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3

THE MYTHIC FOUNDATION OF MODERN LAW

What sacred games shall we have to invent?'
(Nietzsche 1974:181–para. 124)

ORIGINS

To continue with borrowed beginnings, this time from Habermas:

> With varying content, the term 'modern' again and again expresses the consciousness of an epoch that relates itself to the past of antiquity, in order to view itself as the result of a transition from the old to the new.... The project of modernity formulated in the 18th century by the philosophers of the Enlightenment consisted in their efforts to develop objective science, universal morality and law and autonomous art according to their inner logic.
> (Habermas 1985:3, 9)

This was a culmination yet rejection of what had gone before. All things were made new or at least seen anew. This particular modernity set itself against the reign of myth: 'Enlightenment contradicts myth' and 'enlightened thinking has been understood as an opposition and counterforce to myth' (Habermas 1987:107). 'The program of Enlightenment was the disenchantment of the world: the dissolution of myths and the substitution of knowledge for fancy' (Adorno and Horkheimer 1979:3). This newly created world confronted a mythic realm of closed yet multiple meaning, a realm of the transcendent location of origin and identity. With Enlightenment the transcendent was brought to earth. 'Man' was to be the measure of man. There is no need of a

mythic mediation between the real and the transcendental. Meaning was now unified. The transcendental and the limit it imposed on thought and being were the timorous restraints men had placed on themselves in bygone ages. With 'the intoxication of Enlightenment' (see Strakosch 1967:121), man stood alone daring now to know and, in boundless thought, bringing a unifying reason and knowledge to bear on the dark places. Nothing could remain ultimately intractable or mysterious. Reality and its divisions no longer took identity from their place within an enclosing mythic order–they were manifestations of a process of discovery and realization. When this process reaches the limits of its appropriation of the world, Enlightenment creates the very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable 'other' against which Enlightenment pits the vacuity of the universal and in this opposition gives its own project a palpable content. Enlightened being is what the other is not. Modern law is created in this disjunction.

THE HEAVENLY CITY

In debunking the philosophers of Enlightenment, Carl Becker equated the domain to which they would lay claim with the Heavenly City of Augustine:

> In God's appointed time, the Earthly City would come to an end, the earth itself be swallowed up in flames. On that last day good and evil men would be finally separated. For the recalcitrant there was reserved a place of everlasting punishment; but the faithful would be gathered with God in the Heavenly City, there in perfection and felicity to dwell forever.
> (Becker 1932:6)

There are even more venerable precedents and ones more apt 'in the enlightened world [where] mythology has entered into the profane '(Adorno and Horkheimer 1979:28)–particularly John's evocation in *Revelation* 21 of 'a new heaven and a new earth'. Once God has made 'all things new':

> the tabernacle of God is with men, and he will dwell with them, and they shall be his people, and God himself shall be with them, and be their God.
> (John 21:3)

There follows the ravishing evocation of 'that great city, the holy Jerusalem, descending out of heaven from God'. It is a city infused with the presence of God:

> And I saw no temple therein: for the Lord God Almighty and the Lamb are the temple of it.
> And the city had no need of the sun, neither of the moon, to shine in it: for the glory of God did lighten it, and the Lamb is the light thereof.
> And the nations of them which are saved shall walk in the light of it.
>
> (John 21:22–4)

The saved are distinguished from those less than committed to an exclusive truth–from 'the fearful, and unbelieving...sorcerers, and idolaters, and all liars' and others, all of whom are banished to 'the second death'. These are, of course, themes which have the most profound and extensive resonance throughout the myths of Western Christianity and I will be seeking to show how they imbue Enlightenment and its law.

Returning for now to Becker, he says that his aim is 'to show that the *Philosophes* demolished the Heavenly City of St Augustine only to rebuild it with more up-to-date materials': 'the Heavenly City thus shifted to earthly foundations' (Becker 1932:31, 49). The terms of the shift are by now well rehearsed: for example, now 'man is capable, guided solely by the light of reason and experience, of perfecting the good life on earth' (Becker 1932:102). My concern is not immediately with such a claim as this, whether as a supreme good or whether as 'disaster triumphant throughout the earth' (Adorno and Horkheimer 1979:3). Either view flatters Enlightenment and ultimately accedes to the universality of its reach. My concern with Enlightenment as myth sees it in the terms of the particular and the exotic attributed to those 'others' banished from its truth and being. To focus my enquiry, I will use the image of the Heavenly City but in ways different now to Becker's account.

The mythological city is one form of the powerful symbolism of the centre. The centre–whether a city or temple, a sacred mountain or the Garden of Eden–was a foundation and a source of creation, the point at which the chaos of pre-creation was ordered or crushed, and the point where a transcendentally

ordered realm met and conferred a unified, 'enduring, effective' reality on the world (Eliade 1965:18; see also Goodrich and Hachamovitch 1991:169–72). The centre was the very image of the world, the *imago mundi*. It pervaded and consecrated all the world's space. But not everything yet partakes of its being:

> For example, desert regions inhabited by monsters, uncultivated lands, unknown seas on which no navigator has dared to venture, do not share with the city of Babylon, or the Egyptian nome, the privilege of a differentiated prototype. They correspond to a mythical model, but of another nature: all these wild, uncultivated regions and the like are assimilated to chaos; they still participate in the undifferentiated, formless modality of pre-Creation.
>
> (Eliade 1965:9)

In some mythologies a metropolitan creation acts on this modality of pre-creation in an expansionary way:

> Settlement in a new, unknown, uncultivated country is equivalent to an act of Creation. When the Scandinavian colonists took possession of Iceland...and began to cultivate it, they regarded this act neither as an original undertaking nor as human and profane work. Their enterprise was for them only the repetition of a primordial act: the transformation of chaos into cosmos by the divine act of Creation. By cultivating the desert soil, they in fact repeated the act of the gods, who organized chaos by giving it forms and norms. Better still, a territorial conquest does not become real until after–more precisely, through–the ritual of taking possession, which is only a copy of the primordial act of the Creation of the World. In Vedic India the erection of an altar dedicated to Agni constituted legal taking possession of a territory.
>
> (Eliade 1965:10–11)

Similarly, 'the English navigators took possession of conquered countries in the name of the king of England, new Cosmocrator' (Eliade 1965:11).

The dimensions and dynamic of the Earthly City of Enlightenment seem at first to be markedly similar to the celestial. Its claim to unify and order reality is no less encompassing. And there also remain strange regions beyond the elect community of enlightened nations, as they

were called—regions to be continually discovered and reduced to order. Such a ready resemblance surely cannot withstand the necessary history of difference between the enlightened and the pre-modern world. But such a foundational difference, I now argue, incorporates the very dimension of myth that it would seek to deny.

What Enlightenment and modernity supposedly reject, in a word, is transcendence. The key divide posited by Eliade is one between a mythic world where 'neither the objects of the external world nor human acts...have an autonomous intrinsic value' and a modern world where they do (Eliade 1965:3). Mythically, 'objects or acts acquire value, and in so doing become real, because they participate, after one fashion or another, in a reality that transcends them' (Eliade 1965:3–4). Such things once 'shone differently because a god shone through them' (Nietzsche 1974:196—para. 152). In the uniform light of modernity, there is no room for a duality of meaning or for any ultimate ambiguity. What we have instead is the elevation of 'the objects' in a sense encompassing not just a separate material thing but also a distinct constellation of action, such as law. Objects have and maintain identity 'in themselves, complete, self-referring and proper' (Douzinas and Warrington 1991:10).

I will begin to extract the mythic dimensions of the object in terms of its origin, its function and its relation to other objects. Enlightenment's obsession with origins is perhaps the most obvious substitute for the mythically transcendent. The object could no longer take its being from the transcendent source provided in a myth of origin. Its essence now was simply found in its origin. Origin revealed the object in its pristine simplicity. Thus Cassirer, in remarking on the 'complete diversity, this heterogeneity and fluidity' of psychology in the eighteenth century, finds that 'closer inspection reveals the solid grounds and the permanent elements underlying the almost unlimited mutability of psychological phenomena': 'if we trace psychological forms to their sources and origins, we always find such unity and relative simplicity' (Cassirer 1955:16–17). Originary time is connected with the present object in a process of development or civilization in which the continuity of the object is sustained even while it changes. This process was recounted, as we shall see later, in fantastic stories devised in the names of reason and history. Of the infinity of possible objects, narratives were told of some only, and these were told with the constant repetition that characterizes the operation of myth. They included tales of society, law, property and other Eternal Objects such as I described in the last chapter. Eternal Objects dramatically

instance the mythic function of the object. Objects provide 'exemplary models' against which the validity or reality of an act is measured (Eliade 1965:28). Objects, to borrow Lefort's terms again, are 'both representations and "rules", in the sense that they imply a certain way of acting which is consistent with' the object (see Thompson 1986:17). And those who act in ways consistent with Eternal Objects are included in the ranks of the elect—a point I will develop shortly. So much for the origin and function of objects. I will now look at their mythic dimension in the relationship between them.

Despite their erection in denial of a mythic order or a mythic lawgiver, objects in modernity do not 'drift about in a daze' (Auden 1948:99). The universalist thrust of Enlightenment places the object in an integral relation to the 'general' conceived in such terms as universal ordering and reason. What was general had the potential of being known completely, even if some saw that as incapable of final realization. But the shortfall was no restraint on a totalizing ambition. There were to be no ultimate limits. Multiplicity and difference could be safely sought in the steady anticipation that they would return to an assured unity:

> The path of thought then, in physics as in psychology and politics, leads from the particular to the general; but not even this progression would be possible unless every particular as such were already subordinated to a universal rule, unless from the first the general were contained, so to speak embodied, in the particular.
>
> (Cassirer 1955:20)

This dynamic of identity was taken even further:

> One should not seek order, law, and 'reason' as a rule that may be grasped and expressed prior to the phenomena, as their *a priori;* one should rather discover such regularity in the phenomena themselves, as the form of their immanent connection.
>
> (Cassirer 1955:9)

This alternation between the general and the particular cannot, in modernity, be accommodated in distinct realms as they would so readily be in other mythologies. What unites them and sustains

the unity of being, apart from the formulaic gymnastics of the type just instanced, are Eternal Objects. These, in mythic style, mediate between the general and the specifically particular by appropriating the quality of the universal to themselves. Occidental forms, as Eternal Objects, thus provide exemplary models of what the world really is or should be. Let us take property as an instance. As an 'external', reified object, it is suffused with the palpable and the specific. Yet it is also elevated in terms no less extensive than those attributed to the transcendence of myth. It is, to summarize various formulations of Enlightenment, the foundation of civilization, the very motor-force of the origin and development of society, the provocation to self-consciousness and the modality of appropriating nature: 'Property is man', if 'only civilized man': it is identified with 'individuality, liberty and history' and is 'as precious as life itself': it is thus readily seen in terms of the 'sacred' and the 'eternal' (see Kelley 1984a:129–33). What is being universalized here is a particular form of Occidental property. Where it is absent there can only be its precursors or savagery.

