THE EFFECT OF MYTH ON PRIMITIVE AND ANCIENT JUSTICE

M. Stuart Madden*

Abstract

In primitive and civilized cultures alike, myth has served as a foundational component of social structure and societal cultural self-image. For peoples with limitation on their skills of scientific inquiry and/or detached social observation, myth has served purposes ranging from explanation of the natural world to early visions of civil justice and a moral ethos. Such application of myth has necessarily and simultaneously provided adherents with the means of rationalizing the caprice and harshness of the natural world, as well as giving a means of accepting, even a fatalism, concerning injustice.

Accordingly, as evidence of primitive and ancient informs us of the cultural antecedents of much of modern civil justice, so to myth not only provides great storytelling, but also insights into the moral and ethical aspirations of prior cultures, as well as the socio-psychological means of man's adaptation to frustration thereof.

* Distinguished Professor of Law, Pace University School of Law. I would like to thank Myriam Afif and Michael Stalzer for their capable research assistance in the preparation of this article.

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I. INTRODUCTION

Myths have been born, adopted, adapted and passed on for perhaps 10,000 years of man's recollectable past.[1] Their personages have dwelled in the sky in manlike form with fantastic powers; in the sea as serpents or other fantastical creatures; in the bowels of the earth as keepers of, alternatively, the afterlife, Hell, or both; and on the land as benign or malign, corporeal or incorporeal, actors.

From prehistoric time onward, social groups have sought belief systems about which they could model community behavior. More specifically, the mind of primitive and ancient man turned[2] to themes, stories and myths that seemed to be realistic explanations of, or rationalizations of, the external world. As it happens, primitive man,

[1] Epic poems, in contrast, have, by one estimate, been dated only so far back at 4,000 years. ROBERT E. ANDERSON, THE STORY OF EXTINCT CIVILIZATIONS OF THE EAST 47 (George Newnes, Ltd. 1898).

[2] For the purposes of this article, I will use "primitive man" to mean preliterate human social groupings. "Ancient man", in turn, is used to describe ancient literate societies, such as the ancient Egyptians or Greeks.

and to a lesser extent ancient man, could not readily distinguish between his life or being and the forces of the external world. Without this latter and fairly modern capacity, man's interpretations of the forces of nature, as well as the behavior of other humans or human collectives, were likely to be projections of his own wishes, fears and experience. When rain would fall beneficially, the sun would shine seasonally, combatant groups or cultures would not interrupt the safety and progress of the group, and justice and fairness governed man's activities with others, these stories would explain these phenomena as consistent with the will of nature and nature's gods. When, alternatively, the rain caused floods, the crops failed due to an erratic climate, war or internecine conflict interrupted the ordinary patterns of life, or injustice was dealt, man's myths would assign the reason to will of a malevolent, a capricious, or a displeased natural force and its gods. The forceful psychological projection afoot in the adoption of these myths is revealed in the fact that a very large proportion of them involve powerful presences in human form.

Mythologist Thomas Bulfinch suggests in the Preface to his influential BULFINCH'S MYTHOLOGY that two core values to the study of mythology, and in Bulfinch's case, Greek mythology, are that (1) familiarity with this body of literature gives the reader access to tales, metaphors, similes and references that pervade educated discourse; and (2) the literature it self is simply a marvelous read.[3] But Bulfinch assigns much too modest a role for mythology in today's world. The reason is that myths, as first envisioned, were a very sincere evocation of how man interpreted himself and the outside world, and that such interpretation included not only an understanding of man *vis a vis* the natural world but also a particular society's cultural self image, from matters

[3] THOMAS BULFINCH, BULFINCH'S MYTHOLOGY ix (Nelson Doubleday, Inc. 1968).

ceremonial to substantive.[4] And as would be inevitable, a body of myth among primitive man and ancient man has always been devoted to concepts of morality, ethics, right and wrong. In other words, myth has included many of the initiating stories of the rewards of the just life, the penalties that follow the unjust life, and the expectation that the just result will not always be reached (herein of rationalization).

Because myth flowed from early and ancient man's yet unborn capacity to imagine himself as an agent operating independently of nature or indeed of others, it follows that in its identification cultural goals, norms and strictures, myth antedates any law or norm of any society. This is so because to cause a law or a norm to be in effect, man would have to have developed the capacity to imagine himself as distinct from others in his hereditary group, from his possessions, and from his personal or individual prerogatives. Thus in any culture's mythmaking era, its members were, by definition, not yet capable of creating law, and this is true whether the law or norm was written, unwritten (and therefore oral), or customary. This is not to say that a culture's commitment to a structure of myths precluded its later adoption of norms or law, as in the case of the ancient Greeks, but rather only that it's the former period preceded the latter.

Seen in this way, for each affected social group primitive and ancient myth constituted an original and synthetic revelation of social order. Also, three features would characterize myths pertaining not to natural phenomena but rather to man's relation *inter se* to others. First, such myths or fables either explicitly or implicitly revealed norms and expectations that influenced individual or group behavior. Second, the instruction of these myths would vary in no significant way from the such norms, customs and laws as might in time follow. Third, these myths would enjoy great

[4] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 65 (Routledge 1992).

similarity in their identification of normative values consistent with the healthy growth and prosperity of the respective primitive and ancient group. As such, as taken from populations from seven of the eight continents, these fables provide stories of tribulations, rewards, achievement and failure that are a roadmap leading in time to numerous precepts of modern justice, perhaps most centrally self-discipline, forebearance and fairness.

A dominant but not exclusive tenet of myth is that its story was at first thought real, and only later would become, among certain quarters, thought fantastic. In modern times, it might be unlikely that young persons would be told of Zeus, Athena or any part of classical mythology with the purpose or expectation that either the teller or the audience would take the story as anything but fantastic. Yet in our post-modern age numerous myths play roles very similar to those played by ancient myths. Several modern tales that may be termed myths may always have been thought fantastic, and yet, while tempered with this modern insight, the role they have played in a society's concept of itself is still forceful. Among such modern myths (or sagas or fables) are included the stories of Tom Sawyer and Huck Finn, Horatio Alger, Paul Bunyan, and even Spiderman. For present purposes, though, this article will confine itself to the legends of antiquity.

A central feature of mythical and totemic adherence is "mediation of nature and culture[.]"[5] The article to follow will explore myth's two primary roles in primitive and in ancient society. One role has been the assignment of reasons for environmental uncertainty, be it benign or ruinous, i.e., sun, rain, drought, plentiful game, etc. The second role has been the mediation, often strongly normative, between conflicting

[5] CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 91 (U. Chicago 1966).

perceptions of the external world, i.e., generosity and honesty are to be rewarded,[6] save in certain and unpredictable circumstances when they will not. As to the mediation, therefore, of particular interest will be myths that directly or inferentially, and draw upon this rich store for selected demonstrations of how myth provided early and ancient man his sense of social cohesion, and social order.

II. MYTH, SOCIAL ORDERING, AND TORT LAW

Webster's' Third New International Dictionary provides this definition of myth: "a story that is usually of unknown origin and at least partially traditional, that ostensibly relates historical events of such character as to serve to explain some practice, belief, institution, or natural phenomenon[.]"[7] The definition continues by assigning a principal signification of myth to its role in sacred rites. However, as will be seen, the reach of myths as stories the guidance and uncritical acceptance of which affects a culture is not confined to a group's sacred rites.

There are several telling aspects to this definition. First, the story is usually of unknown origin, which is ordinarily true inasmuch as myths did not spring from the art of individual sooths or visionaries, but rather collective creativity that certainly spanned generations as the story underwent adaptation to render myth as intelligible to the task as possible. That myths "ostensibly relat[e] historical events" is seen in the form and

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[6] Among primitive peoples, such hospitality (or generosity) would ensure that all in the community, including infants not yet able to contribute to any communal work, would be provided for adequately:

> [F]or example, the [primitive] Australian hunter who kills a wild animal is expected to give one certain part of it to his elder brother, other parts to his younger brother and still other parts of the animal to defined relatives. He does this knowing that [the other brothers] will make a corresponding distribution of meat to him.

Robert Redfield, *Maine's Ancient Law in the Light of Primitive Societies,* in J.C. SMITH AND DAVID N. WEISSTUB, THE WESTERN IDEA OF LAW 81 (1983).

