



Summer 6-1-1997

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Recommended Citation

Peter Goodrich, *Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law*, 54 Wash. & Lee L. Rev. 1035 (1997).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss3/6>

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Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law

Peter Goodrich*

And if for him the law guarantees an increment of pleasure, and power, it would be good to uncover what this implies about his desire — *he seems to get more sexual satisfaction from making laws than love.*¹

There is evidence that Freud hesitated over the possibility of studying law before he eventually undertook a career in medicine. One might say that the profession of law was repressed in favor of clinical science, and certainly the theme of law and its transgression constantly returns in Freud's work and was to become a foundational focus of the new science of psychoanalysis.² Although positive law was never an explicit or conscious object of Freudian psychoanalysis, it is no exaggeration to observe that his work is structured by conflicts between desire and law, the pleasure principle and the reality principle, and at its most extreme, sexuality and death — *eros* and *thanatos*.³ The jurisprudential themes of authority and prohibition, of desire and transgression, litter his substantive elaborations of the workings of the human psyche. The legalism of Freudian thought is nowhere more evident than in his interpretations of the origins of the social order in the transgression of the authority or law of the father. This well known myth is elaborated in the story of Oedipus, the narrative of a son who kills his father and marries his mother. It is also elaborated in terms of the social anthropology of *Totem and Taboo*, the prehistorical story of the murder of a tribal father by jealous sons, which leads to the genesis of law.

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1. LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN* 38-39 (1985).

2. See 1 ERNEST JONES, *THE LIFE AND WORK OF SIGMUND FREUD* 27 (1953). This reference is brilliantly and amusingly interpolated in Charles Yablon, *Freud as Law Professor: An Alternative History*, 16 *CARDOZO L. REV.* 1439 (1995).

3. See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 48-50, 65-71 (1961) (addressing the antinomy between life and death at the level of the social).

The conflict of desire and law, which Freud found exemplified in the story of Oedipus, can act as a guiding thread to the study of a psychoanalytic theory of law. Sophocles' story of King Oedipus, who was the son of Laius, King of Thebes, was itself, according to Freud, probably a reworking of a dream.⁴ Oedipus was exposed as an infant because an oracle had warned Laius that he would be killed by his yet unborn child. The child was rescued and grew up in an alien court. Uncertain of his own origins, he too questioned the oracle, who warned him to stay away from his home because he was destined to murder his father and marry his mother. While intending to travel away from his home, Oedipus encountered King Laius and in a sudden quarrel killed him. Oedipus then went to Thebes where he solved the riddle of the Sphinx and thereby liberated the city from plague and pestilence. The grateful populace made him king, and he married Jocasta his mother. A plague which the oracle reported would only end when the murderer of Laius had been driven from the land eventually interrupted Oedipus' peaceful and honorable reign. When he discovers that he is himself the unwitting murderer, Oedipus blinds himself and forsakes his home. The oracle has been fulfilled.

The Interpretation of Dreams offers the fullest discussion of the myth of Oedipus, explaining the myth as a "typical dream" in which the subject expresses the desire to kill his father even though his father is dead.⁵ Freud interprets the story of Oedipus first and most forcefully in terms of the universal structure of a child's relation to its parents:

His destiny moves us only because it might have been ours While the poet, as he unravels the past, brings to light the guilt of Oedipus, he is at the same time compelling us to recognize our own inner minds, in which those same impulses, though suppressed, are still to be found.⁶

Freud argues that the individual psyche forms as a result of the Oedipal crisis or conflict. The myth is a story of the foundation of subjectivity through an originary repression. The son learns to orient and limit his desire by recognizing the father's authority through his interdiction or prohibition of the

4. SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 297 (1971).

5. FREUD, *supra* note 4, at 293-94 (discussing the case of a young man who was unable to go out into the street because he was tortured by the fear that he would kill everyone he met). "The analysis . . . showed that the basis of this [obsessional neurosis] was an impulse to murder his somewhat over-severe father." *Id.* at 294; *see also* SIGMUND FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* 109 (1942) (analyzing the case of a physician who unwittingly gives his ancient and ailing father a lethal injection, a mistake which Freud perceives to be dictated in part by "unconscious hostility" to his father).

