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The Time of Law: Eighteenth-Century Speculations

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In the great shift from the theocentric to the skeptical ordering of knowledge that is Enlightenment, one way of knowing stands out as preeminent, as the exemplar for the entire mathesis of modernity. There is a moment, a precise point at which this shift becomes visible, stabilizing the slow-moving plate tectonics of epistemological contest in a discursive daguerreotype whose silvered surface still bears witness to this monumental change. Without this moment modernity, as such, is unthinkable; science, in its broadest sense, groundless, floating free from the certainty that knowledge is knowable. No systematic study of economy and society, language and literature, indeed no human sciences, sciences of the earth—in short nothing that we have inherited as the lexicon of human understanding—would be possible. That moment is June 5, 1756, the day Charles Viner died, and the way of knowing that enables the entire architectonics of modernity is what we have come to recognize as the law.

Dramatic, as openings go. Let's voice some objections in order to get them out of the way. The law, of course, predates the mid-eighteenth century, so what can this claim mean? Furthermore, when talking about the law one needs to make clear what one is referring to. The law comprehends different codes and customs, has an internal ordering that must be adverted to if not respected. The civil law is to be differentiated from the common law, and both differ from canon law. English law is distinct from Scottish, and both differ from French law. Law, in the sense of legislation, concerns the drafting and passing of statutes, and this is distinct from case law, which pertains in the most frequently imagined scenario of the law: the trial in common law. In the proliferation of legal instruments and areas of jurisdiction that characterize modern legal practice, criminal law is distinct from international, commercial from family, and so on. Even if we clear up these cavils, what use is there in making such a bold claim: that there might be *a* moment at which the shift from a pre-modern world, with all its epistemologies grounded in the theological certainties of belief, to the modern world, can be seen, made visible? Obviously the drama of this point of departure is intended

as a heuristic device, a way of sharpening focus, getting a close-up on a massively complex series of articulations in the ordering of knowledge. Or is it?

The date I have mentioned, June 5, 1756, marks the day Charles Viner died, and with him, the embodiment of the old certainty of knowledge as a finite category, of knowledge as a knowable quantum. It is said that Samuel Johnson was the last person to have read every book in print; whether this is true or not I do not know. Charles Viner, however, was certainly the last person to know, in their entirety, the laws of England. He spent his whole working life in passionate pursuit of this one aim: a complete abridgement of the laws of England. This alphabetical digest of every law, published and printed by Viner himself, runs to 24 volumes of so-called black letter, the gothic script of the law books. It is, in almost every respect, a glorious monument to an old order of knowledge: a white elephant of learning and classification, an indigestible digest of a now discarded way of knowing, the remnants of pre-modernity's epistemology. It remains an invaluable work of reference, a dictionary that opens up the history of pre-modernity, but it remains unread if not unreadable. The reasons for this illegibility strike hard to the center of the following presentation. When Viner died, the possibility of deciphering the figures in the woven fabric of his knowing, of what constituted the reach of knowledge for Viner and those contemporaries who shared the same epistemic aspirations, died with him.

Appearance to the contrary, this is not an essay on Charles Viner, perhaps a shadowy figure in the generally accepted "history" of the English enlightenment. My topic is more philosophical: what is it to know the law? What kind of knowledge is the law, and how is that knowledge disseminated, governed, ordered? What grounds the law as knowledge or knowing? My first paragraph provides a very sharp focus to these remarks in order to consider, in all seriousness, whether it makes sense to say that a precise moment in time marks the boundary between one way of knowing and another. This temporal legislation, the force of a proclaimed originary moment that cleaves the order of knowledge so cleanly into a before and after, lies at the heart of the English common law system; moreover it determines the formation of a set of concepts that reverberate through English jurisprudence. In effect the force of this cut into time renders some things knowable and others unknowable; it orders legal knowledge, legality and is, therefore, a good place to begin if we want to answer the question I phrased a moment ago: what is it to *know* the law?

