo Freud goes on to the "necessary" supposition that taboos are prohibitions of primaeval antiquity which were at some time externally imposed upon a generation of primitive men; they must, that is to say, no doubt have been impressed on them violently by the previous generation. . . . [The persistence of the taboo indicates that] the original desire to do the prohibited thing must also still persist among the tribes concerned.

Overcoming the primitive and neurotic handicap of taboo, or at least revealing the violence of its historical imposition so that men can rationally review the functionality of different kinds of interdictions, would thus provide on the one hand a therapeutic path to normalcy for Everyman and a particular resolution of the compulsive taboos that presumably drive the anti-Semite: Totem and Taboo can be read as encompassing the "legal" obsessions of both anti-Semite and Jew, which is the only way to solve Freud's particular problem.

If we remain with Lacan's powerful reformulation of the anthropological dilemma, stated as the attempted if failed solution to...

96. Id. at 30.
97. Id. at 40.
98. In this respect Freud can be read also as carrying forward Nietzsche's anti-anti-Semitism, which is no defense of Jews:

Human history would be a dull and stupid thing without the intelligence furnished by its impotents. Let us begin with the most striking example. Whatever else has been done to damage the powerful and great of this earth seems trivial compared with what the Jews have done, that priestly people who succeeded in avenging themselves on their enemies and oppressors by radically inverting all their values, that is, by an act of the most spiritual vengeance. This was a strategy entirely appropriate to a priestly people in whom vindictiveness had gone mostly underground.

Nietzsche, The Birth of Tragedy and the Genealogy of Morals, 167 (Francis Golffing trans., 1956). Thematic links between Nietzsche's account of "repression, compensation and sublimation" were remarked on as "startlingly Freudian" by Nietzsche's English translator in 1956. Francis Golffing, Preface to id., at ix.
a problem that Freud merely acutely "recognized," we fail to respond to the dimension of projection involved in Freud's origin myth. "Projection," here, not in any technical psychoanalytic sense, but in a reading back from what Freud considered to be the normal (sometimes even "real")\textsuperscript{99} family structure. In the connection between the general reliance on the set of relations, repressions, and desires called the Oedipal Complex on the one hand and the account of the origins of law, the clan structure, and religion in \textit{Totem and Taboo} on the other, there is a transposition of the family order of father-mother-son, read back into the founding event of the killing of the father that transformed the primal horde into a totemic brotherhood. Thus, on the one fateful occasion when desire erupted into action and instituted law as a result, the subordinate males of the horde were not simply acting animalistically, but in line with a desire that Freud imputes backwards from the normalized, bourgeois Oedipal family.\textsuperscript{100} The founding repression, which results in the illusion of the totemic Father, is an exceptional moment that is at the same time "called for," anticipated as necessary for progress. The causality works backwards and forwards; the genealogy in which ontogeny recapitulates phylogeny is mirrored by a teleology in which phylogeny anticipates ontogeny.

Consider this as the logic of a dream, working backward and forward, yet impossible in either direction (the necessary institution of an impossible law). It may not seem odd then that the following recollection appears in Freud's \textit{The Interpretation of Dreams}:

\textsuperscript{99} See, e.g., \textit{TOTEM AND TABOO}, supra note 69, at 21 (discussing relations between primitive "son-in-law" and "mother-in-law" in a manner that universalizes modern European kinship categories, and simultaneously obscures fundamental questions of what genealogy "in law" can mean).

\textsuperscript{100} Jay Geller notes that "anthropologists are all but unanimous in their denial of what Freud found absolutely necessary, namely, his claims for the historicity of the primal horde." Jay Geller, \textit{A Paleontological View of Freud's Study of Religion: Unearthing the Leitfossil Circumcision}, 13 MOD. JUDAISM 49, 65 (1993). Despite this denial, "Freud's haunting theory entered subtly into the thinking of many anthropologists, including Malinowski, Röheim, Lévi-Strauss and more recently Robin Fox." Chris Knight, \textit{BLOOD RELATIONS: MENSTRUATION AND THE ORIGINS OF CULTURE} 55 (1991). Some scholars may understand Freud's work on patricide not as a historical hypothesis, but as a deliberate articulation of the (unconscious?) myths his own culture needed to tell itself in order to explain that culture's particular neuroses. This reading would suggest that, according to Freud himself, "there never was a father enjoyment, who was murdered. We each write the law and retroactively attribute it to father-enjoyment, who must have existed and whom we must have killed." Interview with Professor Jeanne L. Schroeder, Cardozo Law School (Apr. 15, 1996). A similar understanding may animate a revisionist fable in the same genre as \textit{Totem and Taboo}, such as Arthur Jacobson offers us. Arthur J. Jacobson, \textit{Legal Emotion: The Women's Story in Totem and Taboo}, 16 CARDOZO L. REV. 1139 (1995). I find, however, that the tendency of Freud and Lacan to speak of Oedipal development in universal terms militates against the claim that they understood the myth primarily as a story our culture tells about itself.
At that point I was brought up against the event in my youth whose power was still being shown in all these emotions and dreams. I may have been ten or twelve years old, when my father began to take me with him on his walks and reveal to me in his talk his views upon things in the world we live in. Thus it was, on one such occasion, that he told me a story to show how much better things were now than they had been in his days. "When I was a young man," he said, "I went for a walk one Saturday in the streets of your birthplace; I was well dressed, and had a new fur cap on my head. A Christian came up to me and with a single blow knocked off my cap into the mud and shouted: 'Jew! Get off the pavement!'" "And what did you do?" I asked. "I went into the roadway and picked up my cap," was his quiet reply. This struck me as unheroic conduct on the part of the big, strong man who was holding the little boy by the hand. I contrasted this situation with another which fitted my feelings better: the scene in which Hannibal's father, Hamilcar Barca, made his boy swear before the household altar to take vengeance on the Romans. Ever since that time Hannibal had had a place in my fantasies.  

Now imagine the two scenes of recollection, one on top of the other, blended as in a dream. In one of them Sigmund Freud, a child, is walking with his father Jakob Freud, who appears to the child as "a big, strong man." As the two walk along, the father's narrative of his youth superimposes other images onto the first scene; the two come together in the "unheroic conduct on the part of the big, strong man." The father, reduced to a "young man," does not stand his ground when challenged by the anti-Semite, and is displaced from Sigmund's side. He abandons the sidewalk, leaving Sigmund alone and unprotected, at the mercy of the anti-Semite; alternatively, the protective father disappears, to be replaced by a more powerful and fundamentally hostile male. The assurance that "things are better now" appears as a failed attempt to place the two events in proper sequence, to reassure the child Sigmund that he will not be challenged by an anti-Semite in turn when he is a young man, but the ambivalent Law of the Father undermines this progressive reassurance. Freud's confused identifications with his childhood self, with his father and with the anti-Semite relate also to a contradiction inherent in the axiom that ontogeny recapitulates phylogeny. Phylogenetic progress suggests that it is the old man one needs to transcend, while ontogenetic progress suggests to the contrary that it is the immature

child one needs to transcend. In allegorical accounts centering on the progressive redemption of the individual self, the corrupt and superannuated old man cannot be correlated to the old man who has successfully travelled the pilgrimage of life, nor can the innocent child be correlated with the immature child at the mercy of incestuous and parricidal drives. Absent a transgenerational, “cyclical”/historical emphasis on related selves that identify through and with one another, we fall back on the atemporal, idealized, hypostasized notion of the autonomous and self-redeeming moral self with all of the inherent paradoxes just suggested.

There is thus a particularly consequential entanglement in the situation of a Jew who (for whatever reasons) believes in this notion of the murder and subsequent Law of the Father on the one hand, and who is also faced with anti-Semitism on the other hand. The child’s supposed desire to kill the father is actualized in the anti-Semite’s hatred of both himself and his father, and this “organizes the subjective position of the child.” At the same time, the hostility toward the father is justified inasmuch as, in the superimposed recollection, the father has been transformed into an anti-Semite threatening the betrayed child. The child’s supposed hostility toward the father and the anti-Semite’s hostility toward father and child are elaborated into a generalized theory of oppression by the father followed by revolt against the father. The evaluation is ambivalent: The father was indiscriminate, promiscuously possessive (the way “animals” are), yet our rebellion was itself an unfilial act; those things happened in the old days not now, yet each son and each father in every generation replays this scene.