6. FREUD, *supra* note 4, at 296.

son's desire for his mother. In other words, through recognition of what Lacan terms the law of father, the subject enters the social or, for Lacan, the symbolic: "If Freud insisted on the Oedipus complex . . . it is obviously because for him the Law is there *ab origine* [from the beginning]." ⁷ The Oedipus complex presents the initial encounter of the subject with an absolute limit, an authority or law. The myth can thus be taken to exemplify the subjective structure of recognition of authority and obedience to, or (neurotic) revolt against, law. In this sense, the son embodies the conflict that everyone faces between a remorseful obedience to law and transgression of it. At the level of the subject, the Oedipal structure is one of conflict between desire and law. It should be noted, for that reason, that it not only banishes desire to the unconscious, but also defines law by reference to its prohibition of desire or, more simply, to an unconscious erotic drive. To kill your father or sleep with your mother is a consciously incomprehensible or simply unthinkable act.

If the story of Oedipus can act as an allegory for the human relation to authority, it can only explicitly do so by virtue of the power of psychoanalytic interpretation. Freud interprets the story as a figure or symptom of an unconscious structure which is made available only by virtue of the interpretative techniques of psychoanalysis, specifically the hermeneutics developed through the interpretation of dreams, "the royal road to the unconscious." These techniques of interpretation or hermeneutics present the second legally significant feature of the Freudian analysis of the story of Oedipus. Freud reads the story as a series of riddles to decipher. The story is ultimately resolved by the riddle of who had murdered Laius a long time ago:

But he, where is he? Where shall now be read
The fading record of this ancient guilt?⁸

The textual metaphor of psyche and history is not accidental. Psychoanalysis provides a method of symptomatic reconstruction of biographical and historical clues. It treats the individual subject as a text to be interpreted and reconstructed according to an unconscious biographical structure which is manifest only in repetitions, slips, and other apparently accidental figures or clues. Psychoanalysis then arguably provides a powerful method of analysis of texts and of psyche and culture as texts.⁹ This hermeneutics at a minimum

7. JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK III: THE PSYCHOSSES*, 1955-56, at 83 (1993). "This fundamental law is simply a law of symbolization. This is what the Oedipus complex means." *Id.*

8. FREUD, *supra* note 4, at 295 (citing SOPHOCLES, *OEDIPUS REX* (5th Cen. B.C.)).

9. See JACQUES LACAN, *The Function and Field of Speech and Language in Psychoanalysis*, in *ÉCRITS: A SELECTION* 30, 34-38, 77-107 (1977) [hereinafter *ÉCRITS*] (elabo-

provides an alternative technique for interpreting law. Whether analyzed in terms of a judicial subject or author, or in terms of an institutional or cultural subject that can be treated as if it were an author, psychoanalysis offers a method for reading legal texts in the symptomatic terms of their latent meanings.

The third and final feature of Freud's retelling of the story of Oedipus also relates to the metaphor of the psyche as text and concerns the tragic or fated nature of the narrative. The story of Oedipus is the story of an unconscious law, the narrative of a destiny or fate that determines the events of the subject's life independently of any subjective or merely human will. Freud reinterprets Sophocles' portrayal of the triumph of divine will over human impotence in terms of the unconscious determination of a subject's acts. At the heart of the human subject is a phantasm of identity, an imagination of persona or of an institutional role. In Freudian terms, this phantasm is fated in the sense of being initially inscribed by the institution of the family, and it is precisely the law of family that the myth of Oedipus most dramatically depicts. For the subject to know who he is, he must know his genealogical place or where it is that he comes from in the social order. Only through knowing his place — his destiny — can the subject avoid the fate of Oedipus. Simply put, the social order is an order or law of prescribed places that the phantasm of an identity, a place, and a role in the social inculcates in the subject. That inculcation attaches to or places the subject in relation to a social structure that is neither directly evident to analysis nor necessarily conscious to the subject who "acts out" the unconscious dictates of birth and of early experience. Psychoanalysis thus suggests that we study the legal system not simply as an objective system of rules, but also as a symbolic order or imaginary domain. It is through symbols and, more broadly, through images of social place, that the subject recognizes and forms affective attachments to law. The subject of legal authority is bound to law far more strongly by identificatory images or phantasms of a shared substance, by interior and self-imposed limitations, than by the external dictate of positive law.

rating an analogy between the unconscious and linguistic structure); PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 3-6, 59-65 (1970) (detailing the hermeneutic character of psychoanalysis). See generally PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* 181-222 (1995) (discussing theme of psychoanalysis as legal hermeneutic); *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* (David Carlson & Peter Goodrich eds., 1997) (developing a psychoanalytic jurisprudence).