The study of law of course predates the mid-eighteenth century. In England the strands that make up the legal code—the different principles of canon and Roman civil law that intertwine with the common law—have individually exerted their influence on the development of the English mixed legal system. There have been moments when these different conceptualizations of the law have been in contest with each other, when the adoption of a "foreign" legal code, be it Norman or Roman, has been understood in terms of an assault on the homegrown legal tradition, an aggressive subordination of an indigenous national identity. Seen in this light, the prehistory of the nation is deeply embedded in the rivalries between the Norman and Saxon legal codes, but as the sense of nation hardens, the yoking of these two codes is at least considered as a pragmatic response to another threat, the Roman codification of Justinian. It is therefore curious, in view of the deep suspicion in which the Roman civil law was held for so long, that the first two chairs at the ancient universities devoted to the study and teaching of law were dedicated to civil law. It was Henry VIII, who in his zeal to underscore the breach with Rome, favored the Roman over the canon law, and proceeded to establish regius chairs of civil law at both Oxford and Cambridge. It was not until Viner's bequest, in the 1750s, that English law—which is to say the common law—was deemed worthy of a chair and a course of lectures.

There are a number of points that might be raised in relation to the timing of this. The mid-eighteenth century witnessed an impending rush towards the firm establishment of British national identity, and a course of lectures dedicated to the common law—to the historic customary law inherited from the Anglo-Saxons on down, which so firmly rooted the analysis of the laws of the realm in terms of the nation's *history*—could hardly fail to appeal to the patrician elite culture that was increasingly flexing its muscles by exercising its rights to government. William Blackstone, the first Vinerian professor, wrapped his *Commentaries on the Laws of England* up in this ideology of nation, only to heighten his observation that a dire state of affairs persisted in which the gentlemen who were destined to govern and initiate legislation had heretofore entirely neglected their education in the English law. Blackstone begins his lectures, then, with a rationale and a rebuke, and both drive to the heart of this presentation on the law and knowledge. He writes:

> The science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. (I, 4)

He adds, "it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession" (I, 5). The *Commentaries on the Laws of England* represent Blackstone's effort at remedying this situation, and both Viner's bequest and Blackstone's subsequent election as the first Vinerian professor can be taken to signal the point at which the notion that all gentlemen should know the law was taken seriously.

Of course this begs the question as to what it might mean to *know* the law. I shall leave this hanging for the time being, since at the same moment as Blackstone delivered his course of lectures on English law, *in English* (as part of the terms of the bequest indicated), other commentators pointed out that the statute book had become so swollen as to make it impossible for any one individual to know all the laws of the realm. That's what makes Viner's project so hubristic, heroic even. In focusing on the statute book, these commentators were not presuming to speak for the whole of law; they inherited the conventional distinction between so-called natural law and the written law of legislation, which continues to this day. This distinction points to a set of differences in how the law is conceptualized, and we might note two diverging trends immediately: on the one hand the law may be conceptualized in terms of reason, as a deductive process leading back to first principles from which all law follows, while on the other it can be seen in more pragmatic terms as a series of rules formulated to deal with conflicts as and when they are presented to adjudication. This second conceptualization of the law founds our modern form of legal positivism.

Knowing the law, then, might mean two slightly different things, depending on whether one has in mind a set of rules derived from first principles or, alternatively, the regulations governing conduct that result from the everyday practice of resolving disputes. In point of fact Blackstone in his *Commentaries* sets out to cover both these possibilities, both the statute and common law, so his injunction that we should know the law would seem to imply that the law taken as derivable from first principles *and* as the statute book is perfectly knowable. He is able to cover both possibilities through the ingenious ploy of inventing both a systematic account of the common law, which sets out to demonstrate that it can be methodized, and a taxonomy of the statute book that returns such legislation to first principles. In other words he suggests that the law in its entirety is knowable from first principles—it is in this sense more like natural law than a pragmatic code.