There are general elements combined within the Eternal Object. These, as I peremptorily indicated in the last chapter, comprise the subordinating subject, the progression of subordination and that which remains unsubordinated. I will say something more about these, particularly the third. Both the subject and progression were dealt with extensively in the last chapter and I will return to them in the next; the third I consider here in its form of nature. I will look at the subject and progression mainly as a prelude to the account of nature. Through the subject, whether singularly as the individual or collectively as humanity, any action or object can be integrated with the most pervasive and extensive reality. There is an impetus towards creation enabling this to be done which emanates from a particular facility of thought, reason or the mind. 'The highest energy and deepest truth of the mind do not consist in going out into the infinite, but in the mind's maintaining itself against the infinite and proving in its pure unity equal to the infinity of being' (Cassirer 1955:38).

It is progression which comprehensively enfolds the transcendent within the temporal. Mundane reality is sustained in the prospect of 'perfectibility'—one of 'the words without which no enlightened person could reach a restful conclusion' (Becker 1932:47). Even the professedly anti-Utopian succumbed to its necessity. So, for Bentham, the radiant potential of his principle of utility was such that:

> though no one now living may be permitted to enter into this land of promise, yet he who shall contemplate it in its vastness and beauty may rejoice, as did Moses, when on the verge of the desert, from the mountain top, he saw the length and breadth of that good land into which he was not permitted to enter and take possession.
>
> (see Holdsworth 1952:79)

It is, in sum, difficult not to see the discovery of progress in the eighteenth century as myth triumphant. Although the closest mythic analogue may be with myths of the heroic search or voyage, or even the myths of eschatology, progress also evokes origins. Progress does not just go somewhere, it comes from somewhere. Progression is the continuity of an origin, of the passage from pre-creation to the manifest. The lineary progression of the West is one of constant and accumulative creation. This is, nonetheless, an ordered, even restrained creation. Progress would always be potentially disruptive unless it were reduced to an orderly course in nature. Eventually, progress comes to be seen not merely as a matter of expectation or aspiration, but as itself one of nature's laws—that story is taken up in the next chapter.

NATURE AND THE DEIFICATION OF LAW

'Order is Heav'n's first law' (Pope 1950:132—Epistle IV, line 49). When the Heavenly City is brought to Earth, order becomes the first law of nature. Before then, the accepted histories have it, God was considered the supreme lawgiver. Law had to conform ultimately to this mythic origin for its being or validity. No matter how ingenious the scholastic solutions applying God's word to the mundane world, and no matter how mysterious 'his' ways, God remained the necessary and unavoidable source of law's being. Enlightenment replaces God with nature. In terms of the origin myths of modern science, the deific obstacle to humanity's progress in knowledge is eliminated, constraining superstition gives way to incandescent truth, man unaided at last dares to know, and so on. Thus:

> all we have to to is put aside the hindrances which heretofore have delayed the progress of natural science and prevented it from resolutely pursuing its path to the end.

> What always prevented the human mind from achieving a real conquest of nature and from feeling quite at home there was the unfortunate tendency to ask for a realm beyond. If we set aside this question of transcendence, nature ceases at once to be a mystery. Nature is not mysterious and unknowable, but the human mind has enveloped it in artificial darkness.... The riddle of nature vanishes for the mind which dares to stand its ground and cope with it. For such a mind finds no contradictions and partitions but only one being and one form of law.
>
> (Cassirer 1955:65)

This revolution, so the story continues, is accompanied by a basic change in the nature of law. To adopt Althusser's way of putting it, law previously had been solely a matter of '*commandment*. It thus needed a will to order and wills to obey.... Law having only one structure, divine law, natural law and positive (human) laws could be discussed *in the same sense*.... Divine law dominated all law' (Althusser 1972:31–2–his emphasis). But this is changed and nature has laws which are not orders but simply order–a new and 'inexorable regularity and legality' (Hodgen 1964:450). But, I will argue, the mythic dimension attributed to the prior order of God also characterizes the new order of nature. What happens is that God becomes captured by 'his' creation. Malebranche was a deft exponent of the process:

> The will of God is only the love He directs toward His own attributes.... Therefore He can only will and act according to that which He is, only in a manner which bears the character of His attributes. [This is] because He is glorified by being what He is, and by possessing the perfections included in His essence. In a word, [it is] because he cannot contradict Himself, cannot will against the eternal and immutable perfections of his essence.
>
> (see Walton 1972:38)

'Order is...[the] inviolable Law' of God's action (Walton 1972:38). The presence of order and uniformity in nature's laws still required, for Newton and others, a divine lawgiver. After chastising Christ for attributing a particular will or design to God the Father–for saying that the Father would be concerned 'to clothe

the lilies of the field and to preserve the least hair of his disciples' head'–Malebranche asserts that 'order does not permit that [God] have practical *volontés* proper to the execution of his design.... He must not disturb the simplicity of his ways' (Riley 1986:35, 40). God is thus confined to a general will, to acting 'as a consequence of general laws which he has established' (see Riley 1986:29). God is hardly now in a position to resist expulsion from nature altogether–a kind of reverse Eden. What is perhaps worse, there were great ancestor figures of modern law, such as Grotius, who still attributed the new law ultimately to God but nonetheless recognized that God was not strictly necessary for nature. If God persists, 'he' no longer possesses nature but is possessed by it. It is now a matter of 'the laws of nature and of nature's God', as the US Declaration of Independence has it.

This outcome at first seems contrary to the place that nature usually finds in myth. Nature and culture are there placed in opposition. Culture advances by taming and appropriating nature. But the laws of nature and of nature's God inhabit the world, including its culture, as pervasively and comprehensively and in as unifying a way as did the pre-modern deity–'the law that preserved the stars from wrong was also the rule of duty' (Willey 1940:14).

For Grotius, as the modern begetter of law for an entire world, the impulse towards sociality provided by 'human nature...is the mother of natural law' (see Robinson *et al.* 1985:359). To establish this natural law, he looked to writers of antiquity as well as to more contemporary religious and juristic sources, all of them understandably Occidental. In all: 'that is according to the law of nature which is believed to be such among all nations or among all those that are more advanced in civilization' (see Stein 1980:4). The natural law of Enlightenment remained within the tradition of Grotius with somewhat more emphasis on 'scientific' modes of reason and calculation. Reason, in turn, was seen as typical of 'man'. It was both part of man's nature and an imperative guide to what that nature was. All versions of Enlightenment natural law shared the same universal scale and the same partaking in an objective nature.

This story of law's domestication of the deity is a comparatively short one because, in terms of another story, objective natural law did not endure as a basis for practical legal regulation. Elements of it seem to persist in law, as we shall see, but objective natural law

endures more fully as scientific administration. That particular story is taken up in later chapters. There is now division in a once unitary law, a division between 'the law that preserved the stars from wrong' and 'the rule of duty'. That rule is located in the tradition of law as command, a tradition which persisted and was not wholly subordinated in objective order.

Accounts of law as the acts of a sovereign will are every bit as ancient as the equation of law with a set order. The division between the two types of law is tied up with competing Occidental deities. One is the origin and ruler of the cosmos and can alter it at will. Although this god's ways remain ultimately mysterious, they do have to be known if they are to be mythically operative. The primary form of this knowledge is revelation. The other deity is that captured by 'his' own creation. This god is allowed to act only in accordance with the divine order. The primary mode of acquiring knowledge in this scheme is reason. Both of these gods continue to inhabit law but the predominant story of modern law, one told now in the perspective of the nation-state, attributes precedence to the god of will and revelation. The story is so well known as not to bear repetition without tedium. To summarize, it is a story of the separation and dominance of a secular power in the initial form of the centralizing monarchies of medieval and early modern Europe. Although some god is invoked for a time as a final source of law, political rule assumes a secular sweep in which the divine becomes incidental or irrelevant. Hobbes's Leviathan, that 'mortal god', is a resonant marker of the change (Hobbes 1952:100). Natural and divine law become subordinate to the self-sufficient determination of positive law—the law posited by the will of the sovereign.

God's surreptitious triumph can, nonetheless, be glimpsed in the composition of modern law. Merely to present modern law's deific attributes could be to parade the obvious. These attributes could appear to be simply the case, just as a mythology should appear. I will attempt to dramatize the argument by resort to Kafka's 'The Great Wall of China': there can be 'no contemporary law' where 'long-dead emperors are set on the throne in our villages, and one that only lives in song recently had a proclamation of his read out by the priest before the altar' (Kafka 1961:78, 80). We could reduce this in socio-legal terms to a point about limits to law's efficacy but I take it as a point about the mythic being of Occidental law. It cannot be 'contemporary law' drawing together

diversities in time and abstracting from it without transcendentally opposing a palpable world that denies transcendence. God similarly persisted in the face of the denials of a profane or profaned world. The god of the Hebrews and the Christians was a jealous god, one who would never relax the totality and the inexorability of 'his' claims to obedience. There could be 'none other gods before me' (Deuteronomy 5:7). God was the creator of all, sole and omnipotent, pervasive and eternal. Only those who act in accord with the mythic exemplar of God's will or God's law can be saved. Whether or not so to act is a matter for God's subjects in the exercise of that freedom and responsibility which they share with the deity.

Law once bore the characters of God. It explicitly took mythic origins in the godhead. This connection becomes attenuated or, to adopt Derrida's terms, the mythology becomes anaemic or whitened (Derrida 1982:213). The sovereign is no longer God's earthly representative and is now the autonomous and self-sufficient source of law. Law, once it was processed by Kant, is no longer tied to any extraneous order, now deriving its force and origin purely from its intrinsic being. Yet, despite all this, law does not or cannot assume merely terrestrial dimensions. It continues to bear the characters of God. But it does this now in a mundane world.

We can again attempt to penetrate that world in the drama of difference. When delineating Eternal Objects, I used Strathern's location within 'Western liberal society' of a type of 'social action which incorporates the ideal, the normative' and remains apart from and unaffected by 'what that action controls/regulates/modifies' (Strathern 1985:128). She arrives at this perception through its difference to the modes of regulation among the people of Hagen in the New Guinea Highlands. With these people, one mode of regulation, such as fighting or gift exchange or 'talk', is deeply influenced by and even transformable into another. Western law, in contrast, is invested with inviolability and transcendence. These qualities are usually put in terms of law's being normative or formal, general or abstract. In practical terms, this entails law's not being able to 'bear very much reality' (cf. Eliot 1935:49). Law has to be kept at a remove 'from the everyday commitments and discourses of social and political practice and conflict' (Goodrich 1987:5). For this, it assumes the trappings that keep myth apart from the profane yet make it operative, such as priests/guardians of

the myth and its constrained application in ritual. Law's effects are formed magically–that is through 'a method of supporting endeavour to control the environment and social relationships by means where the connection of effort with achievement cannot be measured' (Gluckman 1968:111). Law, like the deity, creates its own world and the legal reality is the magical effect of invoking formulas within law which are mythically adhered to by priests and people (Hagerström 1953). As magical and transcendent, law cannot be brought into an evaluative, much less definitive comparison with mundane reality.