Resistance to Psychoanalysis

Psychoanalytic interpretations of law have not tended to be popular among lawyers or within the conventional parameters of the legal discipline.¹⁰ It is beneficial, therefore, at the outset, to acknowledge and address the resistance or defenses that a psychoanalytic jurisprudence is likely to encounter. Principal among these defenses is the simple argument that psychoanalysis is irrelevant to law. Opponents will claim that psychoanalysis concerns the private and subjective realm of personal relations and individual beliefs. With its emphasis upon dreams, sexuality, symbols, and the unconscious, it belongs — in a sense like morality and religious belief — to a domain anterior to law, a realm of subjectivity or interiority with which secular law is not and never has been concerned. According to this argument, law governs the external acts of a conscious and responsible subject because "the intent of a man cannot be tried, for the devil himself knows not the intent of a man."¹¹ Although this depiction of law as an objective technology is common both within the profession and in popular perception, claiming that legal governance is exclusively exterior and objective is historically untenable and theoretically absurd.

From the time of its discovery, psychoanalysis was something of an heretical enterprise. It threatened the classical order of knowledge and, as a consequence, provoked fear, denial, and ridicule from the established disciplines and their academic watchdogs. In Freud's own analysis,

Society did not wish to hear discussion of the discovery of those relationships which psychoanalysis treated, because in many respects it did not have an easy conscience Psychoanalysis reveals the weaknesses of the [social] system It argues that it is necessary to abandon the

10. See Peter Goodrich, *Translating Legendre or, The Poetical Sermon of a Contemporary Jurist*, 16 CARDOZO L. REV. 963, 963-67 (1995) (discussing one instance of resistance). For some recent examples of the use of psychoanalysis in Anglo-American jurisprudence, see generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); David Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L. REV. 651 (1991); David Caudill, *Lacan and Law: Networking with the Big Other*, in 1 STUDIES IN PSYCHOANALYTIC THEORY 25 (1992); DAVID CAUDILL, *LACAN AND THE SUBJECT OF LAW* (1997); Alain Pottage, *Recreating Difference*, 5 LAW & CRITIQUE 131 (1994); and DRUCILLA CORNELL, *What Takes Place in the Dark*, in TRANSFORMATIONS 170 (1993). For a discussion of the use of psychoanalysis in legal philosophy on the continent, see generally ALAIN POTTAGE, *The Paternity of Law*, in POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES 147 (1994); Anton Schütz, *Sons of Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving*, 16 CARDOZO L. REV. 979 (1995); PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 260-96 (1990).

11. Anon., Y.B. 17 Edw. 4, Pasch fol. 1, pl. 2 (1478).

rigor of the social repression of instinct and provide a greater place for the truth For having formulated these critiques psychoanalysis was dubbed *the enemy of civilization* and was banished as a danger to the public.¹²

Freud argued that the social imposition of morality demanded that the individual renounce desire and repress instinct without any substantial recompense from society. Because social institutions and academic disciplines were so badly organized and so ill equipped to deal with the subjective, irrational, or phantasmic dimensions of sociality, it was easy to deny their existence or ridicule their presence rather than to address such aspects of social existence directly or seriously.¹³

The same argument applies to law. Psychoanalysis addresses a human subject in his or her corporeal reality as a subject driven by desire. Far from the legal image of a rational and objective actor, psychoanalysis takes apart the mask of reason to reveal a domain of unconscious motives, feelings, and other irrational or more properly subjective biographical sources of action. As Freud well predicted, it is not surprising that law as a discipline and lawyers as a profession would not welcome the intrusion of psychoanalysis into the domain of jurisprudence. The unconscious (what Freud termed "the other scene") is deeply threatening both to the individual and to the institution. The unconscious harbors both the desire and the violence which the Oedipal myth graphically illustrates. It represents that subjective force which neither institutions nor subjects can either fully understand or control. That which the subject does not know but feels, the unwitting dictates of prior experience, lend an ever greater complexity to subjective acts — a complexity which law and lawyers are neither willing nor qualified to judge. Consequently, any attempt to draw out the common terrain of the two disciplines or, more ambitiously, to interpret the unconscious roots of institutional writings and other practices will yield denial, hostility, and polemical rejection. Such resistance or charged discussions of psychoanaly-

12. Sigmund Freud, *Résistances à la psychanalyse*, in 2 REVUE JUIVE at 216-17 (1925). An alternative English translation of Freud's *Résistances à la psychanalyse* is available in 19 SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 213, 219-220 (James Strachey ed., 1981) [hereinafter THE STANDARD EDITION]. See PIERRE LEGENDRE, L'AMOUR DU CENSEUR 17-23 (1978) (discussing text).