[7]

content characteristic of myths. They entail a story that may begin so simply as a boy walking in a glade, or a god betrayed by a member of his court, but the portrayal (that will seem fantastic to the modern reader) was subjectively thought to be true in its time. Finally, myths serve to explain or rationalize something. As to the natural world, a myth may explain the origin of thunder, or turning of the seasons, or the behavior of game animals. Or it may explain the origins of the practice of hospitality between and among primitive peoples,[8] or why telling the truth is commendable, but not necessarily gainful. It has been claimed that mythology and theology are "fundamentally alike" in "philosophic conception and point of view" in that "[b]oth are supernaturalistic interpretations of the world and of human experience. In theology, as in myths of primitive peoples, we find the same kinds of stories of gods, demons and heroes[.]"[9] I will for the most part avoid discussing religion or sacred texts I will not treat herein sacred religious themes as either myth or as fact, although I have given brief treatment elsewhere to representative examples of harmony between Judeo-Christian writings and the subsequent law of torts.[10] Conceptually civil defalcations (most frequently torts) have been distinguished from sins by the test that sins are offences against God (or deities more broadly), while torts are offenses against one's neighbor.[11] It is necessary to pause briefly, though, to note that that this distinction between legal proscription and sin is often indistinct, and that sacred texts have with frequency assigned to religious figures

[8] *See generally* M. Stuart Madden, *The Cultural Evolution of Tort Law,* 36 ARIZ. STATE L.J. ___ (2005)
[9] LESLIE A. WHITE, THE EVOLUTION OF CULTURE: THE DEVELOPMENT OF CIVILIZATION TO THE FALL OF ROME 354 (McGraw-Hill 1959).
[10] *See* Chapter 1, M. Stuart Madden, *Tort Law Through Time and Culture: Themes of Economic Efficiency*, in EXPLORING TORT LAW (M. Stuart Madden, ed.)(Cambridge, 2005); M. Stuart Madden, *The Cultural Evolution of Tort Law,* 36 ARIZ. ST. L.J. (2005)(forthcoming). It remains nonetheless an irresistible attraction to point out that the Judeo-Christian depiction of creation set forth in Genesis enjoys, to all but literalists, a singular position among mythic tales.

the role of law giver. Curiously, although Hoebel suggested that among primitive groups, it would be rare for the twain between religious strictures and private delict to meet,[12] he also described the Ashanti as a *"par excellence"* example of "law controlled by religion."[13] By way of a better known example, the anonymous author of Deuteronomy, the fifth book of the Pentateuch and also of the Christian First Covenant (or Old Testament) places Moses at the foot of Mt. Sinai and records the Hebrew leader as the first interlocutor of God's law.

A culture's matured mythological philosophy informs them in every quarter of their existence, including it's goals and the control of group or individual behavior, morality, the integration into and the uniformity of social processes, and indeed the social groups very way of life.[14] The sum total of any peoples' beliefs is its philosophy, and its philosophy may be naturalistic or super-naturalistic, which is to say, mythical.[15] A people postulating a spiritual reason for natural phenomena impose (or "project") their logic of observation upon the natural world without distinguishing their existence in an external world independent of themselves. Thus, writes Leslie A. White, "while we recognize a significant naturalistic composition in the philosophies of primitive peoples, their over-all complexion appears to be predominately super-naturalistic- mythological-in character."[16]

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[12] E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 259 (1954)(1976 ed .):

> [I] believe that a review of the evidence will show that primitive criminal law coincides with certain notions of sin with remarkable frequency, albeit not exclusively. Private law, which predominates among primitives, rarely if ever undertakes to add its sanctions to tabu [taboo].

[13] *Id.* at 264.
[14] *Cf.,* LESLIE A. WHITE, *supra* note 10 at 263-64.
[15] *Id.* at 261.
[16] *Id.* at 262.

I have opened this discussion by proposing that myth has operated in two principal ways: First to assign reasons for the activities of nature, which would be otherwise incomprehensible to ancient man, and second to mediate normatively between conflicting perceptions of the human or group behavior, which again be incomprehensible without explanation or rationalization.[17] Of particular relevance to this latter role of myth, even without a society's means of enforcement, myth, as is true also of norms and customs, can be seen to represent deontic logic, or the "logic of imperatives"[18], which is to say, the myth identifies "necessary relations . . . of opposition and concomitancy."[19] Choosing here for example only the concepts as they might be expressed in the law of torts, a particular myth or fable might provide a society with a means of distinguishing "acting from duty" from "delict".

It has been It is accepted generally that ancient myths were born and not made, which is to say, primitive or ancient did not as a matter of course objectify a certain or a sequence of external event(s), be they natural or cultural, and the proceed consciously to construct a mythic structure responsive thereto. Rather, as generally indisposed to or incapable of disassociating the external world from himself, primitive man projected his own and binary mental faculties upon the natural world, imposing mythological explanations for events that without such projection would be inexplicable

As to both mediating roles (natural and social) governing conflicts between expectation and phenomenon, it is accepted generally that ancient myths were born and

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[17] *Cf.* FITZPATRICK, *supra* note 4 at 16, in which Professor FitzpatricK, in describing the practical effect of the sacred-mythological text of Genesis, writes: "Such mediations transcend what would otherwise be the insuperable limits and contradictions of the profane world."

[18] *See generally* VON WRIGHT, NORMS AND ACTION (discussed in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 205 & n. 36 (Sweet & Maxwell 2001).

[19] P. RAZ, THE CONCEPT OF A LEGAL SYSTEM 97 (1970)(referenced in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 205& n. 35 (Sweet & Maxwell 2001).

not made. This is to say that primitive or ancient man did not as a matter of course objectify a certain or a sequence of external event(s) and consciously construct a mythic structure responsive thereto. Rather, as generally indisposed to or incapable of disassociating the external world from himself, primitive man projected his own and binary mental faculties upon the natural world, imposing mythological explanations for events that without such projection would be inexplicable. Thus myth will serve to explain human interaction if the normatively optimal – or rational - conduct actually occurred. Myth would *also* make comprehensible contrary or irrational conduct by providing a rationalization for it, i.e., by describing a god who was generally good and predictable but whom was sometimes given to capricious or erratic behavior.

The overarching significance of this mediating role of myth is further revealed in the understanding of a very particular man's psychological relationship with the external world and with the actions of others: Man *needs* an explanation for things. As put by Langer, "[M]an can adapt himself to anything his imagination can cope with; but he cannot deal with chaos."[20] Myth is one means of avoiding such chaos, as it "provides a `logical model by means of which the human mind can avoid unwelcome contradictions . . . and so provides a means of `mediating' between opposites that would, if unreconciled, be intolerable." [21] Primitive and ancient man's adoption and perpetuation of mythological stories and structures, therefore, reveals his "obsession with the real, his thirst for being."[22]

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[20] LANGER, PHILOSOPHY IN A NEW KEY 287 ( ), quoted in CLIFFORD GERTZ, THE INTERPRETATION OF CULTURES 99-100 (1973).

[21] MARK P.O MORFORD AND ROBERT J. LENARDON, CLASSICAL MYTHOLOGY (3d ed.) 10 (1985)(internal reference omitted).

[22] M. ELIADE, MYTHS, DRAMS AND MYSTERIES; THE RELATION BETWEEN CONTEMPORARY FAITHS AND ANCIENT REALITY 11 (Glasgow:Collins 1968). *See* comment on the relation between myth and man's existential realization, below at note ___ and accompanying text.