Law takes on and retains its quality of transcendent effectiveness as an enduring type of sovereign rule. Like the monotheistic sovereign, law is a transcendent unity: the 'inevitability of legal unity is seen as central to the very idea of legal order' (Carty 1991:182). So, Holdsworth finds, in one of the better stretches of Blackstone's verse, the informing ideal of his great consolidation of English law:

> Observe how parts with parts unite
> In one harmonious rule of right;
> See countless wheels distinctly tend
> By various laws to one great end.
>
> (see Holdsworth 1952:704)

This harmony and this end come from within law itself. Like its divine counterpart, law is autonomous and self-sustaining. It is independent of any exterior reality. It is not bound by any temporal order: or, more exactly, law's time exists beyond mundane temporality (Goodrich and Hachamovitch 1991:167, 174). Any past, any future can be integrated into its eternal presence. Space is also transcended. Law has, as Carty puts it, the quality of 'everywhereness' (Carty 1991:196). 'There cannot be an "absence of law"' (Stone 1964:24). Law is, in all, possessed of a universality which 'exceeds all finitudes' (Carty 1990:6). This is a universality which rejects or incorporates the particular. The evanescent particularities of mundane reality are taken up into law and there rendered effective and persistent. 'Reality [is] being adjusted' continually, to a law 'which transforms the social realm so as to render it assimilable to the normative complex' (Lenoble and Ost 1980:110). Accounts of modern law diverge in the range and force they accord to law's acting on mundane reality. Claims have been

made, often in the traditions of objective natural law, for the encompassing ability of law to make or re-make society totally. Such an aspiration was not remote from the makers of the 'liberal' French Code Civil (see Kelley 1984a:42–5). Bentham, conceiving himself as the Newton of the moral world, combined law's completeness with its limitless sovereignty in the prospect of an eventual attainment of total and 'certain order' (Lieberman 1989:281). The less ambitious liberal manifestation of law's omnipotence attributes to law not the ability to do everything but the ability to do anything. Law remains pervasive, able to intervene at any point but not intervening at every point. Some areas are supposed to remain characteristically apart, notably a 'private' domain of the subject.

Even in this provisionally limited, liberal mode, law maintains its imperial and universal character against the particular. Law's range of determination remains infinite. As an operative condensation of Enlightenment thought, law becomes:

> an immanent principle that unites the parts into a whole, that makes this whole the object of a general knowledge and will whose sanctions are merely derivative of a judgement and an application directed at the rebellious parts.
>
> (Deleuze and Guattari 1983:212)

Anything can be made the object of this judgement and application. Along with the generality of its sanctioning force, law demands 'that all sectors of society abandon their autonomy of legal interpretation (that is, of the extent of their obligation) in favour of a single...interpretative authority' (Carty 1991:182). Thus we have replicated in law the 'Christian axiom that custom, history, tradition, were to be conquered in their effectiveness by the word–and the law...is little more than the word; "in principio erat verbum"; in the beginning was the word' (Ullmann 1975:49). What is more, modern law could re-shape the conquered, could 'release norm-contents from the dogmatism of mere tradition and...determine them intentionally' (Habermas 1976:86). So, law's power of positive and universal determination turns, as it were, against social relations to which law was once integrally tied. Law constitutes and empowers the realm of so-called civil privatism which replaces the myriad 'public' realms of pre-modern regulation. This civil privatism came to be permeated by detailed controls of

administration and these were ultimately supported by law's dealing with 'the rebellious parts'. The legal subject emerges out of this paradoxical privatism not only as the abstract bearer of legal rights and duties, but also, as we will see in the next chapter, as the possessor of a specific Occidental identity not unlike that possessed by the subject of the Christian god.

We have already encountered another Christian god besides the ineffable, commanding sovereign, and lineaments of this god are also to be found in modern law. With objective natural law, God came to be contained in 'his' creation as 'against the derivation of law from a completely irrational divine will which is impenetrable to human reason' and 'is in the last analysis rooted in divine omnipotence...absolutely unconditional and subject to no limiting rules and norms' (Cassirer 1955:238). This was an old divide, one which had persisted throughout the Middle Ages, to take it no further back. In its modern guise, it is seen in the division between a stable, independent legal order and an earthly form of absolute rule, the commanding sovereign of the Leviathan state (Cassirer 1955:238). The stable and independent 'rule of law' came to be secured in two ways. In one, legal restraint on the state and some enduring stability of law were set in constitutional provisions or procedures the alteration of which was beyond the normal competence of the state. These were usually based in claims to 'natural' or 'human' rights. In the other mode, restraint was built into the law itself. Most notably, the general will which Malebranche had foisted onto God, in opposition to claims that God could 'command' anything, was an antecedent of the generality that mythically inhabits modern law (Riley 1986). For Rousseau, 'the object of laws is always general'; 'no function which has a particular object belongs to the legislative power', and 'what the sovereign commands with regard to a particular matter' is not 'law but is a decree, an act, not of sovereignty, but of magistracy' (Rousseau 1986:211–12).

Perhaps the most significant legacy of the god of order is the mythic equation of Occidental law with order. Just as order is Heaven's first law, so 'the law is an order, and therefore all legal problems must be set and solved as order problems' (Kelsen 1967:192). Through 'legal mytho-logic' there is a 'handling of contradictions in society according to the prescriptions of order' (Lenoble and Ost 1980:229). But the order secured in law cannot itself now be secured in the order of God or nature. There are limits, as Rousseau observed, to an order achieved in 'the nature of things':

> All justice comes from God, who is its sole source; but if we knew how to receive so high an inspiration, we should need neither government nor laws. Doubtless, there is a universal justice emanating from reason alone; but this justice, to be admitted among us, must be mutual. Humanly speaking, in default of natural sanctions, the laws of justice are ineffective among men.... Convention and laws are therefore needed to join rights to duties and refer justice to its object.
>
> (Rousseau 1986:210)

The willed sanction is thus necessary for modern law. There remains, in all, a persistent contradiction between law as avatar of the god of order and law as avatar of the god of illimitable sovereignty.

The serenity of law as transcendent is further disturbed by a certain popular dimension of law. Ullmann describes 'two contrasting themes which portray the creation of law' in 'the Western world':

> Historically speaking, the one called the ascending theme of government and law, can claim priority and appears to be germane alike to lowly and highly developed societies. Its main point is that law-creative power is located in the people itself...: the populace at large is considered to be the bearer of the power that creates law either in a popular assembly or diet, or, more usually, in a council or other organ which contains the representatives chosen by the people.... Opposed to this ascending theme is the descending one according to which original power is located not in the broad base of the people, but in an otherworldly being, in divinity itself which is held to be the source of all power, public and private. The totality of original power being located in one supreme being was distributed downward–or 'descended from above'–so that the mental picture of a pyramid emerges: at its apex there was the Ruler who had received power from divinity and who distributed it downwards, so that whatever power was found at the base of the pyramid was eventually traceable to the supreme head. But, and this is one of the crucial differences from the ascending theme, the office holders are not representatives: they are only delegates of the supreme Ruler.
>
> (Ullmann 1975:30–1)

There was a sharp conflict, as Ullmann shows, between these themes in the Middle Ages. The standard account in the modern history of the West is that, with the decline of absolutist sovereignty and the growth of representative government, the ascending theme progressively wins out. Yet predominant jurisprudential accounts persistently and readily see modern law in terms of the descending theme.

We can refine this contrast by following a seeming by-way in histories of Western law, that of custom, as a popular legal form. Other popular dimensions of law will be considered later in this chapter. Through custom, says Ullmann: 'the stark contrast between the descending and ascending theme of government is... nakedly revealed' (Ullmann 1975:63). Even where it was not mediated through a popular assembly, custom in the medieval period was often accorded an efficacy equal to or greater than that of legislation. It was even more frequently esteemed above 'written laws' and could be foundational of these laws. Although custom was based on usage or long acceptance, it was, according to Aquinas, capable of changing in ways 'just as motivated by the reasoned will as are the written changes of statutory law' (Morrall 1980:75). It could extend beyond the local community. The common law, for example, took some of its origins from general customs of the realm.

Out of the Enlightenment obsession with custom, a different and degraded form emerges. Custom becomes reduced to a peripheral category set in opposition to law through its association with the savage and with those small-scale remnants of a recalcitrant past yet to be transformed in modernity. It is produced by implacable habit and is everything that the reasoned will is not. It is, said Bentham, 'for brutes'–'written law [being] the law for civilized nations' (Bentham 1970a:153). Austin followed suit. For him, law as a positive product of the will contrasted essentially with rules that rest on 'brute custom' rather than on 'manly reason' and were thus 'monstrous or crude productions of childish and imbecile intellect' (Austin 1861–3:58–I).

The treatment of custom in the English domestic scene had for some purposes to be more tender. The common law was once equated with general customs that were to prevail through 'the whole kingdom' (Blackstone 1825:66–7–I). But Blackstone reduced custom to the domination of law and to insignificance. General custom is subjected to the pronouncements of judges, 'the living

oracles' of the law, whose judgement and proceedings are 'carefully registered and preserved, under the name of *records*' and whose determinations become a certain and 'permanent rule' (Blackstone 1825:68–I–his emphasis). Through this process, the common law, like the legislative sovereign, becomes a transcendent entity–'a brooding omnipresence in the sky' (Holmes in *Southern Pacific Co. v. Jensen* (1917 244 US 205 at 222)). It becomes positive or posited law, operating and elaborated in officially contained systems which are incompatible with custom, although some patina of its presence, even some custom-like modalities, survive (Simpson 1987:361).

There still remained a type of custom that was not general but 'particular'. Blackstone adroitly marginalized it: 'for reasons that have been now long forgotten, particular counties, cities, towns, manors and lordships, were very early indulged with the privilege of abiding by their own customs, in contra-distinction to the rest of the nation at large' (Blackstone 1825:74–I). Such customs could (and can) only be accorded legal recognition if they surmount a long line of hurdles. To take an example, the mythic grandeur which once attended custom's origin in a 'time whereof the memory of man runneth not to the contrary' is now reduced to a paltry exactitude: 'so that if anyone can show the beginning of it, it is no good custom' (Blackstone 1825:67, 76–I).

To trespass on the dynamics of another age, and of the next chapter, custom in a broad dimension and the ascending theme can be seen as persisting. In that broad dimension, custom effected and symbolized the unity of the pre-modern community and was its 'common conscience' (Berman 1983:77). Towards the end of the period of Enlightenment, and in professed reaction against it, Savigny revived a tradition that has since endured in social conceptions of modern law. He discovered that it was not a sovereign will but custom as the 'common consciousness of the people' that was the foundation of law (Savigny 1831:28, 30). Although the popular dimension of law thus conflicts with law's claim to transcendence, it is subordinated to law as sovereign. Legislation has for Savigny a distinct and necessary existence (Savigny 1831:104–5). Since it is allowed no specifically determining effect of its own, custom exists in the realm of the vaguely influential, of what ideally should be taken into account in legislating. As with the common law, Savigny's famed idea of law as *Volksgeist,* as the spirit of the people, appropriates custom to a

sovereign system leaving only a seductive trace of its presence. The ascending theme, of law in the instance of custom is not accommodated within law but subordinated to its descending theme, leaving the tension between the two unresolved in law.