The ambivalence is not to be condemned. In a sense, by telling the story with its unwished-for and unanticipated disappointing ending, Jakob Freud wounded his young son. As Hans Loewald describes the theory of the Oedipal relationship, the father was the child’s “protector, as well as the castrator if his authority and predominance were challenged.” Of course, the passive “were challenged” presumes

102. The repressive “no” of the father relates, of course, not only to weaning but to the incest taboo, posited as the interdiction of a fundamental impulse. See 7 Jacques Lacan, supra note 90, at 81-85, 92. If language prevents son-mother incest, why don’t non-human male infants routinely copulate with their mothers? I am led to suspect that, much as I have been arguing that the “Law of the Father” is a discourse produced by Protestant autonomism, “the incestuous impulse” and its “interdiction” by the properly-functioning, lawgiving bourgeois Father is an effect of Freud’s flight from the disturbing Heimlichkeit of Jewishness. On the ambivalence of the term Heimlich, see Freud, The “Uncanny”, supra note 79, at 368.


a challenge from ego (the child), but real-world fathers often are challenged by those with greater power than they. Loewald’s formulation suggests that the father can become a castrated castrator if his “authority and predominance” are challenged by something other than ego—here, the anti-Semite.\(^{105}\)

Freud lacked on the one hand any overt political critique of cultural difference.\(^{106}\) Furthermore, while he associated “in his essential nature” as a member of the Jewish people, he denied that he could “express that essence clearly in words.”\(^{107}\) Nor did he work through what such an ambivalent collective identification might produce. All this is not to gainsay, but merely to qualify as a caution, the suggestion by two acute recent critics that Jewishness constitutes “an identity which is not one.”\(^{108}\) This follows their articulation of an insight they attribute to Freud,\(^{109}\) that the birth of a human child sets the stage for a lifelong intermingling of dependence and autonomy.\(^{110}\) This idea certainly helps get us closer to an effective critique of the liberal construction of the autonomous human male, yet it does not appear to me as an idea that consistently informs Freud’s theoretical speculations. As suggested above, the notion of the Law of the Father is instead troubled by a dreamlike inconsistency. Freud remains almost entirely silent on the subalternity of his generation’s Jewish fathers. As a result, in order to produce an account that simultaneously explains Freud’s own ambivalent feelings toward his father and the anti-Semite’s hostility, Totem and Taboo produces a universal account of the original “badness” of the Father and the guilty taboos that persist after the act of murder that founds the Law.\(^{111}\)

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105. Insofar as it is a corrective, John Brenkman is right to claim that “Freud’s long unhealed wound was the hand of his father was not some primal paternal castration threat but rather the dismay he felt as a child upon hearing his father tell of being bullied.” JOHN BRENKMAN, STRAIGHT MALE MODERN 110 (1993). Brenkman’s point is that Freud’s theory responded not only to a hypothetical universal situation, but to an event in his own life that arose out of the structures of domination and identity within which he lived. I am trying to show here the complex ways in which the father’s disappointing response could nevertheless have been received, given those same structures, as an “unnaming” of the child.

106. See the brief passage in Civilization and Its Discontents where he announces what will, in effect, be a central doctrinal tenet of Lévi-Strauss’s structuralism, that the anthropologist has no place or authority to criticize or to offer a therapeutic analysis within his own cultural sphere. See CIVILIZATION, supra note 69, at 110 (demurring from the claim to be able to diagnose “communal neuroses”); see also Carl E. Schorschke, Politics and Patricide in Freud’s Interpretation of Dreams, in FIN-DE-SIECLE VIENNA: POLITICS AND CULTURE 181 (1980).

107. TOTEM AND TABOO, supra note 69, at xxxi.


109. The attribute is to Freud in general, evidently, since their essay contains few citations.

110. LA PSYCHANALYSE EST-ELLE UNE HISTOIRE JUIVE?, supra note 74, at 65.

111. Carole Pateman criticizes the psychoanalytic feminist critic Juliet Mitchell for asserting that the Law of the Father only arises after the murder of the father. PATEMAN, supra note 72, at 42 (citing JULIET MITCHELL, PSYCHOANALYSIS AND FEMINISM (1974)). Pateman insists to the contrary that the Law of the Father was in effect while the Father yet lived. The dispute
Part of the general ethnographic character associating primitives with neurotics in Freud’s view is a linkage of words with power.112 A fantasy that Freud assumes is overcome in the progression of civilization as in the development of the normal individual.113 What is real is affect, and affect is of two kinds: pain and pleasure.114 Freud extends from the notion of the divergent principles of pain and pleasure a notion of a mixture of feelings of affection and hostility toward the dead. He assumes that these can only be dealt with by primitives (as by neurotics) in an adversarial way, as a conflict of pleasant and repellent associations, in which one of these two affects must ultimately be suppressed by the other. Mourning the death of an elder toward whom one had felt ambivalent crowds out expressions of hostility, which are then projected into a construction of the dead as “demons.”115 On the other hand civilization has mitigated this conflicted relation to the dead: “through the course of ages . . . there has been an extraordinary diminution in ambivalence.”116 Having posited an original ambivalence and a progressive diminution of it, could Freud have admitted to ambivalence toward his parents, let alone toward an explicit connection of that ambivalence to the paradox of their familial power and social powerlessness? Significant here is the lack on Freud’s part of any recognition that these ambivalences can be dealt with, ritualized in any other way than conflict and repression—as they are in various groups’ “ceremonies of ambivalence.”117

The ritualization of ambivalence is only possible, of course, if words do have power. So, however, is psychoanalytic therapy, the “talking

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112. See TOTEM AND TABOO, supra note 69, at 69. Similarly, Freud describes magic as “mistaking an ideal connection for a real one.” Id. at 99.

113. See MANFRED PÖHLEN & MARGARETE BAUTZ-HOLZHERR, DAS FREUDSCHE SUBJECT IN DER ANALYSES 277-79 (1911) (pointing out relation between general tendency toward a “past-burying” progressive temporality and allegorical interpretation in Freud).

114. Freud’s analysis here is thus compatible with the psychological basis of Locke’s voluntarism. See supra text accompanying notes 52-54; cf. Alan Bass, Primary Perversion and Universal Law, 16 CARDOZO L. REV. 1293 (1995) (drawing on writings of Hans Loewald, especially Loewald’s criticism of tendency toward objectivist realism in Freud, to argue against reading of Freud as mechanically objectivist and in favor of reading of Freud’s thought as contingent and exploratory).

115. TOTEM AND TABOO, supra note 69, at 80.

116. Id. at 83.

Freud clearly knew that words have power, yet he is repeatedly undone by his commitment to a realist materialism. When he sets out to explain the origins of a dualistic belief in “soul” on the one hand and “body” on the other, he replaces that belief with a new dualism, in which symbolic organizations (such as totemic clans) can be reduced to displacement of “physical drives” or posited historical events.

Related to the simplistic dichotomy of pleasure and pain in one’s affect toward the dead is a curious analytic lapse, a subjectivism through which the “reality” of the other (in this case an ancestor, alive then dead) is treated as dependent upon the existence of the one who perceives that other. Thus Freud breaks down our awareness of the other into “perception” of her (when she is alive) and “memory” of her (when she is dead, no longer present). Freud thus adds to his insistence on an irreconcilable ambivalence vis-à-vis any deceased loved one a denial of the possibility of a “real” continued relation beyond the organismic dissolution of that other. Unable to reconcile ambivalence toward the dead, primitives and neurotics refuse to acknowledge that the dead are no longer “real.” If this is accepted, it is not necessary to accept the fable of patricide in Totem and Taboo, or even to hear it told as a parable, in order to understand the claim that, inspired by our guilty feelings after that father’s death (but why not the mother’s?), “we write the law in the Father’s name so that we can pretend that he is still alive.” This claim is plausible only if we accept the reification of a bright line separating the other’s “being alive” from his “being dead.”

