

OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW by  
Peter Goodrich, Berkeley, University of California Press, 1995,  
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At the end of this dense and impressively researched book there is a reference to the 12th century jurist Placentinus, or more particularly to his *Sermo de Legibus*, his "poetical sermon" on the laws. This polemic against the glossatorial tradition is presented by Goodrich as exemplary for present day critics of law. Goodrich is impressed, for one thing, by Placentinus's indifference to his audience.

The poetical sermon of the medieval jurist makes no effort to persuade and is quite indifferent to communication. (p247)

It must be said at this point that if these qualities be praiseworthy then Goodrich himself, on the strength of this book, deserves high praise indeed. More to the point, Goodrich promotes the "poetical sermon" as a genre which has the ability to resist the soullessness of modern law and to encourage each one of us to "think for ourselves". This admirable injunction being only remarkable for coming at the conclusion of a book which in many other ways appears to stand opposed to the philosophical tradition which takes "Dare to Think" as its motto.

That this book should end so limply is one of its puzzles. Another is why a book that is crammed with erudition, and whose values seem so right (at least to us), should nonetheless fail — not only to charm but at times to instruct. And instruction is a goal the author has in mind. Law teachers (and no doubt others) are often worried about the point of their work. Will it change anything? Is the teacher or scholar implicated in the very practices which he or she criticises? Goodrich's response to these anxieties, if we understand him, is not to point to any particular content or programme for reform but, rather, to adopt a style, an approach to law which opposes and subverts all the better for being fragmentary and obscure.

It will be no surprise to learn that *Oedipus Lex* draws upon Freudian psychoanalysis; and it also borrows from approaches associated with the writings of Foucault and Derrida. But as far as we can see this learning is used simply as authority for such insights as the following: the repressed or the supplement is always destined to return; a proper analysis of repression starts with a genealogy (a history) of its origins; an interest in the marginal, the obscure, the fragmentary, is a way of recovering what has been excluded from and thus lost to contemporary law; inquiry should be directed to what is different or other to present-day law — the feminine, the foreign, the contingent, the emotional (for another list see p37). Here is the content of law's positive or institutional unconscious, an unconscious which genealogical method can lay bare (a method discussed most expansively at p25ff).

It's more through historical analysis that Goodrich is able to bear out the different traditions in law. In chapters three and four there are many examples from classical authors that remind us, in startling fashion, how enduring was the labour to establish our legal tradition. Chapter five informs us of the inferior status of women in former days, whereas chapter six brings us to a reading of that female icon Justitia. Legal writers of the seventeenth century worked with other notions of the common law, for instance, the view that it

expresses the genius of the English people. This syncretic view of the relationship of law and society could not seriously be held today.

The most interesting chapter in the book (possibly because it is the most accessible) is chapter seven. Here Goodrich provides three case histories, three legal anomalies, to do with the recovery of damages in tort, the postal rule in contract and Crown immunity from actions for contempt of court. As these doctrines are familiar to most lawyers this is as good a place as any to ask just what Goodrich's approach has to offer to legal analysis.

It is Goodrich's claim that anomalies in the legal texts (that is, judgments) can betray an unconscious reservoir of connotations, meanings and repressed desires, which play an important role in legal judgment. For example, an investigation of the figures of speech adopted by the judges may reveal an unconsciousness; an unconsciousness which can be attributed to the legal institutions, in as much as it reveals matters which are not expressly willed by, nor peculiar to, individual judges.

The first example dealt with in chapter seven is based on the English case of *Attia v British Gas*; a case which appears to stand outside the orthodox rules which govern recovery for nervous shock. Here the plaintiff based her claim upon psychiatric harm induced, not by harm to another person but by damage to her house. Goodrich cleverly shows how the judgment reveals a shift in the way in which the facts are described. The harm which befalls the plaintiff comes to be seen as damage to her *home* rather than to her house. By way of this shift the court can draw upon a category with many positive psychoanalytic connotations. For the home is a site of emotional security, of maternal care and the place of our forefathers. It is a place, in other words, which if burnt down might quite reasonably bring on nervous shock in an on-looking owner. Readers of Freud's work will also know that what is not at home ("unheimlich" in German) can become uncanny, therefore captive to uncomfortable emotions and feelings.