Drawing back from this account of the deification of law, we are left with a mystery, or with a series of mysteries. Like the god of *Revelation,* myth enters into the great city of the Enlightened world. It disappears within an encompassing and unitary reality. Law cannot now resort to a transcendent source for its origin and identity. God no longer shines through law. Yet the characters of God are preserved within law itself. How, then, can law maintain its transcendent being within a uniform reality, sustaining deific qualities of autonomy, omnipotence, pervasiveness, and so on? Even in its transcendent dimension, law is not coherent for it is imbued with the conflicting gods of Europe, the god of illimitable sovereign will and the god of order who is captured by 'his' own creation. Transcendent law is contradicted as well in law's popular dimension. Law's deific qualities and law's unity and coherence cannot, then, be found in what law is. But law's deific qualities do not allow it to be subordinate in its being to a source outside of itself.

Where or how else can law find that which gives it being, a new 'fabulous scene that has produced it' (Derrida 1982:213)? It is now found not in terms of what law is but in terms of what law is not. It is found no longer in terms of what law is subordinate to but in terms of what is subordinate to it. Foucault locates at the outset of the modern period a shift in the fundamental mode whereby knowledge is acquired:

> The activity of the mind...will...no longer consist in *drawing things together,* in setting out on a quest for everything that might reveal some sort of kinship, attraction or secretly shared nature within them, but, on the contrary, in *discriminating,* that is, in establishing their identities.... In this sense, discrimination imposes upon comparison the primary and fundamental investigation of difference.
>
> (Foucault 1970:55–his emphasis)

Such a mode of difference is not simply abstract or analytical. It has clear contents to do with identity and order. Nor is it simply the discovery of identity and order but their mythic creation through assured thought or reason brought to bear on the world in the project of Enlightenment. When the limits of that creation

are met, Enlightenment confronts 'wild uncultivated regions' and an 'undifferentiated...pre-creation' (Eliade 1965:9). This it sets beyond itself, beyond its exemplary models, as its opposition and difference. But this is also its own pre-creation, and Enlightenment finds there its mythic origins. In the taking of identity from these origins, they become something to be departed from and negated rather than something to be positively emulated. They form negative exemplars. Hence, modern myth is the ascent from savagery instead of the descent from gods (cf. Sahlins 1976:52–3).

In the transforming thought of Enlightenment, culture confronts nature in standard mythic terms. Savages are of nature rather than culture and they are denied transforming thought or reason. Like the devils of Christian belief, to whom they were constantly compared, savages cannot escape the light but are forever cast out by it. The identities of the European and of European law are achieved in their foundational difference from these beings. I will develop that line of argument in the rest of this chapter.

NATURE, RACE AND LAW

Enlightenment inherits and refines a profound division in 'nature'–another obsession of the age. In the Christian tradition, the Pauline 'natural man' has to become a 'new creature' in order to be saved (I Corinthians 2:14; II Corinthians 5:17). The old Adam of fallen nature had to be cast out in baptism. In the Thomist rendition, nature is the creation of God; the participation by rational beings in God's rule of his creation takes the form of natural law. The Enlightenment variation is summarized by Jordanova:

> While it is important to realize that nature was endowed with a remarkable range of meanings during the period of the Enlightenment...there was also one common theme. Nature was taken to be that realm on which mankind acts, not just to intervene in or manipulate directly, but also to understand and render it intelligible. This perception of nature includes people and the societies they construct. Such an interpretation of nature led to two distinct positions: nature could be taken to be that part of the world which human beings have understood, mastered and made their own. Here, through the unravelling of laws of motion for

> example, the inner recesses of nature were revealed to the human mind. But secondly, nature was also that which has not yet been penetrated (either literally or metaphorically), the wilderness and deserts, unmediated and dangerous nature.
>
> (Jordanova 1980:66)

The second position extended to wild and savage people as well as places. It was an old position, one seemingly indistinguishable from the evocation of those wild, uncultivated regions on which creation operates in myth. Similarly, the appropriated nature of the first position seems to correspond to the achieved and differentiated creation of myth. The difference between Enlightenment and mythic conceptions of nature, however, would supposedly lie in the assertion of a unitary reality as opposed to myth's dual dimensions. Appropriated nature cannot be a transcendent prototype and wild nature cannot be a qualitatively different realm of sempiternal monsters and impassable deserts. But these two dimensions of myth can be readily located in Enlightenment once it is appreciated that the division between appropriated and wild nature is itself encompassed by order, leaving an intractable disorder beyond it. The appropriated and the yet-to-be appropriated share in the same universal order of things (see Foucault 1970:56–7).

It is the sovereign subject who effects a unifying order in nature and who brings things together in order: 'Man's likeness to God consists in sovereignty over existence, in the countenance of the lord and master, and in command' (Adorno and Horkheimer 1979:9). In terms closer to the times, Enlightenment:

> attributes to thought not merely an imitative function but the power and the task of shaping life itself. Thought consists not only in analysing and dissecting, but in actually bringing about that order of things which it conceives as necessary, so that by this act of fulfilment it may demonstrate its own reality and truth.
>
> (Cassirer 1955:viii)

The sovereign subject becomes the illimitable conduit for illimitable thought and reason. Yet the subject also sustains a distinct identity, 'maintaining itself against the infinite' (cf. Cassirer 1955:38). It is

self-sufficient, set apart from and dominant over nature. This is a primal, sovereign and assured position which recognizes, names and orders from afar. As Linnaeus announces, 'the exact Names of things finally rule' (see Foucault 1970:159). Human identity, in short, 'contained the nexus of representation and being' (Foucault 1970:311). Such an identity could not appear in terms of a positive finitude because it could not be any (limited) thing at all. The sovereign subject took identity in difference—its difference from a wild, disordered nature and from, in particular, that 'untamed...natural man' wherein, says Hegel of 'the Negro, ...there is nothing harmonious with humanity' (see Poliakov 1974:241). In mythic terms, this identity of the sovereign subject comes from the creation of European racism.

Myth's basic function, in its European conception, is the conferring of identity on a people. With the creation of modern European identity in Enlightenment the world was reduced to European terms and those terms were equated with universality. That which stood outside of the absolutely universal could only be absolutely different to it. It could only be an aberration or something other than what it should be. It is thus negatively and inextricably connected to the universal. 'The compass opened... the universe' (Montesquieu 1949:366), and there were no longer multiple worlds and difference could not find refuge from an exclusive universality. 'Now,' as Burke announces, 'the Great Map of Mankind is unrolld at once' (see Marshall and Williams 1982: introductory quotation).

The imperatives of difference had palpable dimensions. 'The eighteenth century proved the golden age of slaving' (Wolf 1982:196). There was an expansion of colonization and colonial rule became more explicit and comprehensive in its subordination. By 1800 the West already controlled over a third of the earth's surface. With its expansive claim to exclusive rationality, with its arrogation of a universal and uniform knowledge of the world, and with its affirmation of universal freedom and equality, the Enlightenment sets a fateful dimension. Being of humanity and being unfree were incompatible (Rousseau 1986:186). The all-too-obvious contradiction between Enlightenment thought and practice is mythically resolved by the invention of racism. The Enlightenment gives currency to 'race' in its modern connotation of divisions between people founded on certain physical attributes, usually skin colour. It also affixes to the idea of race three

monumental correlates that go to make up racism as it is now called. For racism, differences based on race are fundamental, intractable and unerringly indicative of superiority and inferiority. Those excluded from the domain of knowing, reason, equality and freedom by a buoyant British and French slavery or an expanding colonization are rendered in racist terms as qualitatively different. This was not simply a matter of excluding the enslaved from the realms of liberty and universal law, as Grotius and Locke did (see Davis 1966:114–15; Locke 1965:325–6, 366–paras. 23–4, 85). In the ubiquitous, all-defining gaze of Enlightenment, the enslaved were purposively constructed as essentially different and strange. Through taking identity in opposition to this creation, Europeans become bound in their own being by the terms in which they oppress others (cf. Hegel 1977:111–19–B.IV A).

I will take Long's *History of Jamaica* (1774) as a typical account of that essential difference which provided the counter in the making of modern European identity. Given Long's supposedly extreme views, this may seem a tendentious choice. However, Long's racism 'fitted all too well into the pattern of racial and cultural pride already prevalent in English thought' (Curtin 1964:44). He was indeed to prove the progenitor of scientific racism. The *philosophes*, it could be objected, were more refined and their racism was merely incidental in their work or even humorously intended (see Barker 1981: chapter 4; Davis 1966:403–cf. Neumann in Montesquieu 1949:239). Presumably jokes and the incidental were of significance even before Freud but, putting that aside, among the mythmakers of the age, racist sentiments were 'commonplace', and the racial 'other' was the invariable basis for theorizing about the nature of 'man' (Marshall and Williams 1982:212, 246). Although Long's concern was with 'the Negro', the characteristics he discovers proved remarkably invariant in accounts of other 'races'.

As a prelude to Long, we can extract the dynamics of the formation of European identity by combining contemporary perspectives. The first step, as Ferguson recognized, is 'to imagine... that a mere negation of all our virtues is a sufficient description of man in his original state' (Ferguson 1966:75). Then from this 'negative state which is styled a state of nature or a state of anarchy' is derived, in the negation of it, a 'positive' state of civilized 'subjection', including the determining order of 'positive' law (Austin 1861–3:222–I). The operative terms which Long

accorded this replete and inviolable negation were to become standard. (For the following see Long 1774:353–6, 377–8–II). 'Negroes' are conceived of in negation. They are 'void of genius ...either inventive or imitative'. They are 'irrational', without 'foresight', and they have 'no plan or system of morality among them':

> They seem unable to combine ideas, or pursue a chain of reasoning: they have no mode of forming calculations, or of recording events to posterity, or of communicating thoughts and observations by marks, characters, or delineation.

Further, 'no rules of civil polity exist among them': they are inhuman, at one with animals or even 'below brutes'. 'Their country in most parts is one continued wilderness, beset with briars and thorns.' Running through all this–the lack of reason, the correspondence with the animal state, the failure to order nature–is the inability to transcend the immediate and to act on and determine their own being, to accept and sustain a project of self-definition. The savage does not, in Shakespeare's astonishingly percipient terms, 'know [its] own meaning', nor can it 'endow [its] purposes with words that made them known' (*The Tempest* I, ii, 356–8). Neither action nor motivation can be constant or constructive. 'Negroes,' says Long, are 'lazy, deceitful, thievish, addicted to all kinds of lust...devoted to all kinds of superstition.' Each of these characteristics, as we shall see, become monuments to contrary European qualities. The repertoire is extended in the fantasies of others among the enlightened who envision savages and even once admired civilizations as stagnant or inert, only capable of acting out of mindless habit (custom) or caprice. The crowning point for Long is that, despite the vastness and variety of Africa, 'a general uniformity' of such attributes 'runs through all these various regions of people', thereby showing them to be intrinsically different and inferior.