118. See Jacques Lacan, Function and Field of Speech and Language, in Jacques Lacan, Ecrits: A Selection 33, 44 (Alan Sheridan trans., 1977) (“For nobody is less demanding than a psychoanalyst as to what provides the status of his action, which he himself is not far from regarding as magical. . . . [Whereas actually] to impute to regression the reality of an actual relation to the object amounts to projecting the subject into an alienating illusion that does no more than echo an alibi of the psychoanalyst.”).

119. Totem and Taboo, supra note 69, at 116.

120. Freud’s progressivism was naïve. By early 1938 he could write with bitter sarcasm, “It was a real weight off the heart to find, in the case of the German people [as opposed to the Italians and the Soviets], that retrogression into all but prehistoric barbarism can come to pass independently of any progressive idea.” Moses and Monotheism, supra note 69, at 67. Yet the same anxiety that authorized his arrogation of an objectivized story of human origins was tied to the compulsion to prove oneself civilized—an ordeal that, of course, was by no means confined to Jews one generation removed from the Yiddish-speaking community.

121. Totem and Taboo, supra note 69, at 117.

122. Jeanne Schroeder, The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis, 16 CARDOZO L. REV. 805, 894 (1995). Goodrich’s allusion to the sacrificial foundation story may also be read in this light. See Goodrich, supra note 8, at 94. (“In terms of origin and source, the most explicit correlation between rationality and group membership is found in the earliest depictions of lawful foundation in sacrifice or oedipal killing.”).

123. In his summary of Daniel Paul Schreber’s memoir, Freud notes that “[t]hrough the whole of Schreber’s book there runs the bitter complaint that God, being only accustomed to intercourse with the dead, does not understand living men.” Sigmund Freud, Psychoanalytic
We could start instead from a supposition of anamnestic solidarity and interdependence, such that when we remember him, he is alive and perhaps also that when we forget him, we die. In fact, the sharp division between the reality of the living and the memory of the dead, let alone the further leap into an association of perception with conscious awareness of the other and of memory with her unconscious presence to us, is not a precultural given. To see the alternative—beginning with the assumption of connection rather than "real" separation between the living and the dead—allows us to see once again the contingency of Freud's assumption of the individual organism as the starting point for analysis and to recall on the contrary that not all symbolic orders start from and devolve back to the bounded individual organism in this way.

Freud acknowledges toward the end of Totem and Taboo a problem of collective psychic continuity, arising from the fact that his account of law stemming from unconscious remorse for the killing of the father necessitates unconscious guilt on the part of subsequent generations that did not take part in that act. But a "collective psyche" need only be posited within a theory grounded in the assumption of the autonomous psychic framework of each immature individual and of a presymbolic human essence onto which law and language are imposed. Assuming that the ambivalent feelings toward elders (physiological pain and pleasure) are likewise prelinguistic sensations in Freud's understanding that ambivalence is not susceptible to a creative symbolic negotiation, this hence results in the unambivalent projective invention of a demon ancestor spirit (expressing and associated solely with pain) to whom one is then subject.

Moses and Monotheism especially suggests that both Judaism and anti-Semitism constitute this kind of ancestral projection, a projection that can be overcome only through greater powers of individual and collective self-reflection. Moses and Monotheism reiterates the father-murder thesis of Totem and Taboo with specific reference to the origins of Judaism and Christianity. The problem of the collective psyche reappears in Moses and Monotheism, where it is handled by

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Notes upon an Autobiographical Account of a Case of Paranoia (Dementia Paranoidea) (1911), in THREE CASE HISTORIES 83, 100 (Philip Rieff ed., Macmillan 1963). Freud himself, of course, would not complain of a flaw in God, but the note is consistent with Freud's sense of the unwarranted collusive power of religion and the dead.

125. See TOTEM AND TABOO, supra note 69, at 117.
126. See Loewald, supra note 104, at 401-02 (stressing importance of striving for unity and symbiosis as countervalue to striving for self-differentiation); Jennifer Nedelsky, Law, Boundaries, and the Bounded Self, 30 REPRESENTATIONS 162 (1990).
127. See TOTEM AND TABOO, supra note 69, at 196-97.
the suggestion that “the archaic heritage of mankind includes . . . memory traces of the experiences of former generations.”128 In Moses and Monotheism, the thesis of the murder of the Father is the basis for the asserted collective murder of the Egyptian Moses, the lawgiver.129 Here, however, the postulated sequence in Totem and Taboo is transposed. In Moses and Monotheism the “father” is a lawgiver of superior, imperial, and enlightened views130 whose strictures are resented by the “savage Semites;”131 they come to “regret[] the murder of Moses and tr[y] to forget it.”132 The story is complicated by the postulation of a second Moses, associated with the bloodthirsty and ritualistic Jahwism with which the Jewish mass is actually more comfortable.133 This suppression of the murder of Moses was never fully effective, and ultimately, through mechanisms Freud does not reveal, “a growing feeling of guiltiness . . . [facilitated] the return of the repressed material.”134 This return of the repressed produced the Prophetic attempt to return to the superior moral quality of the original Mosaic teaching that “the Deity spurns sacrifice and ceremonial; he demands only belief and a life of truth and justice (Maat).”135 This, then, is another version of the thesis of a Law whose authority is grounded in poorly perceived or “unconscious” remorse for the murder of a father figure.

Especially toward the end of Moses and Monotheism, Freud discusses Judaism in two highly evaluative registers, intended as an apologia and partial explanation of the persistence of Jewish distinctiveness. On one hand, he stresses the extraordinary ethical development of Mosaic (and then Prophetic, as opposed to priestly/Jahwist) Judaism. As Daniel Boyarin suggests, this reinforced a defense of Judaism as manly and disciplined in Kantian terms: “Where the Jews have been accused of carnality and, therefore, of being like women, Freud . . . would demonstrate that they are more spiritual, and more rational, than the others, and therefore more masculine than the accusers themselves.”136 On the other hand the Jews remain distinct and are obviously not generally regarded from “outside” as being highly advanced in these Kantian terms. Thus

128. Moses and Monotheism, supra note 69, at 127.
129. See id. at 57.
130. See id. at 22.
131. See id. at 58.
132. Id.
133. Daniel Boyarin suggests that this is an effective if covert “representation of the distinction between German Jews and their embarrassingly primitive relatives, the Ostjuden.” Boyarin, supra note 17, at 267.
134. See Moses and Monotheism, supra note 69, at 108.
135. See id. at 63.
136. Boyarin, supra note 17, at 253.
Freud adds the second and final point: Christianity was a fundamental advance in resolution of the conflict over the killing of the father and hence in the mental growth needed for a responsible, self-reflexive civilization to emerge. The key to this advance in Christianity is the sacrifice of the son: The sacrifice "had to be a Son, for the sin had been murder of the Father."137 Although he is ambivalent toward Christianity, ultimately he inscribes it in a teleology analogous to the therapeutic narrative of progressive self-recognition by the recovering neurotic. Unfortunately, when the Jews responded to Moses, "an eminent father substitute,"138

[i]t was a case of acting instead of remembering, something which often happens during analytic work with neurotics. They responded to the doctrine of Moses—which should have been a stimulus to their memory—by denying their act, did not progress beyond the recognition of the great father, and barred the passage to the point where Paul started his continuation of primeval history.139

Hence the answer to the riddle of Jewish distinctiveness. The Jews stand out and are made to suffer because they were "unable to participate in the progress that this [Christian] confession to the murder of God betokened."140 Freud thereby suggests that Christianity, with its ritualized acknowledgment (rather than repression) of the murder of the primal Father-become-God, is a fundamental advance toward autonomous, self-reflexive collective adulthood, while Jewishness is inherently neurotic. Psychoanalysis (at least in a certain middlebrow understanding)141 promises the individual the insight into the founding repressions of his self-formation that would allow him to recognize and take responsibility for his baser aspects and thus finally to achieve the Protestant ideal of self-governance in which the "self is both reader and text"142; it might thus be understood as offering in turn the evolutionary step beyond that initial Christian recognition.143