In order to make this argument, Blackstone has to wrestle the common law into a framework in which it made sense, and in so doing he attempted to transform it into a fixed and quantifiable object—a static

code of conduct and reason. It was not the first time that this had been attempted—indeed Blackstone generously acknowledges the work of Finch from a century earlier—but in the meld of common and statute law within a Roman analytic structure that is the *Commentaries*, something unusual and original emerged. It might be said, in fact, that the *Commentaries* represent a turning point in the history of English jurisprudence. Part of my wanting to understand the *Commentaries* in this way derives from a hunch I have about the history of legal training and the dispersal of the *ars memorativa* as a *techne* or technology for knowing the law. This decline in the technical arts of memory is coincident with both a new and different interest in memory as a psychological event and the rise of writing in legal procedure.[1] The incidence of guides to pleading can be understood as an effect of this new conceptualization of memory. Blackstone's project distanced itself from an older one, expressed most eloquently by Hale, which suggested that the common law was not static, reducible to a set of reasonable principles, but a body that grew and adapted itself over time according to those needs of society manifest in and through legal process.

Reason or Custom as the Source of the Law ?

The first point I want to take from this is that already in this brief historical sketch two different senses of knowing the law can be discerned. The first, which Blackstone feels most secure with, has it that reason is the only route to true knowledge. What can be known is determined by human rationality, "know *how*," based upon the ethical principles derived from a fundamentally Christian view of society. In answer to the question where does the law come from, Blackstone would answer, from right reason, and in so doing he is drawing on the theocentric tradition of natural law theory exemplified most thoroughly in the period by Thomas Bever's *Discourse on the Study of Jurisprudence* (1766). As Blackstone writes: "...law is the perfection of reason...it always intends to conform thereto, and...what is not reason is not law" (I, 70).

In contrast to this, a second sense of knowing the law is based in a historical approach to the body of law we inherit. As a later jurist, Edward Wynne put it: history supplies the "silence of the law itself." This historical approach has it that the common law, comprising a miscellany of customs, develops in response to the conflicts it is called upon to adjudicate. In order to know this body of law one must, therefore, not inquire into first principles or marshall one's attempts at right reason, but inquire into the circumstances in which such a law came to be seen as necessary—the context for the original formulation of the custom. One does not know the law from abstract principle, but from acquaintance

with the history bearing upon its first formation. One does not seek to know *how* the law is, but *that* it is. This distinction between knowing *that* and knowing *how* will color all of my attempts to answer the question: what is it to know the law? My first qualification of this question, then, states that not only do we need to be more precise about what law is, which kind of law, but also about the ways in which knowledge itself is grounded. Blackstone may be taken as exemplary here, since as we shall see, he wants things all ways—both the law as systematic code and immemorial custom, knowledge by acquaintance and by description, and more than anything else this marks his *Commentaries* out as a singular contribution to English jurisprudence.

This assessment of Blackstone is relatively novel—most histories of eighteenth-century legal discussion claim that the view I have ascribed to Blackstone is in fact that of Jeremy Bentham, his brilliant student and fierce critic. Furthermore, the sense that I may have given that Blackstone's *Commentaries* ushered in a new era should be strongly attenuated by the fact that the alternative historical description of the law persisted alongside the new developing positivism for some time. Francis Sullivan, for example, published his *Historical Treatise on the Feudal Law and the Constitution and Laws of England* in 1772; there were further editions of Kames's *Historical Law Tracts* into the late 1770s and Hale's *History* reached its 4th edition by 1779. Even more noteworthy was the publication in 1787 of John Reeves's *History of English Law*, a compendious account of the law written from the perspective of a practitioner. Nevertheless, the distinction I have made between "know *how*" and "knowing *that*" will help me identify some of the moves in jurisprudential arguments of the period. It also informs many of the questions I want to phrase to contemporary legal theory, thereby building the bridge between the eighteenth-century context and present-day concepts of law, legality, justice and judgment. My central purpose, as an historian, is to shuttle back and forth between eighteenth-century debates and our present moment in order to focus more precisely on that which surrounds us all now—the law—that which we are not allowed to be ignorant of yet at the same time know all too imperfectly.