In the analytical structure of Claude Levi-Strauss, human societies throughout the world have evidenced certain "unchanging patterns" and "consistent structure[s]". Myths "are part of the working of this social structure and are derived ultimately from the structure of the mind."[23] The binary structure of the human mind, the reasoning goes, is binary, *e.g.*, life/death, hunter/hunted, just/unjust, and myth mediates between and resolves such "conflicting opposites."[24] As suggested, such opposites might be natural, such as life v. death, light v. dark, feast v. famine. Or of greater interest for present purposes, the opposites might be truth v. falsehood, or justice v. injustice, which is to say, opposites that confront man in his dealings with other individuals or social groups. Be the myth's instructive value natural or societal, it is labile and malleable, and may change in time.[25]

A societal belief in a myth or in a norm derived therefrom need not have the force of law in order to effectively regulate or at least affect behavior. Indeed, some norms have seemingly controlled social activity even more effectively that had or might law on the same or similar themes. Characterized sometimes as "ruling ideas", myth's "exemplary" ideas "dra[w] a distinction between society and that which lies below it, in an underworld of seedy chaos[.][26] In this latter role, even without a society's means of enforcement, myth, as is true also of norms and customs, can be seen to represent deontic

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[23] MARK P.O MORFORD AND ROBERT J. LENARDON, CLASSICAL MYTHOLOGY (3d ed.) 7-8 (1985)(synopsizing the work of Levi-Strauss).
[24] MARK P.O MORFORD AND ROBERT J. LENARDON, CLASSICAL MYTHOLOGY (3d ed.) at 8 (1985)(synopsizing the work of Levi-Strauss).
[25] *Cf.* FITZPATRICK, *supra* note 4 at 26 (citations omitted).
[26] J. B. Thompson, *Introduction* to C. LEFORT, THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DMOCRACY, TOTALITARIANISM 17 (Cambridge 1986), discussed in FITZPATRICK, *supra* note 4 at 37, 38.

logic, or the "logic of imperatives"[27], which is to say, the myth identifies "necessary relations . . . of opposition and concomitancy."[28] Understood as such, myth is not simple "the preserve of story tellers and performers of ritual," but rather and more importantly "an accessible and regular mode of being in the world, as a mode of making the deepest truths of life generally operative[.]"[29]

Myth has always been imparted by two means: language and symbol, which is to say, myths would ordinarily be conveyed by symbolic or oral story telling. Mythological thought "builds structured sets by means of a structured set, namely, language."[30] Regarding oral story telling, evaluation of the societal role of myth cannot be complete without reference to its primary means of transmission: the oral tradition. As defined and explained by anthropologist A. Raphaël Ndiaye: "There are multiple suitable definitions of oral tradition; despite numerous nuances, it represents the complete information deemed essential, retained and codified by a society, primarily in oral form, in order to facilitate its memorization and ensure its dissemination to present and future generations."[31] "Oral tradition," Ndiaye continues, "appears then as a heritage which displays the many dimensions of humanity, including reason, intelligence and spirituality; a willingness to live on, allowing Claude Lévi-Strauss in particular to affirm that there are no children among people-all are adults."[32] In preliterate societies, while deference was owed great men and village elders (or in matriarchal societies, their female

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[27] *See generally* VON WRIGHT, NORMS AND ACTION (discussed in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 205 & n. 36 (Sweet & Maxwell 2001).
[28] J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 97 (1970)(referenced in M.D.A. FREEMAN, *id.* at 205& n. 35.
[29] FITZPATRICK, *supra* note 4 at 22, referencing P. Davidson, *.Bookmark: The Storyteller*, BBC 2 Television, 7 March 1990.
[30] CLAUDE LEVI-STRAUSS, *supra* note 5 at *id.*
[31] A. Raphaël Ndiaye, *Dakar Oral tradition: From collection to digitization,* 65TH IFLA COUNCIL AND GENERAL CONFERENCE 7 (Bangkok, Thailand) (June, July 1999).
[32] *Id.*

equivalents), decisions were arrived at communally, or horizontally. Ndiaye continues: "Within such societies, oral tradition guarantees its own reproduction by spreading in two directions, vertically and horizontally: *vertically* from the elders and the past to the present; *horizontally*, in a synchronous process between members of the contemporary society.[33] And essential to the nurturance of the governing myth from one generation to another, although the roles of children and their duties of obedience might distinguish them from adults, would differ, children were as infused with a recognition of their participation in the collective on an equivalence with adults. The oral transmission of myth thus reinforced the horizontal aspects of primitive societies, including their horizontal decision making and law giving.

To some, the adoption of mythical perpetuation of such stories betrays the limitations of the human minds of prior cultures to appreciate and interpret their worlds, or more specifically that a culture's mythic ideation is a function of primitive or ancient man's incapacity to analyze reality. Claude Levi-Strauss, C. Leach and others, however, have rebuffed attribution of myths and rites to a proto-analytical "myth-making faculty", in which mankind "turn[s] its back on reality."[34] Instead, to Levi-Strauss, Leach and other social scientists, a culture's myths are the fruits of a methodology that, taking into account the limitations of natural science available to any given era, stands on an equivalence in its creation of natural and social truths generated by many later societies. That primitive man's exploration and explanation of the natural world would predate the development of modern natural science, Levi-Strauss suggests, it is not for this reason

[33] *Id.* at 8.
[34] CLAUDE LEVI-STRAUSS, *supra* note 5 at 16. *See also* C. LEACH, GENESIS AS MYTH AND OTHER ESSAYS 85 (Jonathan Cape 1969)("[T]he anthropologist's belief in the ignorance of his [primitive] contemporaries shows astonishing resilience in the face of adverse evidence.").i.

"less scientific," nor are its postulates "less genuine."[35] Or as explained by Clifford Geertz, there is reason to disagree that man's mental disposition was essentially fixed prior to the development of culture, and that his current rational capabilities are merely extensions thereof.[36] To these social scientists, "[t]ools, hunting, family organization, and later, art, religion, and `science' molded man somatically; and they are, therefore, necessary not merely to his survival but to his existential realization."[37]

To these social scientists, the "principal value" of its myths has been "to preserve until the present time the remains of methods of observation and reflection which were (and no doubt still are) precisely adapted to discoveries of a certain type: those which nature authorized from the starting point of a speculative organization and exploitation of the sensible world in sensible terms."[38] Thus to Malinowski, far from the product of unsophisticated and credulous minds, myths have typically represented "a hand-worked active force[,] . . . a pragmatic charter."[39]

In the end, it is probably most circumspect to assign both scientific and nonscientific attributes to myth. As Levi-Strauss concedes: "Mythical thought for its part is imprisoned in the events of which it never tires of ordering and reordering in its search to find them a meaning. But it also acts as a liberator by its protest against the idea that anything can be meaningless with which science at first resigned itself to a

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[35] *Id.*
[36] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 82 (Basic Books 1973).
[37] *Id.* at 83.
[38] *Id.*
[39] B. MALINOWSKI, MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS 101 (Garden City:Doubleday 1954).

compromise."[40] Any examination of myth, therefore, reveals myth and corresponding phenomenon in a dialectic minuet.[41]

All myths relate (tell or show) a story. The form of the myth's conveyance may that of be story, dance, song; the myth may employ symbol, totem, or, almost invariably, ritual. The choice and manner of utilizing such forms can affect greatly the power of the message and even the message itself. Whatever the form chosen, a myth's ritual, symbolism, totemism or otherwise "function[s] to synthesize a people's ethos – the tone, character and quality of their life, its moral and aesthetic style and mood – and their world view – the picture they have of the way things in sheer actuality are, their most comprehensible order."[42] Accordingly, the relation between law, be it ancient or modern, and the myths of antiquity is best understood when one evaluates not only the content of the story but also its form of portrayal. The dress of the participants might provide a subtext, as in the example of the Navajo elders to represent the myth of their original people by garb recollecting the original animals chosen to guide them.[43] They might involve ceremony, or dance, or the erection of totems or even buildings.[44]

With ceremonial representation, story-telling and accompanying ritual represent a sum that is greater than its parts in terms both of believability and indelibility, a

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[40] CLAUDE LEVI-STRAUSS, *supra* note 5 at 22.
[41] *Id.* at 230-31.
[42] GEERTZ, note 34 at 89.
[43] *I.e,* the silvery white coat of Wolf, the blue-feathered coat of Bluebird, the yellow-furred coat of Mountain Lion, and Hummingbird's coat of many colors. *See* discussion at notes and accompanying text.

> A remarkable feature of the religion of the Chaldeans has been used to explain the shape of their palaces and temples. They `lifted their eyes to the hills' on the north-east, `the Father of countries,' and imagined it the abode of the Gods, the future home of every great and good man. . . .The type of the holy mountain was therefore reproduced in every palace and temple, sometimes by building it on an artificial mound with trees and plants watered from above[.] . . .