137. See MOSES AND MONOTHEISM, supra note 69, at 110.
138. See id. at 113.
139. Id. (emphasis added).
140. See id. at 176.
142. LUXON, supra note 27, at 103.
143. In this respect Daniel Boyarin's characterization of Freud's rewriting of Judaism "as 'manly' Protestantism avant le lettre," Boyarin, supra note 84, at 15, is somewhat misleading. Inasmuch as Protestantism incorporates the necessary intermediate step of "confession to the murder of God" and then transcends the subsequent guilt through self-governance, even a highly ethical Judaism must remain backward in Freud's account. See again the preface to the Hebrew edition of Totem and Taboo, where Freud expresses the wish to see an "analytic" Judaism. Not is it clear, therefore, that Freud simply wanted to stop at a "Protestant Judaism" (that is, the
Freud's emphasis on instincts and the "animal nature" of man may obscure his answer to the inevitable conflict between the need for Law and the struggle of human, egoistical Nature against that Law, namely, the idea of psychoanalytic insight into the self, which is in turn a psychologically informed variant of the Kantian ideal of self-regulation. Freud dreamed of solving the Kantian double bind through the analytic process of reflectively acknowledging and thus incorporating, making proper to one's self, the external (instinctive and biographical) determinants of identity. This attempt to resolve the paradox between the brute fact of external determination and the demand for autonomy through recognition, acknowledgment, and atonement follows the same logic as Freud's account of the Christian atonement for the murder of the Father by the sacrifice of the Son, an act Freud regards as an advance in civilizational consciousness. Yet this entire schema actually presupposes the prior separation between self and other (here, especially ego and parent). This can be seen in the persistent theme in Totem and Taboo contrasting the cosmological projections "outside" the self of primitive man with the Freudian injunction to realize the source of our own projections and thus to master them. By the same token, Freud's highly ethnocentric and progressivist account of the totem system in Totem and Taboo blocks a recognition of the value of contingent, symbolic, or displaced—rather than analytic—resolutions of the tensions between living and dying, choosing and obeying. Only from the perspective of the separated organism is it obvious that these are "real" dichotomies that one ultimately must confront in order to be self-responsible.

This section has argued that Freud's understanding of human beings as "essentially" animals and as such primarily selfish, combined with his fundamental assent to the notion of the species's progress away from naiveté and projection toward realistic self-knowledge and responsibility, produced an account of selfhood that—whatever its insights—militates against recognition of the creative value of other patterns of identity produced by cultures that are not hampered by such limitations. Insofar as a critical theory of Western law continues to share Freud's reductive bias, it remains trapped within the dilemma of ascribing to law a coercive power that, such theory must ultimately claim, is nevertheless "in reality" derivative or illusory. The next section therefore sketches an account of law and identity that recognizes the contingency of Western ideas concerning both the animal/human split and the inherent tendency toward progressive enlightenment.

normative style of assimilating German Jewishness). BOYARIN, supra note 17, at 249.
ANTHROPOLOGY-IN-LAW

* Totem and Taboo*, Freud's most extended essay in the psychology of "primitive" societies, suggests in effect that the first law is the prohibition of incest.\(^{144}\) One of the ways he explores the theme is through a briefly stated hypothesis concerning the origins of habitual mutual avoidance between sons-in-law and their mothers-in-law. Freud claims that these tense relations are informed by a suppressed "incestuous" impulse.\(^{145}\) In this account, the modifying words "in-law" thus operate as a further restraint on a transferred incestuous impulse between biological mother and child, which is itself restrained by the original impulse taboo. Here law appears not as something enabling and structuring relations, but as a cautionary reminder keeping instincts in check. This section will reinvestigate the terrain of law and genealogy, stressing the ways that the symbolic structuring of kinship in law and language not only blocks but enables fecund and creative possibilities for generational transformation and continuity.

Freud's passage on the dangers of the relationship between mother-in-law and son-in-law can be fruitfully contrasted to the traditional Jewish theme of the desire for a worthy son-in-law on the part of a father of a female. Daniel Boyarin has analyzed several rabbinic texts that deal with the tension between biological and textual filiation—between sons and students—in rabbinic culture.\(^{146}\) This tension was ideally and often in fact mediated through the strategem of choosing one's son-in-law. As in the world of classical East European yeshivas (notably during the nineteenth century), this strategem served as a means of preserving or strengthening a hierarchy, when a favored student would marry the daughter of the head of the yeshiva and thus eventually accede to his position by a combination of merit and inherited "right." When the marriage arrangements involved a period of support by the bride's parents for the young couple while the groom continued his studies, the son-in-law would remain literally dependent for a time on his parents-in-law. The attempt to acquire a scholarly son-in-law could likewise be a form of social climbing, a means of transforming acquired wealth into social prestige.\(^{147}\) This Law-of-the-Father-in-

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145. *Id.* at 20-22.
146. *Boyarin, Carnal Israel*, *supra* note 8, at 206-12.
147. Thus the story of the Jewish peasant who tells his wife he's going to town to look for a son-in-law. "But we don't have a daughter," responds his wife. The husband is undisturbed: "Never mind—there should be a son-in-law around the house!" *Emmanuel Olsvangen, Royte Pomerantsen 15* (1947); *see also* Benjamin, *supra* note 3, at 135 (alluding to motif of Jewish father's desire for a son-in-law).
Law might be understood as an extension and elaboration of the sequence of transitions of birthright that, one after the other, consistently deny primogeniture in the stories of Isaac and Ishmael, Jacob and Esau, and Joseph and his brothers. One might almost say that, unlike the psychoanalytic account in which the Father institutes law, here the determination of filiation (and hence paternity) is dependent upon a lawful narrative.

In all of its variations, the motif reflects a link among textuality, generation and masculinist elitism in the workings of Jewishness. Contrary to the structuralist view that would link linguistic binaries with elementary patterns of exogamous kinship, the denial of primogeniture and the emphasis on in-law-hood in Jewishness (once the etnos has been established) always are about an endogamous masculine exchange.

The Lacanian rewriting of psychoanalysis follows Lévi-Strauss's structuralist account of exogamous "exchange[s] of women" between "lineages." In this notion of kinship, the relation of in-laws is short-circuited, naturalized into a relation between the son and the father in which the son is guaranteed "a position as heir to the father's position." Indeed, women as objects of exchange are precisely not subjects or actors in this account. Furthermore, this account that equates exchange among masculinist lineages to replacement of fathers by sons also makes all fathers interchangeable with each other. This story, within which the account of the Oedipal drama linking mother, father, and son is straightforwardly extended into resolution through the son's ultimate "inheritance" directly from the father, must be recognized as having its own cultural particularity.

By contrast, even psychoanalytic discussions of the foundation of law tend to turn to the Old Testament rather than to Oedipus. Perhaps in this they are swayed by the Freudian distinction between the Oedipal myth as an expression of family structure and the Moses story as founding a community joined by the initial repression


149. In the medieval Christian understanding of the contrast between circumcision and baptism, the first wounding of Jesus that inaugurates the Passion leading up to his final Passover or "Easter" is none other than his circumcision. "The succession of ceremonies embodies the opposition between the carnal Synagogue and the spiritual Church. The antagonism between the bloody sacrifice of the ancient Law and the Christian sacrament—baptism, then Eucharist—marks therefore the very body of the one who introduces the rupture." FABRE-VASSAS, supra note 81, at 211. According to Jewish tradition, this circumcision (this "bloody sacrifice" in the medieval Christian recoding) would have been performed by Jesus's father. Mary's husband Joseph (oddly positioned, in any case, as the husband of a virgin) is thus implicitly constructed as the first illegitimae father.