Knowing the Law

What is it to know the law in eighteenth-century England? In answering this question I am going to range over a few rather less well-known writers as well as Blackstone—the eighteenth-century tradition is nothing if not extensive. To begin with I shall take as a guide Richard Hemsworth, whose *A Key to the Law, or an Introduction to Legal Knowledge*, was published in 1765. Hemsworth begins his text with what was by

then a conventional view of the citizen's *obligation* to know the law. He writes:

> Every subject of England is presumed to know the laws, by which he is to regulate his conduct, and the violation of which he is like to be punished...Ignorance of these laws will not excuse them. (vi)

The sense of "knowing" that seems active here is acquaintance—everyone is assumed to be on nodding terms with the laws that govern us. Such a view had, since Locke's formulation of the reciprocal rights of both the state and the subject, become hegemonic. Blackstone, in the introductory material to his *Commentaries* echoes this justification for our consent to law; he notes, in the standard Lockean way, that we give up part of our freedom to act as we wish in order to guarantee that freedom and in so doing we subject ourselves to the laws that bind us together in society. Quoting Locke he notes: "where there is no law there is no freedom" (I, 122). For writers on law in the period, the law might be considered as an envelope within which human action occurs; it invisibly surrounds us and determines what may and may not be done, said, made, exchanged, purchased, inherited, destroyed. It is both so extensive and so nebulous, however, that we are unable to grasp it in its entirety. It is the collective memory of the race. Thus even a nodding acquaintance with *all* the laws was an impossible ideal, and herein lies the first difficulty.

Perhaps a way out is to invoke the sense of "know how"—of knowing the law as a body of rational rules that can be derived from a few basic tenets. As Hemsworth says, part of our contract in entering into society consists in the presumption that each and every subject knows the laws which delimit our behavior, and this suggests that we all act from the same basic principles, we all know right from wrong, that the ethical base to conduct is universal. There is, however, a more awkward question raised by Hemsworth's statement: what is a presumption of knowledge? To presume is, first, to take possession of something without the right to do so, to take something upon oneself without adequate authority or permission; only in its subsequent senses does it mean "assume" or take for granted. The presumption of knowledge, then, suggests that the law is both taken possession of illegally and at the same time taken for granted. The law is taken into each individual's hands, and simultaneously goes without saying. It is like a vapor that infuses our every breathing moment, both taken into our bodies willingly and unwillingly; part of what we unwittingly breathe. In a well functioning society I presume this knowledge of you as you do of me, and when disputes arise, as to, say, the ownership of property, I presume (in the sense of take possession

of) knowledge of the law in order to assert my rights. And, once again in a well ordered society, the law upholds my knowledge if I am successful in my suit. Thus far a presumption of knowledge seems to work just fine, but what happens if I infringe a law I am completely unaware of? What if a statute is on the books that legislates against a certain action unbeknown to me? Given the inflated size of the statute book, this eventuality was deemed to be very likely by eighteenth-century jurists, hence the proposal to either radically overhaul the basis of the law, or to rationalize the statute book into a set of easily digested "leading cases." This proposal was made directly in response to the problem of knowing the laws of the land. As Hemsworth continues:

> Ignorance of the laws will not excuse them....This calls for Redress surely, for it is cruel to inforce the obedience of a law, where it is out of the power of the party to attain to the knowledge thereof, either through want of time, inability of fortune, or incapacity of comprehension, occasioned by the vast extent of those voluminous tracts wherein it is comprised. It is certainly incumbent upon the legislator to reduce the law to a compass so small that every one may have it in his power to be informed of these injunctions which he is bound to obey, and the transgression of which subjects him to a corporal or maletuary punnishment. (vi)

This state of affairs that Hemsworth and others complain of can be seen, at least from one perspective, as a natural consequence of the development of the English legal system. The cohabitation of statute law with common law meant that the proliferation of laws was inevitable. Furthermore, given the lack of training of many legislators in the drafting of the legal code, it is not surprising that the solution to a legal problem was often deemed to be the passing of yet another statute. The incidence of ironic comment on this method of legislation is very high; one commentator notes, for example, that the untrained MP one day proposes a law to prohibit the stealing of geese, and the next a different law to prohibit the theft of cows, etc. This lack of training on the part of those charged with government and legislation was seen as a primary cause of the continual enlargement of the statute book, and therefore one of the major impediments to knowing the law *in toto*. But it was not only the statute book that made the injunction to know the law difficult to obey. For, the peculiarly English form of the law that had developed over centuries, the common law, was itself a maze of irrational and unsystematic customary codes of conduct whose reason for being was lost in the mists of time, time out of mind. In answer to the question "Why is such and such a law?" the only answer possible was "Because it is customarily so." If we can know, in the sense of identify, that source, we might also be able to understand why the rule is as it is.