ROBERT E. ANDERSON, *supra* note 1 at 34.

phenomenon that is true to this day.[45] It is no surprise that so many of today's binding "legal" actions are enveloped in ceremony –one need only consider the sacrament of marriage. Indeed Scandanavian Realist Axel Hagerstrom sought to prove, successfully or otherwise, that so prosaic as might be the oral exchanges of purchase and sale under the Roman system of *jus civile were part of* "a system of rules for the acquisition and exercise of supernatural powers[,]."[46] and that the words and rituals had a "magical effect."[47] And, as M.D.A. Freeman paraphrases Frederick Pollack, "ritual is to law as a bottle is to liquor; you cannot drink the bottle, but equally you cannot cope with liquor without the bottle."[48]

Natural law, to Betrand Russell, "decides what actions would be ethically right, and what wrong, in a community that had no government; and positive law ought to be, as far as possible, persuaded and inspired by natural law."[49] The diplomacy that leads away from analyzing religion *qua* religion as myth does not preclude taking note of the frequent correlations diverse religions have made between natural law or natural rights as individual cultures have visualized that will, and as they have believed in one or more

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[45] Of this phenomenon in modern popular culture, *see* Richard K. Sherwin, *Law in Popular Culture* 7, 8 (New York Law School Faculty Reprint Series No. 1 (2005):

> Images . . . do not simply `add' to the persuasive force of words; they *transform* argument, and in so doing have the ability to persuade all the more powerfully. Unlike words, which compose linear messages that must be taken in sequentially, at least some of the meanings of images can be grasped all at onece. This rapid intelligibility permits visual messages to be greatly condensed (it takes a lot less time to see a picture than to read a thousand words), and allows the image creator to communicate one meaning after another in quick succession. Such immediacy of comprehension enhances persuasion.

[46] M.D.A. FREEMAN, *supra* note LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 857 & n. 15 (Sweet & Maxwell 2001), referencing AXEL HAGERSTROM, DER ROMISCHE OBLIATIONSBERGRIFF (2 vols.)(1927, 1941).

[47] *Id.* at 857 & n. 15.

[48] M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 857-58 (Sweet & Maxwell 2001).

[49] BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 628 (1945).

particular gods.[50] This examination actually steps off of the diplomatic tightrope of dissecting a particular faith in the expectation of determining what is fact and what is fiction. This is true because while all faiths credit their sacred texts and stories as largely factually, they are inclined to assess the beliefs of others as fantastic. Therefore it can be said that at least from the perspective of a substantial minority of persons, the sacred underpinnings of any faith other than there own is footed in myth or fantasy.

What does this approach, if credited, permit us to do? It lets us look at a consistent pattern between and among faiths of assigning God's will as responsible for, or at least consistent with, natural law or natural rights.[51] The basic structure of natural law proposes that (1) the plan for man in society is the pursuit of what is good, just and moral; (2) a perfect God is responsible for this plan, from which man deviates only at his or its peril; and (3) there is an unbreakable teleological connection between God's will and natural law, which is to say, what is good, just and moral. If this much is true, then the conclusion is inescapable that at the direction of diverse and heterogenous faiths, another faith's perception of goodness, justice and morality is based upon myth. This is true even if the observing and the observed faith share essentially similar sacred conclusions.

As suggested earlier, where and when myth has been believed, the fact that it has not been law has not negated its role as a means of social control. Myth has long existed in societies that simultaneously adhered independently to social norms, or even to written

[50] Hereinafter referred to jointly as natural law.
[51] This inquiry puts aside Jeremy Bentham's legendary dismissal of natural law as "nonsense upon stilts." Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 53 (Jeremy Waldron ed., 1987).

law,[52] and examples abound in which the power of myth to regulate a society's behavior has equaled or exceeded the power of its laws. Os systematic significance along these lines, the mythological trappings of equality among mortals does not mean that primitive civil justice was immune to considerations of status or personage. For example, of Big Men in the Plains Indian tradition, Hoebel writes: "By the very reason of their special characters and social status the litigious behavior of such personages does not give a full picture of law at large. Justice may wear a blindfold and every man be equal before the law, but in every society – primitive and civilized- personality and social status color and influence every legal situation."[53]

In the next section I will visit representative a variety of mythical stories that reveal the approach individual cultures have taken to rendering comprehensible the second type of myth we have referred to throughout, that is to say, stories that pertain not to man's life in nature, but rather to man's life in his culture. In each of these stories we will see revealed a normative message as to optimal behavior within that society. Without variation the stories are encomiums honest and industrious individual behavior, and also to the preservation of a peaceful, just and prosperous community. At the same time, in many of these myths the outcome is contrary to what the individual or the society might fairly aspire to. When this happens, as often as not the result is attributable to the acts of a capricious, willful or a displeased deity or spirit. As unfortunate as this result may seem in absolute terms, it is by virtue of this latter type of story that primitive and

[52] An important distinction between law and norms or customs has always been that societies governed by law characteristically have the power of physical coercion to effect same. *See generally* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (7TH ed.) 914 (Sweet & Maxwell 2001)(internal citations omitted).

[53] E. ADAMSON HOEBEL, *supra* note 12 at 249-44.

ancient man could, when phenomena did not seem to align themselves intelligibly with results, locate a rationalization therefore.

III. PRIMITIVE AND ANCIENT MYTHO-DELICTUAL PRECEPTS

That obedience is due to one's elders is a foundational building block of many myths, and there are important reasons for this. The primary one for out purposes is that in primitive and ancient societies alike, a culture's elders were the primary lawgivers, using here "law" in its loosest of interpretations as including norm, custom or ruling idea. Thus, for example, among ancient Egyptians examples remain of the teachings of familial piety. According to one such literary fragment: "The son who obeys his father's word will thereafter live to a good old age." The text continues with a forceful statement of the liabilities that follow departure from this rule: "The disobedient son sees knowledge in ignorance, virtue in vice; his life is what the wise man knows to be death, and curses follow him as he walks in his ways."[54]

The road to many delicts is paved with bad intentions, and thus it is no surprise that primitive mythology contains variations on the most infamous story of the introduction of intentional violence into the world. The story, of course, is that of Cain and Abel, or the tale of the Good Twin and the Evil Twin.[55] The intentional killing of a

[54] ROBERT E. ANDERSON, THE STORY OF EXTINCT CIVILIZATIONS OF THE EAST 57 (George Newnes, Ltd. 1898). Similarly: "A good word shines more than an emerald in the hand of a slave who finds it in the mire." *Id.* at 57-58 Finally, during the reign of the Memphian kings, the perhaps true but in any event self-serving protestation of Ameni, provincial governor, following his campaign in Ethiopia: "no little child was ever ill-treated nor widow oppressed by me. I have never troubled the fisherman, nor disturbed the Shepard. . . I gave equally to the widow and the married woman, and in my judgments, I did not favor the great at the expense of the poor." *Id.* at 58.

[55] The parallels to the myth of Quetzacoatl, and Tezcatlipoca, discussed below at notes ____ and accompanying text, are readily apparent.

member of one's own family, clan or tribe has always been considered the most horrific of crimes. For example, in a Native American context, the killing of one Cheyenne by another Cheyenne was "a stain on the tribal `soul,'", revealing itself by a "`miraculous' of blood on the feathers of the [Medicine] Arrows[,]" one of two very important sacred totems (or fetishes) of the Cheyene.[56] Failure would dog the tribe's hunters and war parties. The perpetrator was thought – by Judeo-Christian analogue – to bear the mark of Cain, his internal organs rotting with such a stench as itself to drive away the game.[57]

An Iroquois creation myth further develops the origins of the divide between good and evil, again the in context of the Good Twin and the Evil Twin. In the story of its early people, there existed and Upper World, inhabited by the Divine Sky People, the Great Water, and the Great Darkness, comprising the world between the Great Water and the Upper World. In the myth of The Woman Who Fell From the Sky, the great chief of the Divine People had a daughter, Atahensic, who became gravely ill.[58] A great corn tree provided food to the people. It came to the chief in a dream that if he placed his daughter at the base of the corn tree, and then dug the tree up by its roots, she would be made well. He did so, but the only consequence was that the tree fell thunderously. A member of the sky people, horrified to see their source of food jeopardized, threw the Atashensic into the hole, and she fell into the water. To save her, the water animals formed a raft of their bodies, but they eventually tired. These animals, Great Turtle, Muskrat, Beaver and Otter, then attempted to each dive to the bottom of the water and to return to the surface with earth. Only Muskrat succeeded, although he died in the effort, and Atashensic

[56] E. ADAMSON HOEBEL, *supra* note 12 at 156-57.
[57] *Id.* at 157.
[58] *See generally* discussion in DONNA ROSENBERG, WORLD MYTHOLOGY: AN ANTHOLOGY OF THE GREAT MYTHS AND EPICS (3d ed.) 511et seq. (NYC 1994).