150. Schroeder, supra note 122, at 899.

inscribed by the written Law. To those operating on the unreflective Pauline assumption that “the letter killeth,” the failure to consider a mythical foundation of law in Greek myth proper may have to do precisely with the oral character of Greek myth.\(^{152}\) It may be as well that the tendency to see Oedipus as reflecting family structure and Exodus as founding polity reflects the prior tendency in the West to distinguish sharply between public, communal Law and private family structures.

Of course, family structure is not so easily separated from law.\(^{153}\) Freud’s idea of “civilization” rests not on the Law-of-the-Father-in-Law in which filiation is contingently based on a synthesis of “biological” and “symbolic” orders, but on the Law of the Father based on an Oedipal myth ideal of philosophy and autonomy. The story of the Oedipus complex is an anti-generational narrative not only because it focuses on the realization of a separated individual ego, but also because the model of struggle, conquest, and supplantation as the moral perfection of the individual self tends to crowd out the values of cultural transmission and transgenerational identification and perspective on change as contingent, not necessarily “progressive.”\(^{154}\) Where power and identity—the roles of parent, lover, and child—are contained quanta in a zero sum game, only displacement is possible, and we must kill our parents in order to become ourselves: “Without the guilty deed of parricide there is no autonomous self. And further, also from the viewpoint of received morality, individuality and its maturity—I am not speaking of unbridled individualism—is a virtue, a sumnum bonum, at any rate in modern Western civilizations.”\(^{155}\) Hence to the first command of autonomy, “Thou shalt be free,” can be added another: “Thou shalt kill me.” No wonder, then, that the Law of the Father is a problem for the autonomist West. Working through that problem requires, among other things, acknowledging the limitations of the cultural framework within which it continues to arise.

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152. Thus Oedipus appears only in the title of Goodrich’s *Oedipus Lex*. GOODRICH, supra note 8. According to this argument, Goodrich’s total avoidance of the question of Greek origins anywhere except in his title would reflect Goodrich’s own persistence in confusing the written letter per se with “the Law” that his book is intended to demystify.

153. Jean-Joseph Goux links Oedipus firmly to the establishment of both codified law and speculative philosophy. “Oedipus is the prototypical figure of the philosopher, the one who challenges sacred enigmas in order to establish the perspective of man and self.” JEAN-JOSEPH GOUX, OEDIPUS, PHILOSOPHER 3 (1993).


155. Loewald, supra note 104, at 393.
Staking everything on the claim that we are really descended from a primal horde of hostile and hierarchical gorillas, Freud cannot see the truth value of another story in which certain groups of people tell each other that they are joined in descent from bears. In part because the logical categories of Roman jurisprudence separate humans as "subjects" from animals (along with plants and inanimate things) as "objects," Western thinking tends to maintain our separate status. Thus Darwin's story about the descent of humans from other primates troubled philosophical anthropology not merely because it challenged the Biblical creation story, but because it interrupted this fundamental Western scheme of separate classification. The story of human evolution is then another motive for Freud's attempt to explain how symbolism, law, and language came to be superimposed on an animal nature to constitute "civilized" humanity. However, we can state a claim for the necessity of law that is not based on the presumption that without law we would fall into barbarism, but rather that without law we would not be. Symbolic ordering—law and language—is not what separates or raises us from the animals, but what defines the kind of animal we are. Recognizing that neither of these totemisms (descent from gorillas or descent from bears) is just a story will be part of my answer to the dilemma of the impossible illegitimacy of law.

156. The troubled distinction between animals and humans is not a universal of culture, but particularly prominent in Western Christianity. See, e.g., Patricia Seed, 'Are These Not Also Men?': The Indians' Humanity and Capacity for Spanish Civilisation, 25 J. LATIN AM. STUD. 629 (1993). On bears in legal theory, see generally PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991) and particularly id. at 6 ("But what's the book about?" my sister asks...). The attack on totemism (also referred to as ancestor worship) reappears in the context of contemporary constitutional theory: "[W]e too may find the stability of authority and the gratifying support of tradition in acts of ancestor worship. Nothing, however, would have mortified the actual founders of the republic more deeply. Every page of The Federalist Papers is a call to the people of America to take its fate into its own hands... The good citizen of today can do no less." JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 10 (1991). Shklar's rhetoric wonderfully exemplifies the paradox of generational autonomy: We must not be overly pious toward the ancestors, lest we mortify them.


158. The combination of moral and physical associations in the term "upright" illustrate this nexus. "Freud's insistent repetition of aufrecht and its cognate Aufrechung goes beyond marking an evolutionary juncture and appears to superimpose a moralistic perspective. The term's connotations suggest that with the raising of the bent-over human posture came the ascendency of the manly, bourgeois values of honest, sincerity, uprightness." Jay Geller, The Aromatics of Jewish Difference; or, Benjamin's Allegory of Aura, in JEWS AND OTHER DIFFERENCES: THE NEW JEWISH CULTURAL STUDIES 203, 225 (Daniel Boyarin & Jonathan Boyarin eds., 1997). This moral-physical development entails the repression of the olfactory sense, associated with animals, primitives... and culturally backward Jews. Id.

159. To a great extent, what follows is intended as an elaboration in a different register of Judith Butler's point that to say human social identities are "constructed" is not to make them any less "real." JUDITH BUTLER, BODIES THAT MATTER, at xxx (1993).
In an Enlightenment perspective, the necessity of symbolism to human existence mandates that we acknowledge a necessary measure of "arbitrariness":

[Whatever culture may be it includes "the imposition of arbitrary form upon the environment." This phrase has two components. One is a recognition that the relationship between the coding process and the phenomenon (be it a tool, social network, or abstract principle) is non-iconic. The other is an idea of man as a creature who can make delusional systems work—who imposes his fantasies, his non-iconic constructs (and constructions), upon the environment. The altered environment shapes his perceptions, and these are again forced back upon the environment, are incorporated into the environment, and press for further adaptation.]

This statement by an American physical anthropologist retains the distinction between "fantasy" and "environment," yet it constitutes an attempt to describe enculturation as human adaptation (how we do it), rather than human advancement (what we've achieved). It therefore has the advantage of removing the progressivist assumptions of language as "higher" than reality. A similar shift from the Freudian repression myth on the one hand to the reformulation of psychoanalysis as founded in the very problem of separation through language on the other hand is crucial here. The view of culture, language or law as imposition underlies Freud's repressive account of the paternal Law: "For men knew that they had disposed of their father by violence, and in their reaction to that impious deed, they determined to respect his will henceforward."161

The presence of language—non-iconic, symbolic systems of communication—is a specific evolutionary adaptation related to the

161. FUTURE OF AN ILLUSION, supra note 69, at 54. In Moses and Monotheism, the institution of law as a collective self-punishment is even more concisely and sharply portrayed: "After their hatred had been satisfied by their act of aggression [killing the father], their love came to the fore in their remorse for the deed. It set up the super-ego by identification with the father; it gave that agency the father's power, as though a punishment for the deed of aggression they had carried out against him, and it created the restrictions which were intended to prevent a repetition of the deed." MOSES AND MONOTHEISM, supra note 69, at 95.

The idea of something like a founding law of the mother has recently been proposed, based on "female child-rearing and economic priorities, female ultimate determination of social structure and female sexual self-restraint in women's own direct material interests." KNIGHT, supra note 100, at 153. All of these are directly connected, in Knight's account, with collective female manipulation of male's hunting activity and regulated redistribution of the spoils of hunt through the prohibition against eating one's own kill, linked back to matriliny and the incest taboo. What seems most unfortunate about this otherwise intriguing feminist origin story is that it is utterly silent about the central importance of gathering—itself largely a female activity—in providing the sustenance of females, males and juveniles infants in hunter-gatherer societies.
extraordinarily long period of dependence in human infants; “prolonged growth and dependency go along with larger brains and longer periods of learning.”162 Significantly, while Jacques Lacan notes the crucial importance of this relation, the way he discusses it suggests something not quite “natural.” For Lacan, the crux of the matter is “real specific prematurity of birth in man.”163 The posited “prematurity” suggests that it would be more normal to be born independent, that is to be autonomous by nature, but that this is not the human situation. For humans, the first stage of formation of the subject, the “mirror stage,” “is precipitated from insufficiency to anticipation,”164 never in sync with itself, thus producing the absence or lack that in Lacan’s view is always part of human being. The central human experience of “méconnaissance,” not of false knowing but of a kind of knowing that is always pre-shaped in specified ways, is here still characterized as a “junction of nature and culture,”165 not more fully integrated as it will be by Legendre. Despite the insufficiency of its biological assumptions or the actual cultural and historical limitations of its supposed universal theorizing, Lacan’s theory of the subject nevertheless moves toward a view of language as material, as constitutive of the human not because humans are a combination of “animal and spiritual nature,” but because culture is the human dimension of adaptation.

