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The unconscious, myth, and the rule of law: Reflections on the persistence of gender inequality

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ABSTRACT

Social order, to remain stable, needs the voluntary compliance of the majority of the population. Such consent requires normative justification. The rational foundation of the rule of law and the democratic state rests on the presumption of the equality of every citizen. Male domination of females nevertheless remains universal even in the most advanced democratic nation states because it is legitimized by the shared assumption that patriarchy reflects the will of God or is dictated by nature. Freud's diagnosis of patriarchy as a collective neurosis of the group mind negates every possible normative justification that can be made for gender hierarchy. Freud made extensive references to myth in developing his analysis of the neurotic foundations of social order. An analysis of the structure of myth suggests that ideological seduction rather than God, nature or biology determines male dominance.

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Preface

"Have any individuals really made a major, lasting difference to the course of science? More specifically...did their contributions have a unique impact that persisted long afterward? By those two criteria, I think that only two scientists within the last two centuries clearly qualify as irreplaceable: Charles Darwin and Sigmund Freud."

[Jared Diamond (2001), *A Tale of Two Reputations*]

1. Introduction: the idealization and the projection of future dialectics

According to Hegel (1988), the achievement of equality would mark the end of history. The liberal democratic state is characterized by the prominence given to equality under the rule of law. It is the product of long and protracted political struggle, and current world events show it to be fragile at best. It is inevitably subject to the forces of internal contradictions as the conscious manifestation of a drive for consistency and rationality under the rule of law confronts the existential reality of death, and the gender conflicts of sexual reproduction. It is our assertion that repressive forces have disguised or hidden deep instincts, thereby frustrating the emancipation of cultures from the subjugation of some

citizens over and above others, profoundly felt in the interaction between females and males in almost all cultures, historically and actually. If so, then psychoanalysis is best placed to clarify the paradox of the continued persistence of male domination within the liberal democratic state.

The Hegelian idea of *The End of History* has a particular meaning, and it does not mean that states cease to exist, that economic competition ends, that nations no longer go to war, or that some utopian state has been achieved. The pattern, direction, or teleology that Hegel recognized as driving the unfolding of history was the evolution of self-consciousness. History will end when full self-consciousness has been achieved, in that all human possibilities have been exhausted since there is no longer anything to negate. Recognition of the individuality of each being now becomes universal; there can no longer be an ideological justification for political domination and submission. Consciousness now knows itself through mutual recognition. Being no longer transforms, as there is nothing more to invalidate. At the point of dialectical overcoming there can no longer be either master or slave because self-consciousness, and with it, history, has reached the end point of ideological freedom in the sense that no distinction in terms of domination and submission can be scientifically, philosophically, legally, or morally justified unless it is consensual (Cooper, 1984; Fukuyama, 1992).

For Hegel, history ended in the aftermath of the French Revolution, with its vision of equality and liberty carried throughout Europe as the ideological justification for the Napoleonic challenge to European monarchies. Marx, a devotee of Hegelian dialectics, adopted and then transformed Hegel's concept of the end of history. Hegel viewed history as ending in the freedom of the individual through the negation of all

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theoretical justifications of social hierarchy. For Marx, on the other hand, history was driven by material reality where history ends in the negation of economic exploitation of one person of another.

Alexandre Kojève, a Russian Marxist, felt that something had gone profoundly wrong with Marxism in the Soviet Union, and he turned to the study of Hegelian dialectics to uncover the problem. Kojève was a significant figure in the development of postmodern critical theory because of his enormous influence on an entire generation of French post-war intellectuals who attended his famous pre-war seminars on Hegel from 1933 to 1939 where he introduced them to the Hegelian dialectics of negativity. Kojève remained committed to a Hegelian closure as an end to history, which he later believed to be manifested in the form of the European union of liberal democratic states. Kojève maintained a lifelong friendship with the political philosopher Leo Strauss, dating from their time in Berlin when they were philosophy students together. Kojève's (1969) book, *Introduction to the Reading of Hegel*, played a significant role in American political thought through the influence of Strauss and his student, Allen Bloom, whom Strauss sent to Paris to study under Kojève.

Fukuyama (1992), who studied political philosophy under Bloom, argues in his book *The End of History and the Last Man*, that history, as understood and explained by Hegel and as interpreted by Kojève, truly ends with the twentieth century in that liberal democracy now remains as the only form of government that can sustain legitimacy and therefore must eventually triumph over all other forms of government. While at the time of the fall of the Berlin wall and the collapse of the Soviet Union Fukuyama's thesis seemed convincing, the current state of the world no longer seems to support his optimism.