Of course a history of responses to the question "What gives law its authority?" would be voluminous; it would include a range of politico-philosophical arguments from Stoic philosophy to rights-based theories of the individual proposed by contemporary legal theorists. But for Blackstone and his contemporaries, the question was fairly simply answered, even if that answer posed a potential paradox. It was held that the laws of the land are given their *imprimatur* by the monarch, by what was termed the prerogative of the sovereign. Indeed all the rights due to the subject flowed directly from the person of the monarch, who was taken quite literally to be the guarantor of the rights of his subjects. It may be argued that behind this prerogative stands something yet more important—the consent of the people to be subject to the monarch; certainly seventeenth-century constitutional theory construed the authority of the law in this way. Insofar as Blackstone inherits this sense of consent, it also figures in his conception of law's empire, but as we shall see, the force of the epistemology of revealed and irrecoverable origin assigns that original consent to a temporal mode that is without memory. In effect we are always *after* the granting of that consent; hence the real location for the authority of the law is the moment after our consent has been given, and in that moment there appears the point of reference for what follows: the prerogative of the monarch. Thus, according to Blackstone and other mid-century jurists, the law derives its force from the sovereign and all cases brought before it are in effect brought on behalf of the rights of the exemplary subject, the monarch. As Blackstone noted, "All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment" (I, 258).

Consequently the authority of the law, insofar as it can be discerned, lies in the person of the monarch, and the laws we agree to be bound by are passed on behalf of the sovereign. As Edward Wynne puts it:

> In every act, passed at this day, we read: "it is enacted by the King, by and with the advice and consent of the Lords Spiritual and Temporal, Commons &." "It is *enacted by the King"*— In this sense the laws may be called, if you will, the king's Laws: but they are more emphatically styled the Laws of the Realm. (III, 129)

However, while the laws of the land are made by the king in that very deliberate speech act: they are "enacted" by him, it does not necessarily follow that the King knows his own laws. Coke, for example, had a century earlier made the point:

> Then the King said, that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by one, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England,

> and causes which concern the life, or inheritance, or goods, or fortunes of his subject are not to be decided by natural reason, but by the artificial reason and judgement of law, which law is an act which requires long study and experience before that a man can attain to the knowledge of it. (63, 65)

Here there is a first answer to my question *who* has knowledge of the law: only those people who have spent a great deal of time studying it, becoming acquainted with it. This knowledge does not flow from first principles or natural reason, it is not "know how," but is derived from exposure to the thing to be known, from knowing *that* the law is such and such. Thus knowledge of the law, being able to recollect its rules, is not necessarily dependent upon the possibility of any single person knowing all the law. Indeed, whether or not the law is known or even knowable to the authority that gives its *imprimatur* to legality is itself unknowable, time out of mind.

The Origin of Customary Law

If this seems to satisfactorily assign a source for the authority of statute law, it still leaves unaddressed the origin of customary law. This is the single most pressing question faced by Hale and the historical tradition within which he writes, to which I now turn. Hale begins his history conventionally enough by pointing out that the laws of the land are of two kinds: statute and the common law. In the case of statute, the question of origin is unproblematic: the statute book records the moment at which a law is passed; it has perfect memory. At least it looks unproblematic, until one discovers that some statutes were passed before the time at which memory begins, the beginning of the reign of Richard the First. These statutes are part of the *lex non scripta* which, notwithstanding its precarious status as merely immemorial usage, has the same standing as the *lex scripta*. As Hale writes:

> ...I therefore stile those parts of the law *leges non scriptae*, because their authoritative and original institutions are not set down in writing in that manner, or with that authority that acts of parliament are; but they are grown into use, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, *and by the strength of custom and reception in this kingdom*. (23-24)