In the text on “The Mirror Stage,” dating from 1949, Lacan mentions that it had been introduced “at our last congress, thirteen years ago.”166 In other words, World War II had intervened. The conclusion of that short text is of the utmost topicality: a critique of the Cartesian cogito,167 up to the existentialist philosophy that is its heir. Existentialism, argues Lacan, arises as an explanation of the impasse of “the historical effort of a society to refuse to recognize that it has any function other than the utilitarian one, and in the anxiety of the individual confronting the ‘concentrational’ form of the social bond that seems to arise to crown this effort.”168 So far the critique is remarkably complementary to that of Horkheimer and

163. Jacques Lacan, The Mirror Stage, in LACAN, supra note 118, at 1, 4. This early essay may not be entirely representative in terms of the overall structure of Lacan’s thought. Yet the suggestion of something “unnatural” about human growth patterns suggests once again an objectivist metaphysics that belies his claim to “oppose any philosophy directly issuing from the Cogito.” Id. at 1; see also Humphrey Morris, Reflections on Lacan: His Origins In Descartes and Freud, 57 PSYCHOANALYTIC Q. 186 (1988).
165. Id. at 7.
166. Id. at 1.
167. See id.
168. Id. at 6.
Adorno’s *Dialectic of Enlightenment*. Yet rather than focusing on a historical “disenchantment of the world,” Lacan concentrates here more narrowly and sharply on the necessary failure of any post-humanist theory that assumes the priority of a normal rationality through “the perception-consciousness system.” Individualism is linked to empiricism and a concentration-camp society that, Lacan suggests, may be the ultimate expression of utilitarian functionalism. As the translator’s note to this passage in Lacan explains, the term translated as “concentrational”—“concentrationnaire”—derives from the experience of prisoners in Nazi concentration camps. The centrality of the anti-Semitic program to the Nazi myth in general suggests in turn the urgency of considering how the figure of Jewish difference perturbs any monumental characterization of universal or even general “Western” progress. However, further insight into this suggestion of links among Jewishness, anti-Semitism and individualist empiricism requires critique of Lacan.

Lacan’s revisionist psychoanalysis points to the fundamental importance of language, yet his rereading of Oedipal development retains the notion of patriarchal “linguistic structures” that operate in such fashion that “[t]he entire concept of identity takes place through [the] repression of the mother.” Lacan’s naturalization of the mother-child dyad is essential to the link between fatherhood and language as that which removes the child and initiates “him” unnaturally into the cultural, symbolic Law of the Father, and thus into desire for the forbidden feminine. Indeed, in an extraordinary reading of several of the Ten Commandments, Lacan interprets the interdiction against coveting as that which inaugurates awareness of the now-desired maternal object. Lacan suggests the priority of Ego before the Law, the way the interdiction against coveting inaugurates

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172. And, it may be, more directly from the original French title of Albert Rousset’s memoir, *Albert Rousset, L’Univers Concentrationnaire* (1947) (translated as *The Other Kingdom* (Ramon Guthrie trans., 1982)).
174. Thus Goux, for example, in universalizing the transition from “monomyth” to “Oedipus,” invokes Eliade’s dichotomy between cyclical and linear societies, describing “every society that breaks away from repetition and experiences something of the order of ‘progress’ . . . [as] Oedipan . . . .” Goux, *supra* note 153, at 204.
a heightened awareness of the now-desired maternal object, and Ego’s resulting desire for death. Lacan himself acknowledges that this paradoxical assertion that the interdiction produces the desire for its transgression, the urge as it were to reach across the barrier for the object that can be perceived only once there is a barrier, is a paraphrase of Paul’s assertion in Romans that “I would not have known sin, if it were not for the law.” \(^{177}\) “Before the Law,” that is, there is innocent unity. \(^{178}\) Without Law—specifically, without the Decalogue and its transgression—society is impossible. \(^{179}\)

Mikkel Borch-Jacobsen has recently argued that Lacan’s attempt to resolve the Oedipus problem leads back to a realist biologism that is impossible according to Lacan’s own schematic distinction among Real, Imaginary, and Symbolic realms, \(^{180}\) in which the Real is that to which we have no direct access. \(^{181}\) Borch-Jacobsen’s analysis suggests that Lacan’s structural model is actually extraordinarily \textit{static} and hence cannot possibly give a satisfactory account of the relations between identification and separation. In Lacan’s case, as Borch-Jacobsen argues, the only guarantee that a son’s identification will lead to a symbolic replacement of the father rather than an imaginary desire for the father is “[n]othing. Nothing except the symbolic Law, which demands that that is the way it is. In fact, Lacan always falls back on it as a last resort—on the Law and the No [Non] of the symbolic father, which forbids imaginary identification with the phallus.” \(^{182}\) Borch-Jacobsen stresses that Lacan’s dilemma is entailed by the assumption that the mother is \textit{only} an object of desire, the father \textit{only} a subject to be imitated \(^{183}\)—or, in the terms I have been using, the mother only nature and the father only language.

\(^{176}\) Lacan, supra note 90, at 101.

\(^{177}\) Romans 7:7.

\(^{178}\) See also Lacan’s postulation of a “co-conformity . . . of Law and desire, stemming from the fact that both are born together . . . .” Lacan, supra note 90, at 89.

\(^{179}\) Id. at 84.

\(^{180}\) In this sense, Lacan’s insistence on the distinctions among these three realms leads into problems of authority analogous to the Protestant rejection of ritual and allegory. By contrast, Claudine Fabre-Vassas details a ritualized “developmental schema” observed in traditional European Catholic society, through which infants become boys and then men simultaneously with their transformation from little “Jews” into properly socialized Christians. See Fabre-Vassas, supra note 81, at 251-58. It might be worthwhile exploring the notion that the modern philosophical and psychoanalytic discourse of identity formation is in large part the search for a schema to replace that traditional ritual format, which has been banished in Protestant modernity.


\(^{182}\) Id. at 281. It should also be noted that there is simultaneous confusion and reinfor-
cement between two derivations of the Law of the Father. In one, which I have not emphasized here, the Law of the Father is an \textit{arbitrary} imposition because paternity is ultimately indeterminate, while in the latter, the Law of the Father is an \textit{arbitrary imposition} because of the presumed natural and harmonious unity of the mother/son dyad.

\(^{183}\) Id. at 269.
On the other hand, a system where filiation is conceived without an a priori, metaphysical dualism (between the symbolic or communicative on one hand, and the biological or "sexual" on the other) need not be structurally plagued by the evident contradiction between the two commands of the Oedipal father to "be like me (a virile man) and do not be like me (that is, do not enter into homosexual rivalry with me)." Such a system is suggested by the synthesizing and non-Pauline approach of Pierre Legendre, which emphasizes that enmeshment within some symbolic order or sets of symbolic orders is intrinsic to human existence, rather than an alien imposition onto a prior humanity. Legendre offers a reformulated Law of the Father minus the catastrophic implications of the patricidal myth. For Legendre, "the law of the Father is nothing other than an original separation which inaugurates subjective life (in the sense of a separation of the infant from the maternal entity), as subject to the law of differentiation through speech." Despite the retention of the gendered language, Legendre insists:

In no way should this problematic be confounded with the history of those conceptions called patriarchal, in contrast to matriarchal ones, relating to progenitive systems, still less with the history of the struggle of the sexes. It is rather a problematic of the power to refer that is the condition of the subject's entry into language.

