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Abstract

It is not the history but the study of law that is endless; and it is not the pleasure but the melancholy of a life in law that is identified by Goodrich in his recent historical analyses of the institutions of the common law. The two books seem to belong together - the concluding chapter of *Oedipus Lex* is in part identical to the introductory chapter of *Law in the Courts of Love* - as if in a series (by different publishers) that constitute a single case study of the pathology of contemporary law. *Oedipus Lex* can thus be viewed as describing a type of psychoanalytic methodology for interpreting the history and texts of social institutions, while *Law in the Courts of Love* (in which psychoanalysis is discussed only in passing) highlights in detail that which has been repressed and forgotten in the institutions of law. In another sense, however, *Law in the Courts of Love* is the primary text of the two books, as Goodrich's concluding evaluation of the failures of critical legal theory recommends the radical historical and historiographical reflection that is exemplified in *Oedipus Lex*. Such 'orderings,' neither of which is misleading, are really beside the point, since each of Goodrich's studies stands alone as a sustained effort to reveal the unconscious of law; for that reason alone, the books can be usefully read together (in any order).

Law's Own Repressed Memory Syndrome

PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW*

PETER GOODRICH, *LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES*

David S. Caudill

For Alix [Strachey], psychoanalysis shared with ... legal history the attraction that it was intricate, arcane, and extremely time-consuming. (Meisel & Kendrick 1985:7)

It is not the history but the study of law that is endless; and it is not the pleasure but the melancholy of a life in law that is identified by Goodrich in his recent historical analyses of the institutions of the common law. The two books seem to belong together — the concluding chapter of *Oedipus Lex* is in part identical to the introductory chapter of *Law in the Courts of Love* — as if in a series (by different publishers) that constitute a single case study of the pathology of contemporary law. *Oedipus Lex* can thus be viewed as describing a type of psychoanalytic methodology for interpreting the history and texts of social institutions, while *Law in the Courts of Love* (in which psychoanalysis is discussed only in passing) highlights in detail that which has been repressed and forgotten in the institutions of law. In another sense, however, *Law in the Courts of Love* is the primary text of the two books, as Goodrich's concluding evaluation of the failures of critical legal theory recommends the radical historical and historiographical reflection that is exemplified in *Oedipus Lex*. Such 'order-

ings,' neither of which is misleading, are really beside the point, since each of Goodrich's studies stands alone as a sustained effort to reveal the unconscious of law; for that reason alone, the books can be usefully read together (in any order).

Psychoanalytic jurisprudence, like psychoanalytic clinical practice, seems to be passing into history — its influence in mainstream legal theory and practice is nowadays minimal. Nevertheless, postmodern legal theorists, informed by a tradition of French critical theory that includes Jacques Lacan, continually revisit Freudian themes and rediscover there the promise of analyzing the unconscious effects of language, including institutional discourse. Regarding that enterprise, Goodrich's work provides a unique and compelling example of the potential of social psychoanalysis for critics of legal processes and institutions.

To speak of the relation of law and *its* unconscious, or of *social* (rather than individual, or 'clinical') psychoanalysis, is to imply a collective or institutional unconscious that is constituted in the history of law. In his attempt to identify the 'materials' that are both hidden (repressed, forgotten, feared, excluded) and also at work (effective, ever-present, 'slipping' out, returning), Goodrich persistently traces the early theory and history of *images* - traumatic images that were and are feared as powerful, evil, false, idolatrous, divisive, or foreign, as well as images that were and are not recognised as such, law's own associations and figures, the return of the repressed. As a system of truth, law is against images even while it is, in its texts and ceremonies, in its representations and its masks, *the* repository of the images of modern culture.

I

Does the subject [in psychoanalysis] not become engaged in an ever-growing dispossession of that being of his, concerning which ... he ends up by recognizing that this being has never been anything more than his construct in the Imaginary and that this construct disappoints all of his certitudes? (Lacan 1968:11)