These laws, like the common law, find their origin in a misty period before time begins: they are, in the accepted formulation, before the time of memory. I will have more to say about this curious concept in my conclusion; for the moment I want to keep with this idea that one part of the legal code has no discernible point of origin. If this is so, from where do these laws draw their authority? Hale answers this in a way that will help Blackstone and others after him develop the epistemology of

revealed and irrecoverable origin, which signals the birth of modernity. Such customary laws, Hale notes, have force only on account of "their being admitted and received by us, which alone gives them their authoritative essence, and qualifies their obligation" (27). Without our consent there is no law, and it is this consent, a form of *sensus communis*, which binds us all together as citizens within law's empire. The force of a customary law, then, resides merely in its having become customary; immemorial usage is itself the authority for the continuation of its use. The recursive nature of this formulation hardly needs remembering; custom, like the law it legitimates, is committed to memory.

In this way Hale seems to sidestep the problem of knowing the origin for such laws. Indeed, he points out that since the origin of the nation is impossible to discern, it is hardly surprising that an origin to customary law should also prove to be unfathomable. He notes:

> ...we have not any clear and certain monuments of the original foundation of the English kingdom or state, when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional; and since we cannot know the original of the planting of the kingdom, we cannot certainly know the original of the laws thereof, which may be well presumed to be very near as ancient as the kingdom itself. (61-62)

There is then, no point in attempting to ground these laws; one just has to get on with what one has. Hale writes:

> Passing therefore from this unsearchable inquiry, I shall descend to that which gives the authority, viz. the formal constituents, as I may call them, of the common law; and they seem to be principally, if not only, these three, viz. first, the common usage, or custom, and practice of this kingdom, in such parts thereof as lie in usage or custom. Secondly, the authority of parliament, introducing such laws; and, thirdly, the judicial decisions of courts of justice, consonant to one another on the series and successions of time. (63)

In effect this states that the law functions, long live the law. There is no origin to the common law since it is lost in a time that is "unsearchable"; we need not worry about this if we only accept the force of immemorial usage and get on with things. This argument is shored up by another conventional formulation, which takes precisely the opposite tack. In answer to the question when does statute law begin (here understood as the written law), the answer is unambiguously definite: the time of memory begins the first day of the reign of Richard the first. The question of origin is therefore answered through this structure of knowing and unknowing, knowable and unknowable time. On the one hand, the common law has no point of origin, while on the other, the time of memory, the point to which all written law can be

traced, has a precise designation: September 3, 1189. And, to make the tense of this legislation of memory yet more complicated, the date from which all statute law originates was assigned retrospectively by a statute, Westminster I (1275), which presumably up until the moment it was passed was uncertain of its own originary authority.

This doubled structure of knowable and unknowable time, a remembering that is a forgetting, will be developed in Blackstone's all-inclusive systematization into an autotelic discourse of the law. Where Hale is content to let the question of origin lie buried within an unfathomable past, and to stress the organic nature of law, Blackstone's need to square the circle, to have both a source for the authority of the law and to prevent our being able to question that source, results in a kind of schizophrenia of knowing and unknowing, certainty and uncertainty, that grounds a new epistemology of self-authentication. It's not that Blackstone single-handedly invents this, or that it is in some sense only to be found in the law (the basis of the conceptual manifold is to be found in constitutional theory of the seventeenth century, and in Hale's attempts to fully historicize the English legal tradition) but it *crystallizes* in Blackstone as a pragmatic solution to the problem of understanding all law in terms of rights. It has been held that he failed in this—a reconciliation of the Roman analytic method with the content of the common law—but this failure to explain the law should be weighed against the great success of his solution to the epistemological question with which I began. For Blackstone, the law is both perfectly knowable and unfathomable, based both in a set of first principles (the rights due to the subject) and an inherited code of conduct that can neither be questioned nor shirked. In answer to the question "What is it to know the law?" Blackstone interposes another, even more powerful concept of knowledge, which describes the law in both a different mood and tense—the ought of futurity being recollected in the present of will— as itself a way of knowing. It knows what we do and cannot do. This mystified and pragmatic solution to an insoluble problem—the epistemology of revealed and irrecoverable origin—may be seen as cheating in regard to legal reasoning, but its force as epistemology flows through the whole of modernity. After this, Viner's historical quest to know the law *in toto* begins to seem like an aspiration from the Dark Ages, a foolish attempt to recover lost memory, its tense of knowing antiquarian, before Enlightenment.