The reformulation is crucial. Reference, differentiation, and subjectivity are still connected through language, but language is no longer linked in a determinate way to repression, masculinity, developmental supersession, and a second if "higher" order. Separation and repression are uncoupled. Indeed, in this formulation mothers can be readily understood as important agents of separation from their children. Identity need not (and thus may not always) work through repression of the mother. At the same time, subjectivity is not necessarily bounded by the spacetime limits of the organism; since language is

184. Id. at 281.
185. LEGENDRE, supra note 2.
186. Id. at 950. Lacan's linkage of language and fatherhood is fundamentally tied to the anthropological thesis that paternity, unlike maternity, is always "factually" uncertain and hence must always be symbolically ratified in order to be socially real. To Legendre it is clear that "subjective life" in no way implies a sovereign subjectivity; hence being "subject" to a law does not immediately raise the paradox of illegitimate constraint.
187. Id. at 950-51.
188. See the discussion of women's role in circumcision rituals in Gil Anidjar, On the (Under)cutting Edge: Does Jewish Memory Need Sharpening?, in JEWS AND OTHER DIFFERENCES, supra note 158, at 360. Anidjar notes that "a representation of the original mother-son first couple [leaves] intact the assumption that there is a nature upon which culture simply asserts itself." Id. at 381.
intrinsic to the humanly real, both connection and separation can be encompassed with its function of “differentiation.”

At this point it is at last possible to understand the connection between Legendre’s insistence on the importance of Jewish textual practice to understanding the dynamics of Western identity and his reformulation of the role of language in subjectivity. Jewishness (although of course not only Jewishness) illustrates the stakes of this reformulation. If, as has recently been suggested, a substantially different construction of masculinity and paternity is at work in rabbinc culture, then a blanket attempt to dismantle what is presumed to be a universally repressive “Law of the Father” will operate to obviate a living possibility of Jewishness along with other different laws with different potentials for creative subversion. The Jewish account of the origins of humanity and then of “Jews” concerns neither patricide nor the anxiety of a male individual (child or adult) alone in the universe. Both of these Biblical “origin” accounts are about the terms on which generation is going to be guaranteed. Consequent with the transgression that institutes knowledge and suffering, explicit mention is made of Eve’s punishment of painful birthing. The essence of the divine promise to the first Jewish father, Abraham, is precisely that of fruitful generation. Crucially important to the ethos of Jewishness, this early moment stresses the connection between symbolic orders and reproduction that constitutes genealogy.

Legendre emphasizes precisely that connection as essential to every human group as defining the species without regard to superstition or Enlightenment. We must, he states:

place the genealogical principle where it should be. One characteristic makes the human something distinctive among the living: [that characteristic is] speech. Genealogy is a concept which can serve to class and comprehend the facts of reproduction concerning man as well among the species. But, speaking of reproduc-

189. LEGENDRE, supra note 2.
190. BOYARIN, supra note 21.
191. For further evidence of the occlusion of the relationship of genealogical rules in general—and specifically of fathers-in-law and sons-in-law—in Western discourse, see the curious account by Peter Goodrich of the frustration attendant upon his initial attempts to bring Legendre’s name and ideas into some circulation among English-reading legal scholars. The editors of a journal to which he had submitted an essay on Legendre found that “the name Legendre was suspicious—it sounded invented, legendary even...” and ultimately rejected the article on the grounds that Legendre “in all probability did not exist.” Peter Goodrich, Translating Legendre or, the Poetical Sermon of a Contemporary Jurist, 16 CARDOZO L. REV. 963, 965 (1995). Perhaps the editors found something Fishy or even Fissy about the idea of a theorist named The Son-in-Law, although since Goodrich is claiming that it was the very idea of a connection between psychoanalysis and law that was being repressed, the same problems might have been attendant upon a putative French theorist named Lefils.
tion remains the deed of man; instituting (instituer) the living is a fact of discourse, and this presupposes humanity.  

Of the two stories of the creation of the first man and woman in Genesis, only one takes account, as it were, of Legendre's thesis. In Genesis 1:27-31, "Man" is created "male and female." There is no mention of language, or death, or gender hierarchy. Genesis 2:7-24 is quite different. It recounts the creation of only one "Adam." Rules are given to this Adam, infraction of which will be punishable by death. Adam is given the power of naming, "and whatsoever the man would call every living creature, that was to be the name thereof."  

We, subsequently, do not enjoy the same unconstrained power of naming and hence of construction as did Adam. The issue then centers on degrees of constraint in constructing a received corpus, or in Legendre's terms, relative distance from the text. Legendre asserts that "juridical relations (le juridisme) are organized according to a maneuver which operates to regulate greater or lesser distance between the subject and what is written." He goes on to identify the fundamental difference in modes of relation and distancing between subject and text in Christianity and Judaism (what we might call different "somatotextualities") as the entry point for his discussion of the general power of "it is written" in Western culture, but nowhere does he attempt to specify what the Jewish mode might be. He might have added that "editing"—selective emphasis in transmission of what is written—is also a key technology in the organization of juridical relations. When this particular old story—not the story that institutes law or patriarchy, but the one that has most powerfully come down to us—is told in the West, the tale of man and woman inaugurating language, gender hierarchy, and genealogy is the one that is more commonly remembered. Curiously, however, the very fact that the Bible refuses to acknowledge itself as a fable means that the other story of simultaneous creation of both sexes need not and cannot be discarded. As recent commentators have suggested, this multiplicity within the text enables a strategy acknowledging

192. LEGENDRE, supra note 157, at 9.
194. LEGENDRE, supra note 2, at 292. Presumably Legendre's use of "writing" here is not intended to exclude oral societies, given his argument about the centrality of speech.
195. Id. at 289-97.
196. For explorations of the nuancing, ameliorative, or critical interpretive possibilities afforded the tradition by the difference between these two stories, see Boyarin, Carnal Israel, supra note 8, at 77. For a contemporary defense of Eve against the charge of "sin," see Sally Frank, Eve Was Right to Eat the Apple, 8 Yale J.L. & Feminism 79.
genealogical attachment and self-formation in relation to the text, without surrender to the dominant monological and masculinist readings by which the text has been interpreted and transmitted.

Both the very fact that two contradictory and authoritative accounts of human creation are present in this text, and the thematic differences between them (one containing language, gender and genealogy, the other "egalitarian"), confirm the point that symbolic orders are both necessary and arbitrary. Both foundational fictions—that of an originary gender equality, with no further attribution making humans distinctive; and that which institutes at the beginning the arbitrary power of naming, inaugurating separation and hierarchy, demand response.

My suggestion is that the ways in which texts become intelligible and the ways in which subjects are formed are analogous in Jewishness: Just as a hermeneutic tradition is inseparable from any possible interpretation within Jewishness, genealogy is inseparable from the formation of any subject recognizable as Jewish. These analogous interdependencies provide a partial mediation of the notion that the relation between self and other, or between signifier and signified, is inevitably agonistic. The mediation is partial because, in these terms that Jewish discourse does share with "the rest of the West," there is indeed a structuring of identity and alterity.