The beauty and necessity of this negative mode of forming identity is that the subject is not presented in limited terms that would contradict its equation with the universal. Even its seemingly limiting virtues of moderation and lawfulness correspond to transcendent harmony and order. There is literally no need for Long to account for the European in his supposed history since the European is the active representation of the ethereal and

pervasive air within which all circumstance exists. Like glimpses of God, Europeans are occasionally discerned in their works which Long sees in contrast to savage incapacities as 'surely no other than the result of innate vigour and energy of the mind, inquisitive, inventive, and hurrying on with a divine enthusiasm to new attainments'. There was some small recognition of limits to European splendour in the use made of other European inventions, those of the 'noble savage' and an original state uncorrupted by such emblems of civilization as administrative efficiency and the rule of law (Ferguson 1966:221–2). But even in these accounts, if sometimes as a matter of regret, the European remained the transcendent, ordering centre of the world. The perception of limits was to assume more challenging dimensions when, toward the end of Enlightenment, 'man' becomes a finite object of the sciences. This story is taken up in the next chapter.

The transcendent, encompassing character of European identity inhabits and secures the ways in which it is formed. The Enlightened, to borrow their motto, dared to know but to know only so much as would confirm European identity. 'It is not at all to be wonder'd', says Locke, 'that *History* gives us but a very little account of Men, *that lived together in the State of Nature*' (Locke 1965:378–para. 101–his emphasis). The main problem for Locke is the absence of contemporary records. We can nonetheless be assured of the state of nature through such feats of reason–the reason Locke was so concerned to establish–as this:

> And if we may not suppose *Men* ever to have been *in the State of Nature*, because we hear not much of them in such a State, we may as well suppose the Armies of *Salmanasser*, or *Xerxes* were never Children, because we hear little of them, till they were Men and imbodied in Armies.
>
> (Locke 1965:378–para. 101–his emphasis)

The massive assumption here of an intrinsic 'man' and of an ability to trace man to a single point of origin are more typically developed by Condorcet (for the following see Condorcet 1965:195–6). 'We are obliged to guess', says Condorcet, how the 'first degrees of improvement' were attained. In this 'we can have no other guide than an investigation of the development of our faculties'. We are, however, aided by 'the history of the several societies that have been observed in almost every intermediate

state,' even 'though we can follow no individual one'. Indeed, 'it is necessary to select' facts from the histories 'of different nations, and at the same time compare and combine them, to form the supposed history of a single people, and delineate its progress'. Within these epochal assumptions there was a refinement, instanced here by Goguet: 'We may judge of the state of the ancient world for some time after the deluge, by the condition of the greatest part of the new world when it was first discovered' (see Meek 1976:21).

All this called for a large disregard of contrary evidence. The contemporary absence of knowledge cannot be an adequate excuse. Knowledge readily available was not used. The evidence relied on became increasingly threadbare and perfunctory as this body of thought 'developed'. Knowledge that would undermine it was ignored. A copious evidence showed, for example, that the savages were not savage (e.g. Axtell 1985: chapter 13). Hodgen puzzles over:

> why identifications of contemporary savagery with classical antiquity, or with old phases of other historical cultures, should ever have been made at all. So much is certain: it was not because of the validity of the correspondences cited.... The number of plausible likenesses elicited...were at best relatively few and usually trivial...[and] they were offset, and the conclusions derived from them were neutralized, by an overwhelming body of divergences which were seldom mentioned, much less assembled for comparison of relative proportions.
>
> (Hodgen 1964:354–5)

This was not simply a disregard of challenging evidence. Such evidence was also re-cast. For example, the identification of 'native North American cultures' with stasis was in part 'maintained despite the discovery of powerful evidence to the contrary' but when some ability of these cultures to change was recognized, this was attributed to exterior influence (Trigger 1985:51, 65). In short, the mythic inviolability of that 'other' against which European identity is formed was secured by elevating some kinds of knowledge and suppressing others.

In an Enlightened perspective, this line of criticism is beside the point. Since 'man's critical mind reflected the supposedly clear and rational laws of the universe' (Mosse 1978:5), it could hardly be

expected to defer to mere evidence. In its unbounded reach, it ordered and gave validity to evidence. With the ordering of things, their natures are evoked and fixed in their classification in difference (Foucault 1970:138). Classification was, at least initially, through visual observation (Foucault 1970:132). With the classification of races, dramatic, visible features were singled out and then massively generalized. Outward features became the signs of inner characteristics and capacities. When so equipped, the classifying gaze could produce order in hierarchical series. The medieval religious notion of the Great Chain of Being was not dissipated in a secular light but took on a fresh relevance in accounting for hierarchical racial division. Enlightened concern with the chain tended to focus on a few of the links (see Lovejoy 1966:181). Thus, in a variant of that concern, an English adaptation of Camper's anatomy could trace the 'regular gradation from the white European down through the human species to the brute creation, from which it appears that in those particulars wherein mankind excel brutes, the European excels the African' (see Thomas 1984:136).

As a myth of origin, this kind of story left a large hiatus. Given common origins for the savage and for the European, how were they now so radically different? For much of the eighteenth century the evidence was sought by such as Montesquieu and Bouffon in environmental terms. A common view was that extremes—exemplified by the 'Hottentot' at one end of the known world and the 'Lapp' at the other—set racially inferior people apart from the moderate European raised in the middling, temperate zone. Strictly, the tenets of the environmentalists were contrary to racism. If racial characteristics varied with environment, climate being the most recognized influence, then a change of environment would result in a change in characteristics. These could not then be attended with that intractability which racism requires. But racism prevailed. Environmental influences served to create enduring difference or to reinforce divisions peremptorily arrived at. Simple and enormously encompassing classifications of races transcended the greatest diversity of environments experienced by people within them. In the end, environment could not provide an answer to what, despite common origins, was the difference between the savage and the European but it did provide the basis of an answer.

The grand solution settled on in the second half of the eighteenth century was the idea of progress or betterment. The

notion of movement or progression in society was itself hardly a new one. In the seventeenth century, to take matters no further back, it was usual to associate the variety of people with their dispersal and progressive decline, following some original unity. This decline included the gradual loss of law and civilization. Sir Matthew Hale described such a decline, relating it to the effects of environment in *The Primitive Origination of Mankind,* a work whose continuing fame has not matched that of his contribution to law (Hale 1677:195–7, 200–1). In the eighteenth century the hold of degeneration itself declined and the direction of movement of societies tended to be reversed with the discovery that Greeks and Romans as forebears of the European had been savages much like the Indians. So some, at least, could change and progress. 'It is in their present condition, that we are to behold, as in a mirror, the features of our progenitors' (Ferguson 1966:80). Environment, especially as a 'mode of subsistence', now provided a basis for this change. Racial difference was linked, notably in the Scottish Enlightenment, with a vague idea of the progress of societies conceived in varying successive stages of material production—the most widely accepted becoming the hunting, the pastoral, the agricultural and the commercial. Although a matter of progression and improvement, this succession of stages was not seen as the result of some singular dynamic akin to evolution. The impetus for racially superior people to move from one stage to another was almost as varied as the diverse speculative and natural histories that accounted for it. These histories often showed as well that any such impetus could not be general for they revealed to the enlightened that there were those who did not progress and who were naturally and fixedly inferior. The mere persistence of backwardness was enough to establish its intractability. To make possible a progression beyond inferior states, each stage in the series supplanted that which went before it. Yet the civilized did harbour traces of a savage origin that had yet to be tamed: the savage passions or the dispositions of women and children, for example.

I have already indicated that the absence or contrary nature of evidence was no restraint on the imperial judgements of Enlightenment. Theorists of progress benefited greatly from that absence of restraint. It seems that the more the enlightened dared the less they needed to know. Despite their continuing hold in the West, the stories of progressive stages have never even remotely

approximated to the most tolerant conditions of historical enquiry, except for those recent attributions of fiction to history itself. I will now recount this tale of racism and enlightened thought in terms of the mythology of modern law.

LAW AND SAVAGERY

Despite its rejection of antiquity and its claims to total originality, the Enlightenment often re-patterned old mythic themes, making them its own. In one such theme, law is contrasted fundamentally with the savage state. For example, having left the enchantment of the Lotus-Eaters with understandably 'downcast hearts', Ulysses and his company:

> came to the land of the Cyclops race, arrogant lawless beings who leave their livelihood to the deathless gods and never use their own hands to sow or plough.... They have no assemblies to debate in, they have no ancestral ordinances; they live in arching caves on the tops of high hills, and the head of each family heeds no other, but makes his own ordinances for wife and children.
>
> (Shewring trans. 1980:101–Book IX)

As we shall see, many elements of the mythic origins of modern law are compressed into this description–the lawless nature of the savage, the emergence of law being associated with agriculture, the equation of law and sociality in contrast to the solitary state of the savage or the savage family. It was indeed common among the Greeks and Romans to identify an uncivilized or wild state with the absence of law (Kelley 1984b:620–chapter I; White 1978:165). For the medieval world, exotic peoples were often monsters who did not have the capacity to follow the law because they lacked human form (see Goldberg forthcoming: chapter 1).

'In the beginning all the World was *America*' (Locke 1965:343–his emphasis). As a source of savage origins, the Americas remained predominant until well into the period of Enlightenment–until, that is, they were displaced as the main location of European imperial expansion. The 'discovery' of the Americas almost immediately produced a profoundly ambivalent European regard of the Indian which was to become characteristic. The Indians were wild, promiscuous, propertyless and lawless

(White 1978:186–7). Or they inhabited a 'golden worlde without toyle... wherein men lyved symplye and innocentlye without enforcement of lawes, without quarrelying, judges, and libelles' (see Hodgen 1964:371). Admiration tended to decline with the intensity of aggressive European settlement. Montaigne's essay 'Of Cannibals' from the late sixteenth century was a greatly influential marker of this change (Montaigne: 1978). Although he was not without admiration for their uncorrupted state and sceptical of their disparagement by others, Montaigne's humanism ultimately accommodates the Indians in negative contrast with the civilized state. They were typified by lacks–of law, government, husbandry, and much else. Montaigne also saw the Indians as exemplars of a general state of savagery. At about the same time, this state of savagery came to be widely viewed as a general prelude to 'civil society', the main instances continuing to be the savages of the New World 'dispersed like wild beasts, lawlesse and naked' (see Hodgen 1964:468). Comparisons were increasingly drawn between the once savage state of the Greeks and the Romans and that of the inhabitants of the Americas: 'living onely by hunting... without tilled landes, without cattel, without King, Law, God, or Reason' (see Meek 1976:48–9), or 'ni foi, ni loi, ni roi'–once the virtues of a Golden Age but then a derogatory catchcry of early French explorers and settlers in North America, one to be put against the civilized condition of 'one king, one law, one faith'.