spread it about the edges of Great Turtle's shell, more and more, until the shell became so broad that it became Great Island, which wold be inhabited by Earth People. There Atashensic dwelled, and eventually gave birth to a child, called Earth Woman. Some time thereafter, Earth Woman became pregnant by the West Wind, and gave to Good Twin and Evil Twin, although evil twin was so competitive that in desiring to be born before Good Twin, he burst from Earth Mother's side, killing her. As time passed, for each beneficial act Good Twin sought for Great Island, Evil Twin would seek to sabotage them. Evil Twin shrunk Good Twin's fruit bearing Sycamore tree into a tree bearing only shrunken and inedible pods, and used his evil imagination to create the great mountains and the sharp rocks that hurt people's feet. He made huge predators, such a Bear, Wolf and Panther, and game animals so large that they could not be safely hunted, but Good Twin made the predators smaller, and the game animals of such a size that they cold be hunted by man. This was intolerable to Evil Twin, who sought to capture the abundance of beneficial animals and hide them in a cave, closing the cave with a boulder. Aware to this act, Good Twin pushed the boulder away, freeing the animals. Eventually Evil Twin concluded the obvious, that he and Good Twin could not coexist. Evil Twin proposed a fight. Good Twin, wishing to avoid violence, proposed a race. The Evil Twin asked the Good Twin what might it be that could hurt hum, and the Good Twin answered the wild rose; to the same question Evil Twin answered Buck's thorns. Thus along the proposed racing courses the Evil Twin placed the branches of the wild rose, taken from the garden of his grandmother, Atashensic. From the forest the Good Twin gathered Buck's horns, and strew them along the Evil Twin's side of the race path. The race began, and is it progressed, whenever the Good Twin tired, he stopped, picked a wild

rose, and ate it for renewed energy. The Evil Twin had nothing to refresh himself, and was increasingly hobbled by the thorns in his feet. Upon his collapse, the Evil Twin begged for mercy, but the Good Twin resolved to treat him as he would have been treated had Evil Twin prevailed, and beat him to death with a branch of Buck's thorns. The Evil Twin's spirit left to become the spirit of the dead, and became the Evil Spirit.[59]

A common mythic thread is that of evil being portrayed as a trickster. This is true in the following Aztec myth of Quetzacoatl, and in the Norse myth of Balder immediately thereafter. In the Aztec tradition we find the myth of Quetzacoatl, who in fact may be a combination of fact and myth. In history he may have been Topilitzin (Our Prince), who brought ethics and laws to the Toltec.[60] In one version of the Quetzacoatl myth, his counterpart, Tezcatlipoca, is not characterized as the Evil Twin of Quetzacoatl, but for all intents and purposes he might as well be. Tezcatlipoca "represents all the evils that test the moral fiber of human beings."[61] Fittingly, Tezcatlipoca is invisible and has no corporeal presence. The themes of the principal Quetzacoatl/ Tezcatlipoca include the tensions between temptation and forbearance, temperance and excess, and reason and emotion. In this version, Tezcatlipoca holds mirror to Quetzacoatl's face, and persuades him that his image "is wrinkled like that of an ancient creature."[62] Tezcatlipoca convinces the now insecure Quetzacoatl that he can regain his vitality and handsomeness by adopting a ridiculous raiment of the feathers of the quetzal bird, a red and yellow painted face, a feathered beard and a turquoise mask. He then urges Quetzacoatl to drink an inebriating beverage, of which he, and then his followers, partake in excess. When he

[59] *Id.* at 511-16.
[60] *See generally* discussion in DONNA ROSENBERG, *id.* at 492 et seq.
[61] *Id.* at 493.
[62] *Id.* at 495

is again sober, Quetzacoatl realizes that among other immoral acts, he has committed incest with his sister. Even though his ashamed, Quetzacoatl rationalizes temporarily that he can, with his new wisdom of himself, yet lead his people. However, Tezcatlipoca continues his evil work by visiting illness and privation upon the tribe of Quetzacoatl, and ultimately Quetzacoatl leaves in a self-enforced exile and dies alone.

The Norse tale of Balder is representative of this genre. To the Norse, Balder, the son of Odin and Frig, represented the epogee of purity and virtue.[63] It was inevitable, therefore, that evil, in the personage of Loki, would seek a way to imprison him. Traveling the world, Balder's mother sought and received a covenant from all living things not to harm her son, save the little mistletoe bush, which she thought to young to bring harm. In disguise, Loki interrogated Frigg, who conceded this omission. Fashioning a mistletoe twig into a weapon, Loki joined a group engaged in a game in which Frig's success was tested by having the participants hurl objects at Balder, only to find them bounce off harmlessly. By trick, Loki persuaded Hoder, Balder's blind brother, to take the mistetoe and throw it at Balder, and Balder was killed. With all of the gods in shock, Frig bade Hermod the Bold to enter Niflheim, the kingdom of the dead, to confer with Hel, Loki's daughter, to seek conditions of Balder's release. Hel required proof that all creatures and forms in nature be weeping over Balder's death. Only one giantess refused, but it turned out that the giantess was Loki in disguise, and Loki fled, and he fled for his life, taking the form of a fish. Thor, engaging in the search, captured him. Loki was bound to three huge rocks by his slain son's intestines, beneath a

[63] *See generally* discussion in DONNA ROSENBERG, *id.* at 218 et seq.

giant and venomous snake. When drops of the venom would touch Loki's skin, he would writhe in such pain that the mountains shook.[64]

The horizontal/consensus approach to primitive decision making, be it for defalcations or otherwise, has mythological antecedents. For example, the creation myth of the Navajo tells of four gods appearing before the First People, who lived in the Yellow World, and who, upon experiencing a shortage of food that imperiled their very existence, dispatched messengers to the North, the South, the East and the West in search of one who might lead them. From the West returned the Mountain Lion, who was strong and wise; from the East the Wolf, as he was strong and clever; from the South, the Bluebird, who was kind and wise; and from the North, the Hummingbird, who was wise and just.[65] For the virtues of each proposed leader the First People came to recognize that to ensure peace, plentitude and justice, they needed the counsel and leadership of each and all of the four. To this day, the legend continues, the Navajo are led by a council of wise men representing each: Wolf wears a silvery white coat; Bluebird a blue feathered coat; Mountain Lion a coat of yellow fur; and Hummingbird a coat of many colors.[66]

Aristotle's role in advancing a concept of corrective justice is well known. In his NICHOMACHEAN ETHICS Book V, ch. 2, "The Thinker" is credited with laying the cornerstone of these principles as they underlay today's common law.[67] Aristotle's understanding was that corrective justice would enable restoration to the victim of the

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[64] *See generally* discussion in DONNA ROSENBERG, WORLD MYTHOLOGY: AN ANTHOLOGY OF THE GREAT MYTHS AND EPICS (3d ed.) 218 -23 (NYC 1994).
[65] *See generally* discussion in DONNA ROSENBERG, *id.* at 498 et seq. .
[66] DONNA ROSENBERG, *id.* at 501et seq.
[67] "[T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice in this sense is unfair or unequal, and the endeavor of the judge is to equalize it." ARISTOTLE, NICOMACHEAN ETHICS 154 (J. Welldon trans., 1987), *discussed in* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 707-08 & n.6 (1989).

status quo ante major, insofar as a monetary award or an injunction can do so.[68] Under the Aristotelian principle of *diorthotikos*, or "making straight," at the remedy phase the court will attempt to equalize things by means of the penalty, taking away from the gain of the wrongdoer." Whether the wrongdoer's gain is monetary, or measured in property, or the community's valuation of a personal physical injury consequent to the defendant's wrongful act, by imposing a remedy approximating the actor's wrongful appropriation and "loss" to the sufferer, "the judge restores equality . . . ."[69]

Consistent therewith, there are close ties between the myth of early Greeks and the more nuanced manner in which the society would eventually come to view restitution as the preferable way to settle most civil harms. In THE ILIAD Book 2 we read the take of the chariot race. Emulus, who was in actuality the fastest charioteer, comes in last, due to the intervention of Athena. Achilles at first proposes to give Eumelus second prize, to rectify the wrong done to him, leaving Diomedes, the actual first place winner, with his first place prize. All are content save Antilochus, who had finished second in actuality, and who proposes to Achilles that the order of finishing remain as it was in fact, and that the compensation due Emulus be his award of a special prize as "the best man in the race."[70] It is a result that in the finest Aristotelian logic "makes straight" a wrong, and in not dislodging either Diomedes or Antilochus from their true order of finish, is probably also Pareto Optimal.[71]