13. Thus Freud remarks that his contemporaries pretended that psychoanalysis was reducible to an obsessive concern with sexuality in all aspects of existence and could thus be dismissed as scandalous and a perversion of science. See Freud, *supra* note 12, at 218. "[W]hat psycho-analysis called sexuality was by no means identical with the impulsion towards a union of the two sexes or towards producing a pleasurable sensation in the genitals; it had far more resemblance to the all-inclusive and all-preserving Eros of Plato's *Symposium*." *Id.*

sis and law embody the negative expressions of the truth or, at the very least, indicate the relevance of the psychoanalytic argument.

Freud's radical vision of psychoanalysis espoused a method that is in no way confined

to the field of psychological disorders, but extends also to the solution of problems in art, philosophy and religion The fertilizing effects of psycho-analytic thought on these other disciplines would certainly contribute greatly towards forging a closer link, in the sense of *universitas literarum*, between medical science and the branches of learning which lie within the sphere of philosophy and the arts.¹⁴

One such art is that of jurisprudence. Hence, the study of law stands to benefit considerably from the insights of psychoanalysis and legal scholars should consider it, like other institutions, as a psychic product rooted in the unconscious.¹⁵ In this sense, psychoanalysis is not an external discipline that analysts "apply" to law, but rather it is intrinsic to an understanding of law as a cultural system of symbols, as well as a system of repression and an object of desire, particularly through its rites, ceremonies, and other images. Specifically in terms of its attempt to address and understand the affective dimensions of legality, in its aim of analyzing the forms of subjective attachment to law, psychoanalysis effaces the modern boundaries of the legal discipline and again invites denial or dismissal. In other words, psychoanalysis not only suggests another dimension, or unconscious, of law applying acts but also, for the same reason, implies that law is a species of mythology, an illusion or phantasm that fascinates and binds the subjects of the legal order.¹⁶ For this reason it merits an historical and theoretical analysis that looks beyond its merely surface and manifest authorities and reasons.

14. 17 SIGMUND FREUD, *On the Teaching of Psycho-Analysis in Universities* (1919), in THE STANDARD EDITION, *supra* note 12, at 171, 173.

15. See, e.g., 19 SIGMUND FREUD, *A Short Account of Psycho-Analysis* (1923), in THE STANDARD EDITION, *supra* note 12, at 191, 208 (stating "[t]he researches of psycho-analysis have in fact thrown a flood of light on the fields of mythology, the science of literature, and the psychology of artists"). "We have shown that myths and fairy tales can be interpreted like dreams, we have traced the convoluted paths that lead from the urge of the unconscious wish to its realization in a work of art, we have learnt to understand the emotional effect of a work of art on the observer" *Id.* For a lucid discussion of this text in relation to the theory of artistic production, see generally SARAH KOFMAN, *THE CHILDHOOD OF ART: AN INTERPRETATION OF FREUD'S AESTHETICS* 1-22 (1988).

16. See generally PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992) (regarding the various resonances of legal mythology); Goodrich, *supra* note 10. The doyen of such analyzes is Pierre Legendre. See generally *The Lost Temporality of Law: An Interview with Pierre Legendre*, 1 LAW & CRITIQUE 3 (1990).

In the Name of the Father . . . and of the Son

Consider the following example from a Canadian case that forms the basis of *Corporal Lortie's Crime*, a treatise by the French psychoanalyst and lawyer Pierre Legendre.¹⁷ The case involves the ill-fated corporal Lortie who was a young and disaffected member of the Canadian armed forces. While watching the Prime Minister of Quebec speaking on television, he formulated a plan to massacre the government of Quebec.¹⁸ Some weeks later, and after careful preparation, Lortie took weekend leave from his base and checked into a motel close to the Citadel in Quebec.¹⁹ On the morning of Tuesday, May 28, 1984, in full military combat dress and after tape-recording a message announcing and explaining his plan to his wife, the military chaplain at his base, and a radio talk-show host, he went to the National Assembly building.²⁰ Lortie entered the Assembly building armed with an automatic rifle and ran through the corridors, firing at anyone in his path.²¹ He killed three people and injured eight before he eventually arrived at the Chamber of Deputies.²² On this day when he had chosen to "kill the government of Quebec,"²³ the government was not in session and the Chamber was empty. Lortie sat down in the President's chair and fired a volley of shots directly in front of him at a clock and to his right at the empty benches where the representatives would have sat had the Assembly been in session.²⁴