Connected to this pulsation of knowing and unknowing is the concept of "immemorial use," and this too is far from uniquely applied to

arguments over the origin of the common law. It crops up in discussions of the language and of the constitution— indeed in the latter case, whenever the unwritten constitution needed to be justified, the phrase was trundled out as if it were, in and of itself, proof of the heights to which reason had soared. Such arguments were, of course, most often made in the interests of maintaining the status quo. Here is Richard Wooddeson, the third Vinerian professor, defending the right of the legislature to make law:

> …for what gives any legislature a right to act, where no express consent can be shewn? what, but immemorial usage? and what is the intrinsic force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent? (22)

This is the alternative answer to the question over the authority of the law: Wooddeson is echoing the argument encountered earlier, which states that in effect the point of origin *is* consent; Blackstone also mobilized this argument when convenient, but he gives it a twist. The time of law, the tense in which judgments are made, is predicated upon our already having given our consent: legal instruments are post-lapsarian. Consequently, while consent may be the hypothetical point of origin, it nevertheless lies buried in the a-logic of forgetfulness, of time without memory. You can't rely on memory if the possibility exists that your memories might be false, imaginary. According to Blackstone, in the world suffused with legality, another sense of authority is continuously, necessarily present, and it is evidenced every day in the performative force of law's enactment; as we have already noted, that "enactment" derives its authority from just one place—as Blackstone remarks—*any* form of legislature, any constitution must contain "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside" (I, 49). In other words he has it both ways.

The Tense of the Law

In conclusion, I want to press hard on what I have called the "tense" of the law; more specifically, I want to address the temporal irrecoverability of the origin of the common law, in order to ask whether the law in fact suffers from a kind of false memory syndrome, by which it obsessively remembers the fact that the origin of the common law is inaccessible to memory. This raises a whole new set of questions about time and the law. Does the law operate within time, and if so is the tense of legal process or judgment able to describe adequately the order of time in which the actions brought to its adjudication take place? In bringing

an action in law one has to make oneself present to it; one comes before the law. But this action has a curiously indistinct temporal accidence, revealed in the doubled sense of *before*, of both time and place.

Does the law have memory? As Wynne notes:

> ... the origin of the principles of the common law, is much more obscure than that of its etymology. That which, at present, characterises its true genius, must be its apology in this respect; "it is, in the highest sense, beyond time of memory" ... (119)

Does the law stay the same? Is it full of forgetting, a form of forgetfulness? Thomas Wood puts it like this:

> True it is that the common and civil laws had not the same root or stock; yet by inoculating and grafting, the body and branches do seem at this day to be almost of a piece. For the *English* law had receiv'd great alterations, and is very much unlike itself; or (as Mr Selden expresses it) *In regard of its first being it is like the Ship, that by often mending hath no piece of the first Materials*. (vi-vii)

It could be said that judgment is the present of law, that judge-made laws and statutes are addressed to the future. Wood again: '"Laws are made with reference to cases that shall happen for the *future* only, and must not comprehend Actions that are *past* before their establishment" (8), while the precedent could be said to be the law's own curious form of the past.

Yet this tripartite structure that seems to mirror a phenomenology of time is only in the loosest of senses really a temporal form. The present of law does not exist; this is why we feel nervous about the fact that legality surrounds us and yet we cannot touch it—it is beyond the temporality in which we experience the world, beyond the time of memory. The law is inserted, forcibly, into the continuum of our experience at the point of judgment, but this does not open up the time of law to our inspection. It is crucial in this regard that customary law has no origin, since as we shall see in a moment, if it did, it would be immediately disqualified as customary. The common law, then, is timeless; it is "as fresh in its obligation, as if it was passed at this day" according to Edward Wynne. It is as if it suffers from amnesia.