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[68] "Therefore the just is intermediate between a sort of gain and a sort of loss, viz, those which are involuntary; it consists in having an equal amount before and after the transaction." *Id.* at Ch. 4, p. 407.
[69] THE COMPLETE WORKS OF ARISTOTLE 786 (Jonathan Barnes ed.)(1984).
[70] HOMER, THE ILIAD Book 23, verses 287-351 at pp. 458-465 (Richard Lattimore, trans.)(U. Chicago 1967).
[71] A rule is Pareto optimal when its effects benefit all *1049 parties, in essence, a win-win proposition. As summarized by Mark Seidenfeld:

> An economic change is considered a Pareto improvement [or Pareto superior] if it makes some individuals better off without making any person worse off. A state of the economic system is Pareto

Another Greek myth seeming instructs that if one is intent upon alienating the affections of a woman, it is best that the woman not be the wife of Ulysses.[72] In the tale sometimes referred to as Penelope's Web, Ulysses,[73] king of Ithaca, is at first reluctant to join the war against Troy, but does so at the insistence of his wife, the beautiful Penelope. Ten years pass, Troy is in ruins, and the Greek warriors return, but there is no sign of Ulysses. Even Laertes tells Penelope that Ulysses must have lost his life in a shipwreck. Another ten yeas pass for the faithful Penelope, and as is inevitable, others seek the love of Penelope, and ask that she choose from among them.. She resists, stating "Give me a month longer to wait for him. In my loom I have a half-finished web of soft linen. I am weaving it for the shroud of our father, Laertes, who is very old and cannot live much longer. If Ulysses fails to return in the time this web is finished, then I will choose, though unwillingly."[74] Penelope's suitors took her at her word and more, taking lodging in her palace and partaking of all of the attendant luxuries. Penelope, in turn, would show them each day how her weaving was progressing, but at night she would unravel what she had woven. Eventually, however, her ruse was found out, and her rude suitors demanded that she make decision. Those gathered arranged once more for a feast, and it was larger and more uproarious than those before. Scarcely noticed, an old beggar entered the courtyard. He first approached Argos, Ulysses' favorite hunting dog, who

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> optimal (or Pareto Efficient) if there is no Pareto superior state that society can reach. If we are using the Pareto criterion to evaluate our economic system, we say that a Pareto optimal state is "economically efficient."

MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 49 (1996). For a general description of Pareto optimality principles, see Robin Paul Malloy, Law and Economics: A Comparative Approach to Theory and Practice (1990).

[72] For a rendition of this myth, *see generally* THE BOOK OF VIRTUES FOR YOUNG PEOPLE: A TREASURY OF GREAT MORAL STORIES 259 et seq. (William J. Bennett, ed.)(Simon & Schuster 1997)(hereinafter THE BOOK OF VIRTUES).

[73] Ulysses is the Roman name for the Greek hero Odysseus.

[74] THE BOOK OF VIRTUES, *supra* note 72 at 313 et seq.

had grown old and toothless, and was mistreated by the interlopers. The beggar patted the dog's head, and whispered "Argus, old friend." The dog stood, and then fell dead, but with a look of satisfaction. The suitors noticed the beggar and ridiculed him, ordering him out, but the beggar offered news of Ulysses, and Penelope bade that he stay and receive refreshment. An old lady who had been Ulysses nurse washed his feet, but sprang back in alarm upon noticing a scar upon the beggar's knee, a scar that seemed distantly familiar to her. The beggar whispered to her: "Dear nurse, you were ever discreet and wise. You know me by the old scar I have carried on my knee since boyhood. Well keep the secret, for I bide my time, until the hour of vengeance is nigh."[75] The suitors grew more demanding, and Penelope responded by pointing to a great bow hanging on the wall, saying: "Chiefs and Princes, let us leave this decision to the Gods. Behold, there hangs the great bow of Ulysses, which he alone was able to string. Let each of you try his strength in bending it, and I will choose the one who can shoot an arrow from it most skillfully."

Each chief and prince tried his hand but each failed, until one said derisively: "Perhaps the beggar would like to take part in this contest." The beggar approached the bow, and stood tall, revealing himself. Penelope cried Ulysses' name. The suitor's fled in panic, but Ulysses with his bow and his arrows killed every one. Penelope returned to Ulysses with the soft white cloth of her web, and declared: "This is the web, Ulysses. I promised that on the day of its completion I would choose a husband, and I choose you."[76]

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[75] *Id.* at 318 et seq.
[76] THE BOOK OF VIRTUES, *id.* at 318-19 et seq.

If a principal instruction of the law of civil justice in any age is the avoidance of bloodshed and the adoption of peaceable means of resolving discord, the story of Penelope' Web seems on its face to be the exception that test the rule. And perhaps this is true, at least in the view of Michael Gagarin: It is inevitable that others have arrived at a slightly different, but not conflicting, interpretation of the rights and prerogatives of the parties to this eventual melee. This is the analysis of Michael Gagarin: "[T]he dispute between Odysseus and the suitors seems to validate the rejection of a peaceful settlement recitation in favor of self-help in order to receive one's desired compensation. The dispute itself stems from the conflicting set of rules guiding the behavior of both the suitors and Penelpe in the ambiguous situation of Odysseus's extremely long absence. As legitimate suitors of a woman who has indicated that she will soon select one of them to be her new husband, they have a right to be entertained in Odysseus's home until she makes this decision. In sever respects, however, their behavior in the house is clearly improper, most of them obviously violate the norms of proper treatment of a beggar, and their plans to kill Telemachus is a clear violation of several norms."[77]

Even among subsistence societies there exist strong social strictures against killing, be it by commission or omission, and as often as not these social norms are footed in myth. For example, there has been much misunderstanding about the practices of the ancient Inuit. Among the Inuit, claims of countenanced senilicide are both true and untrue. There was widespread if not general acceptance that the aged individual could decide that he or she could no longer contribute effectively to the collective, and ask that a family member or friend end their life.[78] However Iglulik myth reveals a social antipathy

[77] MICHAEL GAGARIN, EARLY GREEK LAW 104 (1986).
[78] *Id.* at 76-77.

towards the involuntary killing of the elderly, generally provid[ing] [for] some miraculous form of rescue . . . with a cruel and ignominious death for those who abandoned them."[79] Among the Plains Indians, a proportion of the law was driven by religion and other parts were not. For a killing, guilt was determined by the group's supernatural authority. Its punishment was in accord with its taboo or fetish against such acts represented a "pollution" of a universal communal taboo, and the tribe would exile, or "got shed", of the individual so as not to be tainted by the deed.[80]

A lynchpin of all justice systems has been the elevation of truth over untruth. Predictably, numerous primitive myths support the ethos of honesty. A myth of certain Eastern Woodlands Indians fortifies a moral that truth is rewarded.[81] It has sometimes received the anglicized title of The Indian Cinderella. It begins on the shores of a bay, where there lived a great warrior, who had once been among Glooskap's (a Native American mythic hero) helpers. This warrior, who was known as Strong Man, the Invisible, had the power to make himself invisible, a skill he used to sneak among enemies and learn of their plans. The warrior lived with his sister, who could see him when others could not. Many maidens wished to wed this warrior, and as sisters are wont to do, she helped him evaluate the candidates. In the early evening, she would walk to the beach with any girl wishing to wed him. The warrior would approach in his invisible form, and the sister would ask the suitor: "Do you see him?" The girl would invariably respond falsely "Yes," which one might think would dispose of the matter, but the sister would indulge herself with further questions, such as "With what does he draw his sled?",

[79] G. Holm, *Ethnological Sketch of the Angmassalik Eskimos,* 39 MEDDELESER OM GRONLAND 74 et seq. (1914), quoted in E. ADAMSON HOEBEL, *supra* note 12 at 77.
[80] E. ADAMSON HOEBEL, *id.* at 262-63.
[81] THE BOOK OF VIRTUES, *supra* note 72 at 259 et seq.

to which she would receive yet other fabricated replies.[82] The village chief, a widower, had three daughters. The youngest was beautiful, and for this reason the two older sisters were jealous, dressed her in rags, cut her hair, and burned her face with coals, lying to their father that their younger sister had done these things to herself. The two older maidens naturally wanted to win the hand of Strong Wind, and like so many others, they lied that they could see him, and went home disappointed. One day, the youngest patched her tattered clothes and adorned herself in such modest ornaments as she had, and went to visit Strong Wind's sister. "Do you see him?" the sister asked, and the young maiden answered "No." Again she was asked: "Do you see him now?" This time she answered: "Yes, and he is very wonderful." "With what does he draw his sled?" The maiden responded: "With the Rainbow." "Of what is his bowstring?" She answered: "His bowstring is the Milky Way." It was now that Strong Wind's sister knew that the maiden had spoken the truth when she had said that she had seen him, as he had made himself visible after her first truthful answer. The warrior's sister took her to their home and bathed her, and her scars disappeared, her hair grew long and beautiful, and she took the wife's seat next to her new husband. As for the cruel daughters, Strong Wind learned of their acts and turned them into aspen trees. "To this day," the story concludes, "the leaves of the aspen have always trembled, and they shiver in fear at the approach of Strong Wind, in matters not how softly he comes, for they are still mindful of his great power and anger because of their lies and their cruelty to their sister long ago.[83]

From prehistory onward one pole star of man's cultural evolution has been the goal that one should treat another man as one would expected to be treated himself.