When practising psychoanalysts gather at meetings and conferences to hear a 'clinical case presentation,' the first order of business — as in any initial consultation with an analyst (the patient in the chair and not yet on the couch) — is to recognize the so-called 'presenting symptoms.' Likewise, *Oedipus Lex* begins with a list of symptoms presented by those in law: not just by students of law, lawyers, and judges, but by the corporate commu-

nity of lawyers, including their institutions and texts, their collective imagery, emblems, dress and discourse. The symptoms — a certain dullness or emptiness, a melancholic and mournful sense of loss — are clearest to those on the outside: to non-lawyers who see law as a plague, to initiates who feel themselves being institutionalized, to novelists (e.g., Dickens) who see the separation of law and justice (pp. 1-5). On the inside, however, legal discourse and texts form a citadel of defense mechanisms — projections of law as reason, source, unity, norm, and stability; repression and denial of law's past, of its history of multiplicities, justice, women, aliens, art, ethics, subjectivities, violence, desire, and failures; repetition and forgetfulness both in customary practices and in the rhetoric (or antirrhetic) of denunciation, defense, and exclusion; phantasm and delirium. The unconscious or history of law, the unofficial and hidden realm of loss and exclusion, must therefore be read in the fragments, slips, and condensations of desire that lie behind or at the margins of the official history of law as rule, legitimacy, and lineage (pp. 33-39).

Goodrich's genealogical method is an attempt to read the institution of law against itself by highlighting the images, figures, rites, myths, and emotions that are suppressed in the everyday doctrinal and scientific discourse of law (pp.13, 29). The project requires an appreciation of why law is threatened by genealogy and resistant to recollection. For example, the figure of femininity, the image of woman, which cannot be excluded but only exiled within, variously represents uncertainty, doubt, nature, passion, creativity and death — in short, another and a competing jurisdiction (pp. 37-38). Moreover, we must appreciate the rhetoric that denies rhetoric, that excludes disturbing images (the foreign, the unclean, the idolaters, the seductive), that falsely claims antiquity, and that identifies and sets boundaries on national community.

Without an appreciation of those essentially antirrhetic rhetorical structures and their persistent semiotic force, the critique of contemporary legal forms, whether in ethical, feminist, literary, or sociological terms, is doomed to the status of a repetitious and ineffective play upon institutional surfaces that history and dogma will soon consume and forget (p.45).

Popular associations of rhetoric with a dialectic, communitarian dialogue toward ethical progress will be challenged by Goodrich's exposition of the antagonistic and possessive strategies of law against the faithless, the alien, the indecent — all threats to law's identificatory and originary myths (pp. 104-106). In the spirit of Irigaray's (1992) arguments for legal protections

of feminine difference, Goodrich demonstrates that as the image of man is associated with law and reason, the image of woman is associated with plurality, deceit, and difference. To hold these images in place, law must forget the history of women, including women lawgivers and monarchs, as well as feminine figures of virtue, truth and wisdom — goddesses (pp. 149-158). And yet the law takes on feminine characteristics, which remain as anomalies and reappear as conscience, emotion, passion or desire (p. 172). Each slip or symptom points to another face of the law, an 'other' jurisdiction and another reason repressed in fear. Goodrich offers examples — old and recent cases — that challenge the image of law as unified and stable, and concludes by suggesting that in the marginalized history of the common law there are vestiges of other jurisdictions — courts of conscience, spiritual courts — that betray law's plurality, fragmentation, and poetics.

In that unofficial or counter-history, Goodrich recovers both a history of and a basis for resistance. *Law in the Courts of Love*, which appeared after *Oedipus Lex*, specifies several such lost episodes in an effort to reinvigorate critical legal theory.

II

The question is how often and in connection with which works can we expect of literature moral edification. My claim is that the 'lesser', not the 'great', works have greater moral significance (Nehemas 1996:31)

To write against the law, against closure and rules, *Law in the Courts of Love* turns to minor jurisprudences, to repressed and forgotten jurisdictions and institutions that, when revealed, threaten to interrupt contemporary legal institutions and force a recognition of 'the racial, sexual and cultural limitations of its phantasms, of its laws' (p.8). (Recall Deleuze and Guattari's (1986:16-19) use of the term 'minor literature' to identify destabilizing and revolutionary writing.) Law's unconscious is constituted by forgetting and excluding - - in the name of reason, science, law - - the images of justice, ethics, spirit, meaning, and virtue that pervaded earlier plural and diverse institutions.

The twelfth century courts of love, associated with jurisdiction over emotion, fidelity, and relationships, and presided over by women, offer an image of feminine justice to challenge conventional legal history. Goodrich acknowledges the historiographical controversy, however, over whether such courts existed, whether their place belongs to romantic fiction or

amusing fantasies, rather than to the history of law (pp 35-36). Stories about courts of love seem less than credible, lacking in hard evidence, but Goodrich raises the question of the meaning of denial of their existence: Can women produce law? Is reality so different from the imaginary realm of fiction? Again, following Irigaray (1992), Goodrich sees the potential of empowering the feminine by associating law with love — with relationships, temporality, the personal, actual persons, bodies, desire, and intimacy (pp 57-58). Goodrich refers as well to the work of Drucilla Cornell (1995) in arguing that 'sexuate rights must be predicated upon the recognition of a novel jurisdiction and object of law' (p. 61).