In the words of Rousseau (1762), "The strongest is never strong enough to be always master, unless he transforms strength into right, and obedience into duty," (I: 3) or as recognized by Hobbes, "even the tyrant must sleep." The rule of law and the democratic state mark the end of history because their ultimate justification and normative foundation rest on the negation of any and every possible philosophical, religious, biological ideology that can justify the domination of one individual over another. It is this negation that affirms the necessity of individual consent to political order. The rule of law is generated from the necessary conditions required for consent to be meaningful. The equality of every citizen as a free agent is the last and only normative justification for social order left standing.

Fukuyama's mistake was to view the Hegelian–Kojève end of history in terms of a progressive historical determinism or liberal humanism rather than simply as a dialectics of negations of ideological justifications of social hierarchy. From the origins of science in the philosophy of the presocratic Greeks to the physics of quantum mechanics and the evolutionary biology of genetics, the path to enlightenment has always been that of a negation of the old resulting in the affirmation of the new. Coole (2000), in *Negativity and Politics: Dionysus and Dialectics from Kant to Postmodernism* writes, "that negativity is affirmative, productive as well as destructive" (p. 4). "It is a generativity," she argues, that "is affirmative: a creative–destructive force that engenders as well as ruins positive forms" (p. 6). In her chapter devoted to Nietzsche, entitled "Negativity as will to power," Coole describes him as "an exponent of negativity, where *becoming affirmative equals becoming negativity*" (p. 86). Coole writes that Nietzschean negativity is not spoken but is a performance where through styles, gestures, symbolisms, and rhythms we express ourselves as Dionysian in negation of the Apollonian in "a process of generativity," a "Dionysian creative–destructive becoming" (p. 89 and 182).

2. The perpetuation of hierarchy

Historically, normative hierarchal social order has been based on the following differentiations:

1. Sex–gender: male over female;
2. Generational differences: parent over progeny;

3. Order of birth: first born over second born;
4. Proximity: close relationship over distant relationship, kin over non-kin, highborn over lowborn.

The great advantage of the justification of social order in terms of biological status is it lowers the transaction costs in the devolution of power. It is better that the identity of the king is certain than it is having the most qualified person as king, given the high costs of dynastic wars. The rule of law emerges from the negation of law based on biologically determined status (Smith, 1964; Smith & Weisstub, 1979, 1983). The end of history entails the negation of every normative justification of hierarchal social order based on biological difference. It is the foundation of individual freedom, not Christianity, not philosophy, not economics, although they may also provide some normative justification. After all, Locke (1988), the father of classical liberalism, wrote the first of his famous *Two Treatise of Government* in the form of a sentence-by-sentence negation of Filmer's (1949) *Patriarcha; or the Natural Power of Kings*.

Since the consent of every agent is impossible to obtain, democracy as the will of the majority is the only compromise. The rule of law furnishes the justification for overriding the lack of consent of the minority. The rule of law is a normative system consisting of obligations and rights (Smith, 1976, pp. 22–87). The logical relationships between propositions as to their existence or absence reflect the classical structure of Aristotelian logic (Robinson, Coval, & Smith, 1983). The foundational principle of equality is that of the universalizability of legal judgments (Smith, 1976, pp. 88–108). Legal judgments are universalizable in that they are based upon the principle of formal justice: *Any judgment made in regard to a particular situation, that a particular person is or is not legally obligated to do a particular act, logically entails that the judgment instances a rule of law such that anyone in a relevantly similar situation is or is not legally obligated to do the same act*.

The principle of formal justice is a meta-legal principle in that we can derive from it how legal judgments are to be made in terms of the rule of law, equality before the law, impartiality of the judiciary, the separation of church and state, the doctrine of precedent, the right to due process of law, and the reciprocal nature of rights and duties.

Since stable social order requires normative justification, and because normative justification can no longer be based on what differentiates people, it logically follows, through the process of negation, that it must rest on the foundation of what everyone shares in common, and that is the capacity for cognitive action, which defines us as consensual agents. The features, which individuals have in common, include:

1. the ability to evaluate the truth of empirical propositions;
2. the ability to reckon, which includes logic and prediction;
3. goals arising from our needs and desires;
4. the ability to choose between them according to their consequences;
5. the ability to set in motion events which tend to accomplish these objectives.

An agent then is a sentient, reckoning, goal-oriented, physically effective system. From the basic features of agency, namely truth, reason, goals, choice, and causal efficacy, we can derive the rights to freedom of thought, speech, the press, and association (Coval & Smith, 1986).

3. The paradoxes of sexuality

Why is it that democratic legislatures continue to fill the formal structure of legal rights, duties, and liberties with patriarchal content? If the driving force of political change and social order was conscious rationality, or a progressive determinism described by Fukuyama (1992) as a Hegelian "directional history" (p. 245, p. 287), patriarchy would have long disappeared, at least where the rule of law and democracy prevail. The Hegel–Kojève–Fukuyama hypothesis reads as if everyone were male. There can be no end of history in Hegel's sense, until there is an end to *his-story*. Even Fukuyama realizes this to be the case,

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