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[82] *Id.* at 260 .
[83] THE BOOK OF VIRTUES, *supra* note 72 at 261-62 et seq.

Stated most famously by Jesus of Nazareth in what would become the vernacularized "Golden Rule", one African myth conveys masterfully both the concept and the operative effect. In a folk tale entitled simply Gratitude[84] from the Nupe of the Sudan, a hunter in the bush kills and antelope. Boaji, a civet, asks the hunter for some of the meat, which the hunter gives it. The following day, the hunter encounters an crocodile that is lost and unable to find itsway back to the River Niger. The crocodile offers the hunter five loads of fish if the hunter will show him the way, and the hunter agrees. He ties a thong around the crocodile's foot and leads him to the river's edge. He loosens the thong to permit the crocodile to make good on the bargain, but after bringing up several loads of fish the crocodile snaps and the hunter's foot and drags him under water. Presenting its catch to his brother crocodiles, the hunter explains the circumstances and pleads "Is this fair?" The crocodile relents, somewhat, and agrees to solicit the views of four others. The first is a colored oval mat called an Asubi, floating down the river, and it recounts the experience of Asubi at the hands of man, which is to say, man holds the Asubi in high regards until it is old, at which time man discards it. The Asubi concludes that the crocodile should be free to do with the man as it wishes. The next item consulted, also floating down the river, is an old dress, that reaches the same conclusion as had the Asubi. So too is the advice given by an old mare that has come to the river to drink. Next the hunter and the crocodile meet Boaji, the civet

The civet replies that it cannot properly respond until it is able to understand the entirety of the circumstances that led to the hunter's plight. He has the hunter tie the thong around the crocodile's foot as it had been initially, and then to lead the group back

[84] LEO FROBENIUS AND DOUGLAS B. FOX, AFRICAN GENESIS: FOLK TALES AND MYTHS OF AFRICA 163 (1999).

into the bush to the place where the hunter had first encountered the crocodile. The civet asked of the crocodile if it had been satisfied once it had been led by the foot to the water, and the crocodile replied "No, I was not satisfied. Boaji said: "Good. You punished the hunter for his bad treatment of you by grabbing his foot and dragging him to the sandbank. So now the matter is in order. In order to avoid further quarrels of this kind the hunter must unbind the thong and leave you in the bush." The civet and hunter left, leaving the crocodile lost, hungry and thirsty. The tale concludes: "There comes a time for every man when he is treated as he has treated others."[85]

Long before Samuel D. Warren and Louis D. Brandeis staked claim to one of the earliest expositions of a right to be left alone (or privacy),[86] that right, and a particularly harsh punishment for its violation, were described in a story Acteon, his hounds, and the virgin goddess Diana. Thomas Bullfinch records the how the virgin goddess Diana punished Acteon, the son of King Cadmus, upon Actaeon's inadvertent invasion of her privacy. One day under a warm midday sun when Actaeon, his companions, and his hounds were hunting stag in the mountains, Actaeon announced to the others that their hunting having already brought success enough for one day, they should take their rest. Nearby in a small body of water fed by a stream, Diana, the huntress queen, too took her rest as her nymphs, Crocale, Nephele, Hyale and the rest, attended to her bow, javelin, quiver, clothese and sandals. Actaeon, having left his companions but having no purpose to do so (led thither by his destiny") encounters Diana, whose nymphs, screaming, rush to cover her. Unable to locate her arrows to slay the intruder, Diana utters instead: "No go and tell, if you can, that you have seen Diana unapparrelled." At once stag horns began

[85] *Id.* at 163-170.
[86] Louis D. Brandeis, Samuel D. Warren, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890).

to grow from Actaeon's head, and the rest of his body began to assume the form of a stag. He fled, and although he admired his new speed, when he paused to see his reflection in some water he wept in fear in shame. As he paused, Actaeon was seen by his hounds, Malampus, a Spartan dog, together with Pamphagus, Dorceus, Lelaps, Theron, Nape, Tigris and the others, w ho gave chase. Over cliffs and through gorges Actaeon fled until his dogs closed in. He commanded them: "I am Actaeon; recognize your master." But he was unable to speak any human words, and was felled by his own hounds to the cheers of his hunting companions.[87]

Further to the genre of African folk tales or myths, numerous stories address a polycentric array of human strengths and foibles, and in so doing reveal norms and cultural expectations very similar to those recognized in modern law throughout the world. One Soninke legend, from the Sudan, entitled Gassire's Lute, tells of a mythical Wagadu, "not of stone, not of wood, not of earth[,]" but rather "the strength which lives in the hearts of men[.]"[88] Wagadu would disappear (or "sleep"), and with her that strength in men's hearths, when overwhelmed by man's vanity, falsehood, greed, or dissension, which is to say, four pillars of man's "guilt".[89] Within one of many tales centering upon Wagadu, she appears not as a mythical person but rather as a town. The

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[87] BULFINCH'S, *supra* note 3 at 37. In his poem Adonais Shelley wrote of the story of Actaeon:

> Midst others of less note came one frail form,
> A phantom among men; companionless
> As the last cloud of an expiring storm,
> Whose thunder as its knell; he, as I guess,
> Had gazed on Nature's naked loveliness,
> Actaeon-like, and now he fled astray
> With feble steps o'er the world's wilderness;
> And his own thoughts, along that rugged way,
> Pursued by raging hounds their father and their prey.

Id. at 37. Bulfinch surmises that "[t]he allusion is probably to Shelley himself." *Id.*

[88] LEO FROBENIUS AND DOUGLAS B. FOX, AFRICAN GENESIS: FOLK TALES AND MYTHS OF AFRICA 97 (1999).

[89] *Id.* at 98.

forces of Wagadu are led by Wagana Sako, has gone to war against a rival group, led by Mamadi Sefe Dekote. One night Mamadi Sefe Dekote secretly leaves the battle lines and enters Wagadu, seeking an audience with Wagana Sako's wife and another woman. On the same night, Wagana Sako also leaves the lines and returns to see his wife. As he approaches his hut, he sees and hears the following: As Mamadi Sefe Dekote addresses Wagana Sako's wife, the two of them witness a mouse running along a beam above them. The mouse sees a cat below it, and is so frightened that it falls and is killed by the cat. Mamadi Sefe Dekote says: "Just as the mouse fears the cat, so do we fear your husband." Hearing this, Wagana Sako knows he cannot confront his enemy, and he remounts his horse and leaves, for its is considered "unchivalrous for a Soninke to challenge a man who admitted that he was afraid."[90]

Kabyl was a regionbordering the Mediterranean Sea in what is now Algeria. One Kabyl folk tale, the Jackal and Farmer,[91] tells a story of the risks of attempting to molest one into giving up the just deserts of his labor.[92] It is the story of a farmer who daily plowed his land with two oxen. In a succession of days, as the farmer plows he is confronted by a lion who states: "Give me one of your two oxen or I'll kill you and both of them." For three or more encounters the farmer surrenders an ox, and proceeds to buy another in order to continue his farming, but with the same result. One day, an observant jackal engages the farmer in a conversation in which the farmer recites the dilemma of which the jackal is already aware. The jackal tells the farmer that he will rid the farmer of the lion upon the promise that the farmer will give the jackal a sheep, and the farmer readily agreed. The jackal proposes to the farmer agree to a ruse whereby the lion,

[90] *Id*. at 118-19.
[91] *Id.* at 89.
[92] The verb "strong arm" did not seem to fit this anthropomorphic tale.