The founding of the people Israel is analogous to the creation story in its double character. What Israel was before the contract/covenant with God was not autonomous males, but a slave or sojourner people. The mentality of "enslavement" to God, through the text and practice of Torah, and the commandment to remember slavery are inseparable one from the other in the formation of the Torah complex. Yet the relation between this new people Israel and God is twofold. One presentation of the covenant is as a statement of obligation without bargain, in which "the Israelites are morally

197. See, e.g., MIEKE BAL, LETHAL LOVE (1987).
198. See MICHAEL WALZER, EXODUS AND REVOLUTION (1985), along with the sharply worded response by Edward Said, Michael Walzer's Exodus and Revolution: A Canaanite Reading, 5 GRAND STREET 86 (1985). Both of these works are limited by an overbearing presentism. See Jonathan Boyarin, Reading Exodus Into History, 23 NEW LITERARY HIST. 523 (1992). A list of all of the places in the Torah where Israel is reminded that it was "slaves" or "sojourners" in Egypt is provided in Harry P. Nasuti, Identity, Identification and Imitation: The Narrative Hermeneutics of Biblical Law, 4 J.L. & RELIGION 9, 12-13 (1986).
199. Thus the consensus rabbinic interpretation of Deuteronomy 16:3: "That thou mayest remember the day when thou camest forth out of the land of Egypt all the days of thy life." The rabbis explain, "Had it been written 'the days of thy life,' it would have meant this world only; 'all the days of thy life' means that the times of the Messiah are included as well." The passage is found in the Passover Haggadah; it was originally a midrash. MISHNAH BERAKHOT 1:5; SIFRE DEUTERONOMY 130; Mekhilta 13:3. The point here is that in this view, even in the times of the Messiah there is not a "we" separate from biology and more broadly from a genealogy that is at once embodied and symbolic. Genealogy is anamnestic, it does not forget.
indebted to God for redeeming them from slavery.\textsuperscript{200} The other presentation describes a conditional contract, an offer by God and its acceptance by Israel. In this version, God's redemption of Israel from Egypt serves not to obligate them \textit{a priori}, but to reassure them that if you "keep my covenant, then ye shall be Mine own treasure from among all peoples . . . ."\textsuperscript{201}

Sustaining this notion of Torah necessitates remembering its entire history. It cannot withstand the assumption that what is "true" or unalienated Torah is the Law that operates in an autonomous, unified and unitary Jewish regime (Land, State, Kingdom) of Israel, precisely because in \textit{that} view the "living" Torah exercised in "real life" conditions is dependent on \textit{collective} Jewish autonomy. There the violence of a state law\textsuperscript{202} would devolve upon Torah as well.\textsuperscript{203} The Jewish situation of semi-autonomy in diaspora\textsuperscript{204} sustains the double sense of the covenant. The sense of exile enforces the memory of slavery and sojourn; the assurance of ultimate special divine regard compensates for current subalternity. It may be that a great deal of the ambivalence about the Jewish relation to God in Christianity generally has to do with the way Jewishness persistently disturbs principles of individual freedom, while maddeningly insisting on a constrained plurality of meanings tied to the genealogically inseparable production of both interpretations and descendants, against the ideal of a univocal truth proper to an individual person, whether that person be the infallible Pope or the authorized Protestant reader.\textsuperscript{205}

\textsuperscript{201} Exodus 19:5.
\textsuperscript{202} See Robert Cover, Violence and the Word, in ESSAYS OF COVER, supra note 20, at 203.
\textsuperscript{203} For a concise example of this common view of the relations between "Halakha in Exile" and in "an essentially Jewish reality," see ELIEZER BERKOVITS, \textit{NOT IN HEAVEN: THE NATURE AND FUNCTION OF HALAKHA} (1983).
\textsuperscript{204} See Abner S. Greene, Kiryas Joel and Two Mistakes About Equality, 96 COLUM. L. REV. 1, 13 n.57 (1996) (arguing that "[t]he reality is semi-autonomy; lawmaking groups exist within lawmaking governments," summarizing Sally F. Moore, \textit{Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study}, 7 LAW \& SOC'Y REV. 719, 744 (1973)).
\textsuperscript{205} In its Catholic and Protestant forms, this ideal of univocality derives from the imperial model of authority:

Here we come upon the stumbling block between two worlds of exegesis, the Jewish and the Christian. The Christian war [of texts] produced its own rules of arbitration: the establishment of the 'breathing Law (\textit{Lex animata}), a direct calque of the imperial model; a man detached from ordinary descent finds himself promoted to the position of the supreme Interpreter, the incarnation of absolute Reference. A hierarchisation of interpretations follows, and thus a particular notion of relation to text, a notion incompatible with the Talmudic idea of 'disputes for the sake of Heaven' in the work of exegesis, much more simply acknowledged as an apprenticeship in filiation, understood as the vital connection to the place of Truth.

\textsc{Legendre, supra} note 157, at 185 (translation mine).
In terms of modern political and legal theory, the double covenant establishing Jewishness as a juridical relation of text and subject disrupts the incompatibility in classic contractarianism between offer-and-acceptance formation of contract on one hand, and the master-servant hierarchical relation on the other. The tendency to conceive human relations as necessarily either free and autonomously entered into or as constrained and in some sense illegitimate matches the recurrent dichotomy between the repressive and generative aspects of law. For a critical discourse aimed at liberation, these dichotomies lead in turn to an almost inevitable impulse to see the Law as more fundamentally repression than generation. “Like Lacan’s child with its mirror-image, the individual subject is supplied with an idealized image, a misrecognition, of autonomy and freedom.”

What if there were a law—Jewishness, as I have described it—that did not have recourse to an assumption of either original or ideal autonomy?

This radical autonomism, as expressed particularly in the writings of Nietzsche, has been linked to the terror of personal finitude. The emphasis on “will” in Nietzsche articulates in turn with his allusion to the “tyranny” of “the sick females, who have unrivaled resources for dominating, oppressing, tyrannizing.” The association of the Semitic with the feminine was a commonplace of nineteenth-century European progressive ideology. My point has been not primarily to explore that fateful association as part of the pathology of Fascism, but to indicate some of the terrific symptoms of that prior detachment in which Man is a priori taken as solitary, autonomous. Where Nietzsche looks to unmask the bastard genealogy of morals and hence release the creative artistic powers of the authentic Man of Will toward a glorious future, I point toward the detachment from generation that initiates that self-annihilating terror, and its corresponding difficulty of relating to the Law other than by the dichotomous strategies of abasement or rebellion. Jewishness, by contrast, if my construction of it is at all plausible, recognizes the

206. See supra text accompanying notes 52-54 (discussing Locke and the origins of this incompatibility).
207. See, e.g., David Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575 (1984) (arguing that law is “a form of denial, a way to deal with perceived contradictions that are too painful for us to hold in consciousness”).
materiality of symbol, language, and law as inseparable from human existence, and hence regards neither generation (the feminine) nor law as an imposition on ideal autonomy. Certainly Jewishness does not contain in itself the answer to the paradoxical demands of species-wide and culturally-particularist identifications, nor to the species-historical problem of sexism, let alone to the contingent persistence of a host of other dominations. My central effort to demystify the “Old Testament” as the source of Law and patriarchy would be undermined by simply counterposing Jewishness as the “solution” to such human problems. Yet documenting the displacement onto Jewishness of dilemmas endemic to post-Christian European liberalism, and insisting on the continuing potential of Jewishness as one cultural resource for thinking through those dilemmas nevertheless seems worthwhile. Toward that end, I have worked here to clear away some ultimately spurious commonplaces and perhaps provide some new clues toward a starting point.

CONCLUSION

In attempting such an ambitious sketch, I have done no more than support my claim that the tensions between genealogy and autonomy in the construction of juridical identity in the modern West are closely linked to arguments about Christian and Jewish hermeneutics and rhetorics of identity. For this claim does not only cast into a contingent and historicized light the ideal of autonomy underlying the claims to universal validity of Western law. It also undermines any lingering notion that the Western account of law and identity is itself the very model of autonomy, free from dependence on the “arbitrary” authority of particular effects of history and culture. Rather, it is entirely conceivable for the Occident and its law to reach an impasse that cannot be reduced to a moment in its dialectical teleology. Framed with the use of particular resources and in response to particular exigencies—those I stress here being the mediation of tensions between Christian supersession and Jewish textual authority, and between idealized autonomy and effective genealogy—Western law may not be adequate to millenial challenges including globalization, the delegitimation of gender hierarchies and the degradation of the planet. It is, of course, what we have to work with; but at the very least, we desperately need to recognize both its blind spots and the available resources that it continues to repress, more

212. In particular, I do not yet know how my claims about generation helps us better to understand the general institution of patriarchy, beyond questioning again the usefulness of assuming the existence of such a “general” institution.
often than not quite successfully. This Article is an invitation to the reader to view Jewishness both as one of the elements to which Western law responds, and as a resource for our own reinventions of identity and authority. If it has accomplished that, it has been successful.