The second example takes up the postal rule in contract law and the longstanding problem that this rule stands in opposition to the prevailing idea that a contract should be a meeting of minds. For the postal rule can of course work to bind an offeror before actual communication of the acceptance has taken place. The rule in Goodrich's hands turns out to be an allegory for the privileged position given by the common law to women in marriage contracts. Women it was thought should benefit from the gap in time between posting and receipt of acceptance as to do otherwise would leave them unprotected against unscrupulous suitors. This makes the postal rule an ironic exception to the way women were generally treated by contract law. For once the marriage contract was made, women lacked capacity to make contracts with outsiders and arrangements made within the home had no legal validity.

The sorry case of *M v Home Office* is Goodrich's third example. Here high-handed action by the Home Office resulted in the deportation (and presumed death) of M before there could be judicial review of his refugee claim. The particular legal issue in the case concerned the ability of the courts to enforce prerogative orders against the Home Office. Goodrich has no trouble contrasting the shabby and ultimately disastrous treatment of M with the pious rhetoric in the case concerning the special relationship of "trust" between the executive and the judiciary. But the main points which Goodrich extracts from this example appear to be first, that legal fictions (in this case the fiction

of the wholeness of the body of the law) can have real consequences and, second, that the synecdoche, which identifies the law with the law of the *land*, relies upon a longstanding and repressed fear of all that is foreign and strange.

The first thing to be said in comment is that Goodrich's examples deserve to be read, since our outline cannot do justice to the richness of his discussion. Speaking generally, there is much in Goodrich's approach which makes good sense. There will always be more going on in a legal judgment than appears on the surface of the law report. A rhetorical or psychoanalytic approach would seem well-placed to recover ideas and interests which cannot be articulated expressly in legal terms. And who could be against giving the silenced a voice or against confronting the law with its repressed desires and prejudices?

But granted all of the above, whether a *particular* analysis of a case or a legal doctrine is insightful or useful depends on whether the analyst is able to connect the unconscious meanings glimpsed through the text with the decision. For just as a patient will only be helped by an interpretation of the past which he or she can accept, the social critic must convince the audience that the meanings recovered are of contemporary relevance. Goodrich may make other points along the way (about legal history, for instance) but his discussion of the cases in chapter seven will only work if he can show that the unconscious meanings which he recovers play some role in motivating the decision.

With this "test" in mind, the discussion of *Attia v British Gas* is a nice example of the important role which a figure of speech may play in legal reasoning. (But how large a role, and whether this case is of any significance at all, are other matters.) The other two examples seem less successful. As Goodrich admits, there is no single explanation for the postal rule (p204). He asserts that the spiritual exemplar for contract law has always been the marriage contract, which is unorthodox and, at the least, requires more effort in demonstration. (And we ask in passing, whether an illustration which, in the hands of a particular judge works against women, really illustrates an unconscious desire to protect women, p207.) Finally, our deep-seated fear of foreigners is unfortunately real enough. But it seems too pervasive a fear to explain *M v Home Office*. It could after all explain *every* decision dealing with non-citizens which doesn't find in their favour.

To return to the book in general. It succeeds as a learned account of a number of writers, approaches, ideas which have to date failed to be incorporated into the common law tradition. Granted this shows that law can be thought otherwise. But this kind of analysis on its own doesn't establish that law *ought* to be thought otherwise or more to the point that it now can be *made* otherwise. For one does not have to be in the grip of an outdated philosophy of history to believe that not everything thought can now be achieved.

Negative remarks such as these may only show that we are not members of the audience which this book seeks to address. Time will tell if this anticipated audience grows in numbers.

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