thinking that a disguised voice of the jackal is that of God, permits the farmer to strike and kill it with a hatchet. Preparing to make good on his bargain with the jackal, the farmer kills a ram and places it in a basket he takes to the fields. His wife suggests that it is not the fairest of deals that the farmer has struck with the jackal, and the two agree to also place in the basket the farmer's hound. The following day, the basket is placed near the field in which the farmer plows, and near the end of the day the jackal arrives to claim his prize. It opens the basket not to find the ram alone, but rather the dog together with the ram, and the dog chases the jackal away. Bringing home the basket and the ram, the farmer declares to his wife: "The jackal has not called for his ram. Now we can eat it for ourselves."[93]

A complete survey of African myth would likely reveal that its agrarian cultures thought as disparagingly of jackals as they might of hyenas. So it would seem, at least in this, another folk tale from the Kabyl, titled The Jackal and the Lambs.[94] In this story, a grotto serves as the home of a ewe and her two lambs. At the end of a day of grazing, the ewe returns to the home with hay for here lambs, and uses this password to signal to the lambs that they may safely open the door: "The jug between the legs (the udder) and the hay between the horns." A jackal observes this, and tries to use the same password to gain entrance, but the lambs, recognizing that his voice is not that of the ewe, refuse him entrance. The jackal consults with a wise man, who tells him that to change his voice to be as soft as the ewe's, he must lie on an ant heap, and let the ants run in and out of his mouth, permitting the ants to eat away enough of his throat to change his voice. The jackal does so, and the following day his trick works, and he enters the grotto and

[93] *Id.* at 90-91.
[94] LEO FROBENIUS AND DOUGLAS B. FOX, AFRICAN GENESIS: FOLK TALES AND MYTHS OF AFRICA 77 (1999).

devours the lambs. The ewe quickly detects the jackal's paw in this matter, and when she next sees him, she throws the bundle of hay between her horns at the jackal, burying him. She then alerts the shepherd as to the jackal's wrong, and that it can be found buried beneath the hay, whereupon the shepherd takes his crook and beats the animal to death.[95]

If a central role of myth is to advance a cultural ideation that explains the external world to its adherents, it follows that this explanation will provide that although one may wish and behave in such a manner that fairness, justice, comfort and prosperity ought to prevail, from time to time, or perhaps even as often as not, they will not. This, again, is part and parcel of the rationalizing, mediating role of myth. An East African tale of Fire and Water speaks of the "eternal struggle between truth and falsehood."[96] The tale recounts Truth, Falsehood, Fire and Water journeying together, only to discover a herd of cattle. They decide it will be just to divide the herd into equal shares, but this is not enough for the greedy falsehood. He seeks to set his fellow travelers upon themselves, first turning to Water and claiming that Fire intends to burn all nearby vegetation, driving the cattle away, and advises Water to extinguish the fire right away. Water unwisely heeds Falsehood's counsel and he does so. The Falsehood approaches Truth and claims that on the basis of what Water has done, he is not to be trusted, and that he and Truth should flee with all of the cattle and head into the mountains. Truth is fooled, and agrees. As Truth and Falshood take the cattle uphill, Water cannot follow. Atop the mountain, Falsehood reveals his mendacity, claims Truth as his servant. Truth defies him and the two fight to the accompaniment of thunder, but neither can destroy the other. The both

[95] *Id.* at 78-79.
[96] For this tale, *see generally* THE BOOK OF VIRTUES, *supra* note 72 at 277-79.

call in Wind to decide the conflict, but Wind responds that it is not for him to do. In language that conveys a clear normative preference for Truth, Wind states:

> Truth and Falsehood are destined to struggle. Sometimes Truth will win but other times Falsehood will win, and then Truth must rise up and fight again. Until the end of the world. Truth must battle Falsehood, and must never rest or let down his guard, or he will be finished once and for all.[97]

Another Dinka legend reveals with literary flair the mediating role myth can play for a person or a people who must see some reason in their confrontation with hardship or injustice. The Dinka rationalize injustice through the myth of the Departed Divinity. As characterized by Clifford Geertz, in this less homiletic than descriptive account, the Sky, wherein dwells the Divinity, and the earth, were once connected by a rope.[98] There was o death or suffering, and man and woman were able to subsist on a single grain of millet each day. Eventually greed overtook the woman,[99] and planted more than her aliquot share, but in her haste, her hoe struck Divinity. Divinity thereafter severed the rope and retreated to the sky, leaving man to the evil and injustice in which he suffers to this day.[100] As can be recognized, without the myth of the Departed Divinity, the Dinka would be hard pressed to find any "moral coherence" in a world of suffering, injustice and iniquity.[101]

Lest children be left out of the a cultural message that life can be harsh and unfair, many folk songs and folk games include what might be described as truly appalling results. As put by one scholar, many children's games reveal "something of the stern,

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[97] *Id.* at 279.
[98] *See generally* discussion in GEERTZ, *supra* note at 107.
[99] Geertz points out the obvious similarities to the Creation Story in the Judeo-Christian Book of Genesis.
[100] GEERTZ, *supra* note at *id.*.
[101] *Id.* at 108.

hard rules of society in an early day[.]"[102] For example, in a Swiss version of the game-song of "Judge and Jury", a thief who has fled from capture is caught, and is brought back to the king, who orders his execution by beheading.[103] Another example is a German game-song, carried out in verse and pantomime, a young girl[104] would be sitting on a stone in the center of the game, "combing her golden hair[.]" Her assailant would approach undetected, until such time as she noticed him, and saw him to be her "wicked brother", Karl. As she begins to weep he pulls a make believe knife and stabs her, and then flees. Some in the circle rush to her aid. Her good brother, Benjamin, then appears, lifts her in his arms, and carries her from the circle.[105] Several variations on this game-song exist, but in none of them are the good brother, family members, or others able to protect her or for that matter apprehend the villain.[106]

IV. CONCLUSION

At a formal level, modern law enjoys many similarities with the myths of antiquity. Indeed, Professors Goodrich and Hachamovitch suggest that the law is a "presence which implies the totality of its history, but this implication is not logical or

[102] Paul G. Brewster, Traces of Ancient Germanic Law in a German Game-Song, at 1 ALISON DUNDEES RENTELN, ALAN DUNDES, FOLK LAW 408 (1994).
[103] *Id.*
[104] As in this era boys and girls did not play together, at a gathering of boys the part would be played by a boy.
[105] Paul G. Brewster, *Traces of Ancient Germanic Law in a German Game-Song,* at 1 ALISON DUNDEES RENTELN, ALAN DUNDES, FOLK LAW 409 (1994).
[106] *Id.* at 410.

historical; rather it is traditional and mythic." [107] Law has also been plausibly described as magical, i.e., it represents a societal the effects of which are imposed magically, through "a method of supporting endeavor to control the environment and social relationships by means where the connection of effort with achievement cannot be measured."[108] And so it is perhaps arbitrarily dichotomous to inquire as to the effect of myth on primitive and modern justice, when myth and justice are so closely interrelated.

However it can be seen that myth and fable have performed a role that differs from that played by religion, and it did so millennia before organized faith. In terms of timing, myths and fables were adopted as socio-cultural interpretive means at times when their appurtenant cultures were pre-theistic or pan-theistic. Myth and fable also served the smaller and more insular constituencies of clans and tribes, while a more fully developed society was the typical social predicate for organized faith.

Of greatest importance, myth and fable, unlike religion, have always enjoyed the malleability that would permit it to change, if only incrementally, to respond to the new externalities that might face a social group. If after untold years of fruitful existence in a region of deciduous forests changes in climate made the availability of game less predictable, then mythic figures were at the ready to mold themselves into forms with personal traits that were displeased with the affected adherents. And if guiding cultural tenets of honesty (or generosity, or other estimable characteristics) were sometimes put to the test by the injustice or greed of others, myth or fable could render such unpredictable results susceptible of rationalization, even if not agreeable.

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[107] P. Goodrich, Y. Hachamovitch, *Time Ouof Mind: An Introduction to the Semiotics of Common Law,* in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 174 (Peter Fitzpatrick, ed.)(Pluto Press:Durham;Duke University Press 1991).

[108] M. Gluckman, *Magic, Sorery and Witchcraft,* in A DICTIONARY OF SOCIOLOGY 110-11 (London:Routledge & Kegan Paul 1968).

None of this is to suggest that myth and fable hold a monopoly on the social self-image of any particular culture, or on the instruction as to behavior that should be or must be. There is no doubt that religion's sacred texts include copious behavioral instruction. And yet myth cannot be displaced as a fundamental and inextirpatable source of social history, and as such, an ongoing cultural influence throughout the world. Myth gave to primitive and ancient man at least as much to hope as to fear, which is, after all, the function of progressive modern justice systems.