With the advent of Enlightenment these elements and more were wrought into a mythic charter by Hobbes, the 'demon-king of modernity' (cf. Tuck 1989:102. I draw on Hobbes 1952, Introduction and chapters 13, 15, 17, 18, 26–7). Through a primal covenant between 'men':

> is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man, though of greater stature and strength than the natural.... The pacts and covenants, by which the parts of this body politic were at first made, set together, and united, resemble that *fiat,* or the *Let us make man,* pronounced by God in the Creation.
>
> (Hobbes 1952:47–his emphasis)

Although this Leviathan is but a 'mortal god' (Hobbes 1952:100), it is not restrained by mortal attributes. The binding and bonding

covenant may no longer issue from the godhead but it is still attended with a mythic transcendence, inviolability and persistence. The resulting Commonwealth and its representative, the sovereign, are coequally imbued with these sacred qualities. The foundational terms in which a person enters into the covenant are taken to be:

> I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up thy right to him, and authorise all his actions in like manner.
>
> (Hobbes 1952:100)

Hobbes proceeds with formidable rigour to secure this pact and its creations, the Commonwealth and the sovereign, against any change or possibility of legitimate disturbance. To take just one line of argument:

> They that have already instituted a Commonwealth, being thereby bound by covenant to own the actions and judgements of one, cannot lawfully make a new covenant amongst themselves to be obedient to any other, in anything whatsoever, without his permission. And therefore, they that are subjects to a monarch cannot without his leave cast off monarchy and return to the confusion of a disunited multitude; nor transfer their person from him that beareth it to another man, or other assembly of men: for they are bound, every man to every man, to own and be reputed author of all that he that already is their sovereign shall do and judge fit to be done.
>
> (Hobbes 1952:101)

The commitment to Leviathan is total and interminable. It is attended with the mystical union of subjects within the Commonwealth. They are taken up into the sacred realm in which they mythically participate. In being 'the author of the Commonwealth, the subject becomes comprehensively committed to all actions of the sovereign 'as if they were his own'; subjects are thus inextricably bound: 'to him that beareth their person'–'none of his subjects, by any pretence of forfeiture, can be freed from his subjection' (Hobbes 1952:100–1). Ultimately, this sovereignty is the 'soul' of Leviathan: 'giving life and motion to the whole body' (1952:47).

Hobbes proceeds to erect law in the same dimension as sovereignty. He is concerned with 'law in general', his 'design being not to show what is law here and there, but what is *law*': 'none can make laws but the Commonwealth, because our subjection is to the Commonwealth only', and since the sovereign is the representative of the Commonwealth 'the sovereign is the sole legislator' (1952:130–his emphasis). It is the 'authority of the legislator' which gives to laws a mythic persistence, which enables them to 'continue to be laws' (1952:131). Law takes form as a 'command' of the sovereign 'addressed to one...obliged to obey him' (1952:130). The moral 'laws of nature' cannot be 'properly law' until they take form as such a command (1952:131). This command theory was to become the predominant notion in English jurisprudence but it did involve an immediate problem in that people have to know of commands in order to obey them. Hence, the command of the Commonwealth is law only to those who have means to take notice of it. 'Over natural fools, children or madman there is no law, no more than over brute beasts' (1952:132). But if law were to be dependent on popular knowledge, this could undermine the whole edifice of authority. With uncharacteristic equivocation, Hobbes opts largely, and understandably, for the maxim that ignorance of the law is no excuse (1952:139). This troubling popular element of law is pursued later.

What could be the impetus or force impelling the absolute and eternal transfer of power to a mortal god? Such impetus or force comes from a negative necessity. 'Our natural passions' are incompatible with political society: they put us in opposition to each other in 'a war as is of every man against every man' (Hobbes 1952:85). Given this and given the rough equality of physical and mental ability among 'men', it is only through deterrence that relations between humans can emerge and they can only be crude and precarious. For anything more, a superordinate power is needed. There can be no peace 'without subjection': 'men have no pleasure (but on the contrary a great deal of grief) in keeping company where there is no power able to overawe them' (1952:85, 99). Such a power has to be sustained–it has to make the covenant 'constant and lasting'–for without its persistence there would be a reversion to 'the condition of war', to a chaotic pre-creation, a 'return to the confusion of a disunited multitude' and 'to the sword' (1952:100–3).

> It may peradventure be thought there was never such a time nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner.
>
> (Hobbes 1952:87–8)

The American Indian and a general invocation of savage 'places, where men have lived by small families' provide the only (supposedly) tangible bases of this pre-creation (Hobbes 1952:99). Hobbes intends the American instance to be universalized, even if 'it was never generally so', at least to the extent that 'where there were no common power to fear' some such state would prevail (1952:86). He affirms the similarity of that brutish state with the absence of a feared 'common power' when peaceful government comes 'to degenerate into a civil war' (1952:86). He also invokes the antagonistic condition existing between 'kings and persons of sovereign authority' (1952:86). Neither of these instances is developed, and neither would long stand comparison with the primordial chaos provided by the simple savage, yet Hobbes does clearly intend them to be contemporary equivalents of the negating savagery that still lies below and that results from an absence of overarching order. In short, 'from this very negation is derived the positive content of the law of the land in its unconditional and unlimited validity' (Cassirer 1955:19).

The savage state provides more than the force creating and sustaining law and political society. It is also a specular repository of the virtues mythically attributed to high civilizations:

> Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society;

> and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.
>
> (Hobbes 1952:87)

To this catalogue of negatives there are two which need to be added more specifically. These assume a close relation in a period of Enlightenment. One is the absence of property, something which Hobbes often adverts to. In the savage state there can be no security of possession and expectation: 'there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's that he can get, and for so long as he can keep it' (1952:86–his emphasis). The other negative is the absence of law: 'where there is no common power, there is no law' and a law cannot be made till they have agreed upon the person that shall make it' (1952:88).

Hobbes is the mythmaker of the tradition of overwhelming order, including its equivalent in law, legal positivism. What comes after could be seen as more or less elaborate footnotes to Hobbes's *Leviathan*. Knowledge continued to flow from the Americas of people 'without subordination, law, or form of government', joined increasingly with efforts 'to civilize this barbarism, to render it susceptible of laws' (Axtell 1985:50). Such knowledge came to be generalized into that of an original, savage state. By the early eighteenth century, says Stein, 'the usual explanation of the origin of the state, or "civil society", as it was called, began by postulating an original state of nature, in which primitive man lived on his own. He had few social relationships with other men, and was subject to neither government nor law' (Stein 1980:1). The 'secularized' natural law of Enlightenment was in part based on the negative reflection of this state, on what was said to be common to those nations said to be civilized (Stein 1980:4). The monumental classifications in nature revealed by Linnaeus in 1735, after God had 'suffered him to peep into His own secret cabinet', definitively related types of *homo sapiens* to types of regulation, or lack of it: the American was regulated by custom, the European governed by laws, the Asiatic by opinion and the African by caprice (see Hodgen 1964:425). No less influentially, Montesquieu attributed governing 'causes' to groups of people in a more sociological way, savages being dominated by nature and climate, the Japanese by laws, and so on (Montesquieu 1949:293–4). The minority tradition of seeing the savage vices as virtues persisted.

Rousseau on the whole thought it a good, if irretrievably lost, thing to have 'no society but that of the family, no laws but those of nature' (see Meek 1976:86). With a modernist versatility worthy of the creator of Rameau's nephew, Diderot could, on site as it were, extol the Tahitians for following their natural, especially sexual, inclinations and for not being constrained by laws; yet when closer to the Western tradition he declaims–passionately–'the laws, the laws; there is the sole barrier that one can erect against the passions of men' (Diderot 1950; Bloch and Bloch 1980:37; Riley 1986:203). Even Ferguson–who censured an emerging modernity so percipiently in his *Essay on the History of Civil Society* of 1767 and who so admired the savagery it displaced, at least in its Scottish location–saw the 'rude nations' as ultimately restrained and inferior through want of 'subordination' in a 'system of laws' and 'perpetual command' (Ferguson 1966:121).

For the myth of law, the longest footnote to Hobbes is that provided by John Austin. It is a considerable chronological leap now to 1832 when Austin's *The Province of Jurisprudence Determined* was first published to only modest success. It is an even longer leap to the position of dominance which this work assumed and for long retained in English jurisprudence from the later nineteenth century. But Austin is very close to Hobbes and to the tradition of transcendent order. The reduced Austin lodged in English jurisprudence is well-nigh indistinguishable from Hobbes. This much is immediately evident in Austin's initial announcement that law is a command of a political superior to a political inferior (Austin 1861–3:1, 5–I). This 'superiority...is styled sovereignty', and it entails 'the relation of sovereignty and subjection': an exclusive and independent sovereignty accorded general and habitual obedience is necessary for 'political society' and law to exist (1861–3:170–3, 179–I). And 'in every society political and independent, the actual positive law is a creature of the actual sovereign' (1861–3:313–II). Although Austin does not follow Hobbes in the concentrated care devoted to foundations, the sole base evoked for his structure is savagery and it is frequently evoked. Austin draws on both a general and existent state of savagery and the 'imaginery case' of a 'solitary savage' which he takes 'the liberty of borrowing from...Dr. Paley' (1861–3:82–I. The borrowing could be Paley 1828 (1785):4–5). This solitary savage was 'a child abandoned in the wilderness immediately after its birth, and growing to the age of manhood in estrangement from human society' (1861–3:82–I). As such, it could not be a 'social man', would not appreciate the necessity of property, would be in total conflict with 'his' fellows, and

hence 'the ends of government and law would be defeated' (1861–3:85–I). The savage 'mind' is 'unfurnished' with certain notions essential for society: these 'involve the notions of political society; of supreme government; of positive law; of legal right; of legal duty; of legal injury' (1861–3:85–I). Austin also discovers and adverts often to a general state of savagery which he calls 'natural society' as opposed to 'political society' and which is illustrated by 'the savage...societies which live by hunting or fishing in the woods or on the coasts of New Holland' and by those 'which range in the forests and plains of the North American continent' (1861–3:184–I).