The organization of legal training in Great Britain exemplifies, for Goodrich, the effort to visualize the profession as an ancient religious order, with its own emblems and symbols, rituals and food, clothing and study, fellowship and myth (pp. 72-94). Denying its mythological dimension (by seeking an origin in natural laws) and its own images (by claiming to be a discourse against images), a literature develops that denies its literary qualities — moments of invention and fiction, indeterminacy and contingency, are repressed (p.112). Here Goodrich harshly attacks Stanley Fish's (1992) notion that law is an autonomous practice that must forget its history (pp. 114-121) — Fish's amnesia and faith, his commitment to forget law's philosophical and literary qualities, exemplify the pathology of the common law, its masculine methodology and its phantasm of certitude.

The genre of law cannot avoid a mixture of sources and styles, a dependence upon other loves and upon the wisdom and the desire of other disciplines. Amnesia as to the diverse disciplinary sources, contexts and motives of legal practice can no more establish an autonomy of law than a text can maintain its boundaries within the exigencies of law's literary practices, canon or precedent

The claim to the unity of judgement or to the closure of law at best represents a fiction and at worst a symptom of a confused forgetting or deeply unhappy repression (p. 137).

The crisis of law is that it is simply what lawyers do, that it is self-founding, and that it has no legitimacy in nature, justice, contract, ethics, or rights (pp. 162-164). Estranged from ethical practice, law dies along with the art of legal interpretation. Goodrich is not trying to reinvoke universal law, but trying to recognize the law of indecision, of failure, of life, 'which marks all closure as provisional' (p. 165). Thus *Law in the Courts of Love*, like *Oedipus Lex*, begins with a meditation on law as a disabling and

estranging profession rendered lifeless by its closure, its mundane sociality masking its death.

Goodrich's implied critique of legal realism leads easily into his reassessment of critical legal theory in his last chapter. As to realism, which disclosed the inevitable political aspect of law, it may seem curious that Goodrich would be so dismissive. And yet Goodrich insists that law is not 'just politics' in any immediate sense — law has a history of style and sensibilities and aesthetics that forms the unconscious of its daily politics. Critical Legal Studies, a radical realist movement that failed as a radical political movement, succeeded only as a fashionable academic and theoretical orientation — the introduction of European philosophical terminology and themes, understandable only to a limited audience, did not threaten the legal establishment. Nor were the 'crits' outsiders — most were highly-paid academics, not unloved, and they tended to function like media personalities. Rather than oppositional or subversive figures, they were welcomed under the umbrella of legal theory — an image of dry respectability, phallic not feminine (pp. 195-196) — and into the introverted and uni-disciplinary world of American law reviews.

Goodrich does not, however, paint with too broad a brush — Critical Legal Studies was never homogeneous, and the movement actually did constitute a threat in terms of its politics of writing — the autobiographical aspects of radical feminism and critical race theory, the awareness that a law of texts accompanies the texts of law, and a focus on grammatology, modes of discourse, and mechanisms of transmission (p. 218). Goodrich sees hope for a critique of the tradition and discipline of law, a re-writing of the history of law in terms of its homosociality, its symbolic structures, its unquestioned grids and schemata, its rhetorical forms.

III

Here we return to the genealogical method of *Oedipus Lex*, and the circular aspect of these two books — *Oedipus Lex* ends with the call to rediscover lost jurisdictions, and *Law in the Courts of Love* offers examples from law's history; but that historical inquiry ends with a critique of realist anti-history and a call for a new critical-historical method that is theorized in *Oedipus Lex*. The point of the exercise, clearly, is to find a place or space for critical reflection on contemporary legal institutions and processes, and for some leverage that is unavailable both in current critical legal methodology and in the closed universe of the repressive doctrinal

tradition of mainstream jurisprudence. Given those alternatives, Goodrich's work deserves more attention than it will likely receive in the legal academy. Nevertheless, for those enamored of Irigaray's call for a rewriting of law to protect feminine difference, or Cornell's notion that sexuality requires a novel jurisdiction and juridical object, or any other thinker who has identified the lack of diversity in law, Goodrich has begun the hard work of re-introducing the repressed plurality, bodies, desire, ethics, and justice that were and are already there, in the texts of law's unconscious.

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