The thing that causes the law to lose its memory is the force of the time of memory itself. Here is Wynne again on the dating of memory:

> By *common law*, we mean those general customs that bind the whole Realm, by an immemorial usage. The time of memory (as it is called) or the particular aera, that distinguishes the nature of these laws, is the first year of King Richard the First. Every thing that was a matter of general obligation before that time, with all its consequences, is said to be by common Law; every new obligation induced since that time, must be by some Act of Parliament, the very letter of which Law is now remaining.

> ...tho' indeed the common law, in general, is *Lex non scripta*, yet some part of it may be preserved in writing without derogating from the just idea of it. A custom surely is not altered by writing it. Every thing that does not bind the subject, and is not in writing, must be in force as common law: but common law itself may be preserved in writing, provided its usage is immemorial, or the date of that writing corresponds with the other part of the definition, by being antecedent to the period abovementioned, "as the time of memory." (110-11)

A number of things flow from this; first it sets up criteria for establishing whether a custom is a good or not, which as Blackstone notes is the first thing one should ask: "for if it is not a good custom it ought no longer be used" (I, 76). This leads him to describe what makes for a good custom; he writes:

> 1. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. (I, 76)

The authority for customary law is so grounded in this epistemology of amnesia that a qualifying principle states that if its origin can be found, it automatically disqualifies it as a good custom. The second quality of a good custom is continual use since:

> Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. (I, 77)

Thus this precise cut in time designating what might be thought of as the pre-oedipal stage of legality is decisive in regard to the force of customary law. Furthermore, a custom is only customary insofar as it both derives from and continues to be held up in consensus. If there is any dissent at all, even if that dissent was before the time of memory, such dispute automatically disqualifies the custom as common law:

> For as customs owe their original to common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting. (I, 77)

The logic is impeccable: only that which is before the time of memory can attain the status of a custom, and only that which has continual undisputed use as a custom has the force of law. The origin cannot be discerned and the force cannot be disputed. This is what might be termed the self-authenticating epistemology of amnesia, the grounding of modernity.

The second thing that follows from the temporal accidence of customary law is eternal repetition, like some prefiguration of a *Groundhog Day* the immemoriality of the common law is destined to be repeated until memory returns. So, just as we are unable to spirit

ourselves out of the consensual form of legality within which we operate (we are already within the time of memory, within the law), we are also unable to consensually formulate new common law. As Wooddeson notes:

> ... not that such consent is subsequently removable, at the will even of all the subjects of the state, for that would be making a part of the community equal to the whole originally, and superior to the rules thereof after their establishment. (22)

Thus we live under the aegis of a peculiar form of liberty, bound to each other through our being bound to the law. As Wynne puts it:

> I would reason thus: that the only idea of Liberty in society is the power of acting as we please, in all cases not forbid by known Law; that the just prerogative is part of the common law, and must be evidenced in every instance as common law itself is, that is, by immemorial usage, uncontradicted by Act of Parliament; and therefore that the power of the crown so evidenced, can no more be repugnant to true legal liberty, than a particular law is. No new prerogative can start up at this day, any more than new common law; and any pretence to either, that is contradicted by antient usage, and not supported by act of parliament, can have no binding power, or produce any legal restraint on natural liberty. (54-55)

The time of the law is, then and now, irrecoverable, being based on time out of mind and perpetually made present. This doctrine, which had pretty much attained the status of fact well before Blackstone penned his lectures, is transformed into the groundwork of a new epistemology, the skeptical world view of the Enlightenment, which we all inherit. With this new way of knowing, we do not need the certainty of belief, nor the grounding concept of origin, since the new epistemology of amnesia says we can posit both a time of knowing—the time of memory—and a time of unknowing, of forgetting, and something straddles these two temporal orders for us, something knows both, is known to both, and that is the law. We have no choice; we must imagine that memory has an origin, it is true, not imaginary, and that origin must be determinable: the day Charles Viner died. The law has no memory, but this does not mean that it cannot know what it does not remember. Now is the time of law, now and forever.

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Note

1. For a good discussion of this see Michael Lobban, *Common Law and English Jurisprudence 1760-1850* (Oxford, Clarendon Press, 1991).

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