> A natural society, a society in a state of nature, or a society independent but natural, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who compose it lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.
>
> (Austin 1861–3:176–I)

This negative state has none of the robust virtue of, say, Ferguson's unsubordinated Scottish Highlanders. Being a state of nature, it is completely wild and lawless (1861–3:9–II), and even if it were not:

> Some, moreover, of the positive laws obtaining in a political community, would probably be useless to a natural society which had not ascended from the savage state. And others which might be useful even to such a society, it probably would not observe; inasmuch as the ignorance and stupidity which had prevented its submission to political government, would probably prevent it from observing every rule of conduct that had not been forced upon it by the coarsest and most imperious necessity.
>
> (Austin 1861–3:258–II)

Although it is the savage which in 'negative' terms gives content to the 'political' and gives content to law, Austin does take most eloquent account of a domestic challenge to order which might seem to provide a foundation in addition to savagery, the challenge

posed by 'the poor and the ignorant', especially in their misguided propensity to 'break machinery, or fire barns and corn ricks, to the end of raising wages, or the rate of parish relief' (1861–3:62–I). This affliction is attributed to their ignorance of the imperative good of property and capital. Its cure lies in a full appreciation of the principles of utilitarian ethics, particularly of the Malthusian variety: 'if they adjusted their numbers to the demand for their labour, they would share abundantly, with their employers, in the blessings' of property (1861–3:62–I). Unlike the 'stupid' savage who can only respond to the imperatives of the inexorable (Austin 1861–3:258–II), 'the multitude...can and will' come to 'understand these principles' (1861–3:60–I). This will be merely a boon to the law–'an enlightened people were a better auxiliary to the judge than an army of policemen' (1861–3: 63–I). Law is not eventually affected since such things can be resolved in terms of personal knowledge and morals. It is only the irredeemable savage which provides the ultimate limiting case against which law is constituted. One final point is needed to complete the comparison with Hobbes. As we saw, if law were a command, people needed to know of the command in order to follow it. This requirement introduced a dangerous popular element into Hobbes's scheme of things. Austin agonizes less over this and simply adopts the maxim: 'ignorance of the law is no excuse': 'if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable' (1861–3:171–II). In all, the enlightening of the people can only be an aid to making existent law more effective. It cannot be intrinsic to law. Unlike the elimination of savagery, it cannot be allowed as a condition of law's existence.

Nothing could more aptly reveal the mythic nature of this commanding law than the effrontery of welding it to order in times of its infliction of massive disorder. In the increasing effort to subordinate the Indians, to 'reduce them to civility', law and order were constantly combined not just in opposition to but as a means of subduing the 'disordered and riotous' savages in their state of lawless 'anarchy', but often with the realization that they may, after all, remain uncontrollable and unpredictable (Axtell 1985:136–8). This scenario precisely reverses what was the case.

European intervention was freighted with the deathly disordering of an already and subtly ordered situation–a situation which, for the

European, 'was literally unthinkable' (Axtell 1985:137). Nonetheless, this association of law with order, security and regularity rapidly became general and obvious, the violence associated with the establishment of law and order assuming insignificance in the immeasurability of the violence and disorder of savagery (see e.g. Ferguson 1966:221–2; Meek 1976:204). For Austin, 'general security' and a 'general feeling of security' are 'the principal ends of political society and law' and these are the antithesis of that 'negative state which is styled a state of nature or a state of anarchy' (1861–3:84, 122–I). The very mind of the savage, as we saw, is 'unfurnished' with the notions of political society and law (Austin 1861–3:85–I). Like the Cyclops, 'his thinking is lawless, unsystematic and rhapsodical' (Adorno and Horkheimer 1979:65). This contrasts essentially with 'the uniformity of conduct produced by an imperative law' (Austin 1861–3:159–I). The colonial situation provides another monumental instance of law initiating and sustaining pervasive disorder even in the pursuit of its pretence to secure order. An abundance of instances can also be found in the more domestic European settings where modern law explicitly confronted and sought to undermine an existing order which was often, in the process, rendered in the terms created for savagery and barbarian despotisms. As a mode of modernity, law was an instrument of far-reaching change integral to the 'tearing down and building up' (Cassirer 1955:ix). But no matter what its visitations of disorder and no matter what the distance between its practice and the perfection of its order, law remains mythically inviolable in its intrinsic equation with order.

Disorder on law's part cannot, then, be located in law itself. The sources of disorder must exist outside of law–in the eruptions and disruptions of untamed nature or barely contained human passion against which an ordering law is intrinsically set. The savage was the concentration of these dangers and the constant and predominant want of the savage was order. Savages had 'no skill of submission' (see Axtell 1985:271). Ferguson admired them for their lawless minds, for being unable to 'accept commands' and for being opposed to 'subordination', something which could be taken as an exact counterpoint to Austin's idea of law (Ferguson 1966:84).

I will now explore this state of savagery in its opposition to the order of law. A particular and indicative obsession of colonist and *philosophe* alike was the lack of fixity in savage life. Indians could not begin to be civilized until they were in a 'fixed condition of life': 'Their Nature is so volatile, they can few or none of them be brought to fix to a trade' (see

Axtell 1985:141, 160). Lacking resolution themselves, they could not project it onto a world: they 'have none of the spirit, industry, and perseverance necessary in those who *subdue* a wilderness' (see Axtell 1985:149—emphasis in the original). With 'primitive common ownership', declared Grotius, men were content 'to feed on the spontaneous products of the earth, to dwell in caves' (see Meek 1976:15). They did not constructively tame nature. What Grotius was thus content to learn from 'sacred history', Locke arrived at with no history at all. The savage was a wanderer or related to land in an indefinite communal way, not sufficiently 'removed from the common state Nature placed it in' (Locke 1965:329—para. 27). In either capacity, the savage had no sufficiently fixed relation to things to support a legal right to them. Property was the basis of law. In the state of nature, Austin confirmed: 'men...have no legal rights' (1861-3:9—II). The convenient ignorance of the European thence found a 'void' and 'wilderness' in savage climes, a lack of fixed position and tenure, such as to justify and even require the assertion of an 'exclusive right' and the acquiring of 'sovereignty' over them—borrowing here the sentiments of de Vattel, 'perhaps the most widely read of all eighteenth-century authorities on international law' (Curtin 1971:42–3). For Vattel and for this so-called international law, it is not simply a matter of when 'a Nation finds a country inhabited and without an owner, it may lawfully take possession of it' but also a Nation may likewise occupy a territory 'in which are to be found only wandering tribes whose small numbers can not populate the whole country', since 'their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession' (Vattel 1971:44–5). Inadequate production as well as inadequate peopling justified European appropriation:

> For I aske whether in the wild woods and uncultivated waste of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniencies of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?
>
> (Locke 1965:336—para. 37)

(Indeed, for Locke, the absence of a fixed, cultivating relation to land accounted for the lack of reason itself (see Hulme 1990:30).) In short, and in mythic terms, settlement 'is equivalent to an act of Creation' (Eliade 1965:10).

Law becomes generally and integrally associated with the mythic settling of the world—with its adequate occupation and its bestowal on rightful holders, the Occidental 'possessors and builders of the earth' (Levinas 1979:46). Blackstone provides a most significant account in his *Commentaries on the Laws of England*, first published between 1765 and 1769 (and amended by Blackstone up to the sixteenth edition of 1825 which I use here). Although it is customary to portray Blackstone as the supreme systematizer and popularizer of English law, his originality has been denied more than extolled (cf. Lieberman 1989:31–3; Milsom 1981). Unfair as this assessment may be for his work in general, what is important about his account of law and the settlement of the world is that it is, style apart, so unremarkable. It reflects and encapsulates the thought of the age and brings it to bear on the creation of law. It is to be found at the outset of the second volume of the *Commentaries* dealing with property. 'There is', he begins, 'nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property' (Blackstone 1825:1–II). He then sets out 'the original and foundation' of the right of property, proceeding by way of *Genesis* and the pervasive dominion 'the all-bountiful Creator gave to man' to the 'state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves' (1825:2–3—II). Property was then held in common and the only personal element in property was the holding of things for immediate use. 'But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion' (1825:4—II). The result was first a transition from 'the wild and uncultivated' nations to a pastoral existence when the 'world by degrees grew more populous'; then it 'became necessary' to resort to 'the art of agriculture' and for this private property was found to be essential:

> Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature.... Necessity begat property: and in order to insure that property, recourse was had to civil society, which

> brought along with it a long train of inseparable concomitants; states, government, laws.
>
> (Blackstone 1825:5, 7–II)

This was and remains a common story. Whether or not impelled by an increasing population, the joint arrival of agriculture and property–property not just as things but as the great figure of settlement and order–requires a complex and more intense regulation than the episodic assertions called for in the nomadic or even in the pastoral state; what is required is an explicit, permanently sustained ordering that is law (see Meek 1976:93, 102–4; Stein 1980:28, 33–6). In the result, the paradigm of law corresponds to the property relation. Blackstone secured in English law a structure in which the person engages in formal action which affects things or 'the field of acquisition' (Kelley 1984b:624–chapter I). This is but a ritualized form of how Occidental social and imperial action relates to the world. Sir Matthew Hale, evoked by Blackstone as an ancestor, had already rendered 'man's' general relation to nature in quasi-legal terms whereby 'Man was invested with power, authority, right, dominion, trust and care' (Hale 1677:370).

The relation of law to property and sustained order had been refined in advance of Blackstone by Locke. Even if less dire than it was for Hobbes, the state of nature in Locke's view was still dangerous and uncertain. These defects were cured only by entering into a political or civil society marked by law:

> Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide controversies between them, and punish Offenders, *are in Civil Society* one with another; but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect *state of Nature.*
>
> (Locke 1965:367–para. 87–his emphasis)

The 'Civiliz'd part of Mankind', in contrast, is characterized by 'positive laws' (1965:331–para. 30). Then, most famously, Locke ties that entry into political society with the securing of property, fusing central, sovereign command with the order of settlement.

'The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*' (1965:395–para. 124–his emphasis). He immediately proceeds to delineate the rule of law as a response to 'many things wanting...in the state of Nature', as a response, at its most general, to the chaos of merely individual assertions of passion and self-interest:

> *First,* There wants an *establish'd,* settled, known *Law,* received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them.... *Secondly,* In the State of Nature there wants a *known and indifferent Judge,* with Authority to determine all differences according to the established Law ...*Thirdly,* In the state of Nature there often wants *Power* to back and support the Sentence when right, and to *give* it due *Execution.*
>
> (Locke 1965:396–paras. 124–6–his emphasis)

This new law is characterized by a unifying strength. Adam Smith, in his *Lectures on Jurisprudence,* finds that with the society of hunters for disputes outside the family 'the whole community... interferes to make up the difference: which is ordinarily all the length they go, never daring to inflict what is properly called punishment' (1978:201). 'Barbarous nations' had weak governments unable, for example, to enforce the death penalty for murder, 'the only proper punishment' and the one inflicted in 'strong', 'civilized nations' (1978:106, 476). This capacity is elevated in those terms of sovereignty which were earlier traced to Hobbes. To take a famed definition from Austinian jurisprudence:

> If a *determinate* human superior, *not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.
>
> (Austin 1861-3:170–I–his emphasis)

Although this position is ultimately sustained in terms of strength, the stronger state does not incorporate the feeble since 'there is neither a *habit* of command on the part of the former, nor a *habit* of obedience on

the part of the latter' (Austin 1861–3:173–I–his emphasis). Each retains its distinct force, its distinct centre of power and, hence, its own determinacy: 'no indeterminate party can command expressly or tacitly, or can receive obedience or submission:...no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment' (1861–3:175–I). 'Every law properly so called flows from a *determinate* source, or emanates from a *determinate* author' (1861–3:120–I–his emphasis). Austin's consolidation of the idea of sovereignty replicates within modernity the mythic symbolism of the ordering centre of creation. Only that which comes from the centre has validity (Eliade 1965:18). Law exists by virtue of its 'position' in identification with the sovereign and centre (Austin 1861–3:2–I). It takes on the impression of the *imago mundi*, affirming the ordered, normal course, often by correcting deviations from that course. The creation and enforcement of any law is a ritual reassertion of the foundational strength and ordering of the centre (cf. Eliade 1965:20). What is being affirmed is not just a particular order in opposition to disorder but the very being and force of order itself.

This order, in its originating opposition to savage chaos, accords a unity to law transcending its diverse and contradictory elements, thus making coherent legal order possible. Locke, as we saw, exemplified the fusing of command with settled order–the sovereign god with the god captured by a fixed creation–through their common negation in the savage state. Law is further captured in order by its own subjects. Even Hobbes, who would recognize popular participation in law only in a mythical act of self-alienation, was discomfited by the necessity of the subject's having to recognize the sovereign's command (1952:39). We can approach this dimension of order by refining the disorder of simple savagery as the foil of law. Even in 'a territory of considerable extent', wrote Ferguson, where the inhabitants retain their 'warlike and turbulent spirit', they can be ordered by the 'bridle of ...barbarian despotism': and in the later eighteenth century it became a fashion to contrast law with fickle despotisms, particularly of the oriental variety (Ferguson 1966:103–4; and see Marshall and Williams 1982:140). Law was integrally part of and endured as the civilized European order. Outside this order, there was either the unpredictable arbitrariness of despotism or the inconstancy and mindless hedonism of the simple savage (Ferguson 1966:93, 95). In law, human projects could be initiated by members of political or civil society and secured in time (see e.g. Locke 1965:344–para. 50). Rousseau combined all elements of the mix: law was needed

because 'society must have activities and ends'; law also embodied and sustained what civilization had managed to inculcate so far and it dealt with those continuing assertions of nature inimical to order (Strauss and Cropsey 1972:542–4). So, returning to Austin, law is not just a peremptory command: it is also 'a command which obliges a person or persons to a *course* of conduct' (1861–3:15–I). 'An imperative law or rule guides the conduct of the obliged, or is a *norma*, model, or pattern, to which their conduct conforms' (1861–3:159–I). Law creates enduring rights and obligations of which the pre-social savage can know nothing (1861–3:85–I). There is a contradiction between law as a simple command of a sovereign and law as project, model and obligation, dependent on popular support and adherence. This contradiction is also mediated through law's relation to savagery. Since in both these situations law is created as a negation of the savage state, it is created the same and unified in that essence which Enlightenment derives from origins.

LAW AND PROGRESS

Seemingly in opposition to an ordered legality, modern law also comes into being in a process of change and progression. It is not (just) a command coming from above nor is it tied fixedly to any order; rather, it responds in its constitution to change in 'society'. This part of the myth, which I now explore, is worked out in the narratives of law and progress; and the story, as we shall see, is told in such a way as to enable it to be reconciled with the imperative of order.

There are certain precursors of progress to be sketched in first. Law has to be linked to society, or distinct types of law linked to distinct 'nations', as they were called. The significant ancestor figure here seems to be Montesquieu. The 'laws' whose 'spirit' he sought cannot readily be equated with modern ideas of law but that difficulty has not obstructed his received reputation as the progenitor of the connection between law and society. Montesquieu thought that laws have or ought to have a relation to several shaping factors and 'that it should be a great chance if those of one nation suit another' (1949:6). He enumerated a considerable number of shaping factors–climate, geography, 'principal occupation of the natives', 'the degree of liberty which the constitution will bear', religion, and so, considerably, on: 'all these together constitute what I call the Spirit of the Laws' (1949:6–7). There were contemporaries and

predecessors who made connections between law and society if of a different kind. Hobbes and Hume, among others, equated sociality with a necessary minimum legality (Hobbes 1952: chapters 14 and 15; Hume 1888: Book III parts 1–2). Given supposedly obvious circumstances of the human condition–circumstances of moderate equality of powers, moderate selfishness and moderate scarcity–the existence and civility of human society must depend 'on the strict observance' of laws securing 'the stability of possession, its transference, and the performance of promises' (Hume 1888: Book III part I–para. 6). This equation of a distinct configuration of bourgeois law with universal necessity had no more existent foundation than the assertion that everyone slept between clean sheets but it has nonetheless endured in the mythology of modern law. Neither these contributions nor that of Montesquieu sought to relate different laws to different societies in a scheme or sequence of progression. Montesquieu, however, did outline one influence on law which was to prove momentous in its development by the chroniclers of progression: that is the

> very great relation to the manner in which the several nations procure their subsistence. There should be a code of laws of a much larger extent for a nation attached to trade and navigation than for people who are content with cultivating the earth. There should be a much greater for the latter than for those who subsist by their flocks and herds. There must be a still greater for these than for such as live by hunting.
>
> (Montesquieu 1949:275)

What is more, Montesquieu provided a way of recognizing a diversity of types of law in different settings. Law did not, in this view, simply emerge at some stage and prior to that there was non-law. Even those with the most adverse assessment of savages could, in this temper, attribute some law to them even if it be 'irrational and ridiculous': although 'laws have been justly regarded as the master-piece of human genius...the jurisprudence, the customs and manners of the Negroes, seem perfectly suited to the measure of their narrow intellect', including their inability to create 'regulations dictated by forsight' (Long 1774:378–Book III). As Long's 'scientific' assessment indicates, the linking of law and society was accompanied by an expansion of the peoples brought into contention, an expansion beyond the previously predominant concern with the American Indian. Indeed, the historical and

geographic range of peoples considered by Montesquieu could be seen as a large contribution to the universal sweep which the doctrine of progress inexorably imports.

These various relations of law to societies coalesce with the invention of progress and connect law to sequential stages of progress usually conceived in terms of four modes of 'subsistence'–the hunting, the pastoral, the agricultural and the commercial (see Meek 1976). The overall trajectory of these stories remained the same as those idylls of order in which the primordial and savage gives way to the civilized life. There was a rough similarity in the numerous tales of progression but probably one of the most enduring influences was provided by Adam Smith in his *Lectures on Jurisprudence,* a work which even now silently sets the broad terms of the comparative sociology of law (Smith 1978). With the progression of societies, law for Smith increased in quantity and complexity and in its distinctness as a social form. As with many of these accounts, the advance of law was tied integrally to the progressive consolidation of property: the 'early age of hunters', as typified by the American Indians, had no property and hence few laws and an uncivilized legal system (1978:16, 201). With the pastoral stage, people are more numerous, there is a greater division of labour, property is more extensive, and 'distinctions of rich and poor' emerge: 'permanent laws' and the expansion of authority are now needed to secure property and the rich (1978:202, 208–9). With such 'useful inequality in the fortunes of mankind', the poor could yet be consoled because they lived in a far greater opulence than any savage prince (1978:338, 562; see also Locke 1965:339–para. 41). No new foundational impetus is adduced for law's progression into the ages of agriculture and commerce but there are further changes in law. Quantitatively, there is more law and an increasingly stronger central authority. Qualitatively, the simple legal regime of the whole community which characterizes pastoralists gives way to more complex and institutionally separate forms of authority, to legislatures and regular courts (1978:204–5). Although the procession of stages, for Smith and its other chroniclers, was serially supplanting, progression was a continuing creation, still traced back continuously to the state of savagery which remained a constant contrast and point of reference, no matter for what stage. I will now look a little more closely at the nature of this progression before bringing matters to a conclusion.

It may seem rash to depart from the admirable work of Stein (1980) and Meek (1976) showing that, for law and for the social sciences, this progression is a type of evolution. Matters seem to be more mixed and, for my purposes, more revealing. For a start, there was hardly that underlying, unitary and unifying dynamic inhabiting the progression which is usually associated with evolution. The impetus for the progression varied greatly with the different accounts of it. In some tales, progress depends on the characteristics of those who progress–'the more industrious and discerning part of mankind', the more highly educated, or those who increase in 'craft, and ambition' (Blackstone 1825:4; Riley 1986:248; Stein 1980:22). In other versions, or sometimes in the very same version, there was great emphasis on more external factors, such as the increase in population: an increase in population requires an increase in resources or an increase in resources enabled population to increase. What in one moment were consequences of progress became in another its cause, and vice versa. Thus, an increasing sociality results from an increasing population or an increasing population results from increasing sociality (see Meek 1976:163). All of which is mixed with inspiring metaphors of the 'rise' and 'spirit' of society (Meek 1976:5; Stein 1980:28).

To labour such incoherence would be little better than facile because there was no coherent evolutionary dynamic involved in the progression. The contrary assertion, to borrow it from Stein, is that the thinkers in France and Scotland who developed the idea of progression 'treated the mode of subsistence as not merely one of several factors affecting the character of a society's laws but as the crucial circumstance which dictated their nature and scope', and on that basis they erected 'a scheme of development' (Stein 1980:19). Such a notion of 'legal evolution' is presented by Stein in a careful and abundant illustration. There certainly is progression but, as we have just seen, there is no general dynamic giving it identity and effect. Something else is at work. Law is being typologically related to diverse and distinct modes of subsistence. In the 'spirit' of the times, law is identified in simplifying and classifying relation to other things, in 'a coherent pattern', as Stein describes the object of the quest (Stein, 1980:27). Law is thus located and identified in 'the order of things', in an order that springs from within the things ordered (Foucault 1970:209). Progression becomes a mode of tracing that identity. This can be exemplified in a quotation which Stein provides from Kames's metaphorical journey on the Nile–a Nile whose enormous

and inextricable complexities are indicatively reduced to the simple progress of more straightforward domestic streams:

> When we enter upon the municipal law of any country in its present state we resemble a traveller, who crossing the Delta, loses his way among the numberless branches of the Egyptian river. But when we begin at the source and follow the current of law…all its relations and dependencies are traced with no greater difficulty, than are the many streams into which that magnificent river is divided before it is lost in the sea.
>
> (see Stein 1980:26)

This sustained progression emanating from a source in savagery exists within a still foundational order. It is the story of something achieved, not of something still being achieved. What is talked of here is the perfection and completeness of law and what comes before are simply its pale precursors. The chroniclers of law and progression did not see themselves as departing from a foundational equation of law with order. The progression does not supplant the order of things and proceed to identify law as part of a pervasive and encompassing dynamic. The thought was not there to elevate a dynamic of progression into an impelling and cohering evolution. Any concern with an actual dynamic of progression was, rather, diverse, inconsistent and almost incidental.

Progression can be an elaboration of order because both are traced to the same constituting source. In 'the order of things', to find the origin of a thing is to locate its being. The opposition between the progression of law and law's order is mediated and the two are united in the origin of a primal and chaotic savagery. Both the progression and the order of law take their being in the negation or denial of this 'state of nature'. Positive law, being constituted simply in terms of what it is not, can be self-contained and self-presenced. Change becomes a refinement of legal order and contributes towards its perfection. In its being without restriction, law can now do anything. An infinite capacity for change–for law itself changing and for effecting change–is associated with order. This enviable instrument of rule is presented in more spectacularly virtuous ways as the rule of law–for law to rule, it must be able to do anything. The incredulous cannot definitively attribute limits to a law constituted in negation.