During interrogation after his arrest, Lortie explained his crime in the following terms: "[T]he government of Quebec had the face of my father."²⁵ A number of biographical facts and further comments from Lortie from subsequent questioning add context to that extraordinary remark. Lortie came from a family of six.²⁶ His father had been an alcoholic and violently

17. PIERRE LEGENDRE, *LE CRIME DU CAPORAL LORTIE. TRAITÉ SUR LE PÈRE* [THE CRIME OF CORPORAL LORTIE. A TREATISE ON THE FATHER] (1989). See generally Alain Pottage, *Crime and Culture: The Relevance of the Psychoanalytical*, 55 MOD. L. REV. 421 (1992) (reviewing *The Crime of Corporal Lortie*); Peter Goodrich, *Introduction: Psychoanalysis and Law*, in *LAW AND THE UNCONSCIOUS: A LEGENDRE READER 1* (P. Goodrich ed., 1997) [hereinafter *LAW AND THE UNCONSCIOUS*].

18. LEGENDRE, *supra* note 17, at 63.

19. *Id.* at 89.

20. *Id.* at 98.

21. *Id.* at 99.

22. *Id.*

23. *Id.* at 189.

24. *Id.* at 99.

25. *Id.* at 61.

26. *Id.* at 92.

abused his mother and the children.²⁷ His father had also had an incestuous relationship with Lortie's eldest sister.²⁸ At one point, the children banded together and secreted a number of weapons around the house, vowing to kill their father the next time he became violent with them.²⁹ After his arrest, Lortie talked of losing a battle "against an inner negativity,"³⁰ expressing a fear of having internalized the image of his father and a terror of becoming his father. Another remark also supports this confusion. When shown a video tape of his crime, Lortie fled the dock in tears and hammered his head against the wall of his cell.³¹ When asked who it was in the video, he acknowledged that "you know I cannot say that it is not me, it is me."³² Just prior to his arrest, when asked why he had acted as he had, Lortie responded comparably by saying, "I cannot tell you. It was not my heart but my head."³³

The case of Lortie provides an exemplary illustration of the psychoanalytic theory of law and, specifically, of the Oedipal crisis that lies at the origin of law. The violence of his childhood, and most particularly the tyrannical behavior of his father, prevented Lortie from being able to attach himself to any viable image of identity or of family place. When his father left the family and abandoned Lortie, it was no longer possible to kill him in person.³⁴ Thus, struggling with the interior image of his father, Lortie attempted to resolve his "inner negativity" by projecting the face of his father onto the government of Quebec and then "killing the government."³⁵ What is most striking in this psychotic desire to destroy a social image or phantasm of paternity is not the madness of the displacement, but rather its peculiar and inexorable logic. Lortie's failure to attach to or recognize a familial order and law, expressed through his desire to kill his father, is repeated at a phantasmic level in his transgression of secular law. The two laws are based upon analogous figures of paternity and are indissolubly bound to each other, both in the psyche of the subject and in the symbolism of the social.

The western legal tradition is a Christian tradition and is explicitly a tradition of *utrumque ius* or of two laws. Historically, the complementary

27. *Id.*

28. *Id.* at 93

29. *Id.*

30. *Id.* at 61.

31. *Id.* at 99.

32. *Id.* at 95.

33. *Id.*

34. *Id.* at 93.

35. *Id.* at 62.

jurisdictions of spiritual and secular law have split western legality. The church and canon law governed what would later, and largely inaccurately, be termed the private sphere; royal law and its secular equivalents governed the public domain. Although the precise depiction of jurisdictions and laws varied within different political theologies, the hierarchy of laws was invariant. Divine law preceded natural law, which in turn preceded human or positive law. Human law was but a pale shadow of divine will and, not least for this reason, the study of law was conceived consistently as the study of divine and human rule in both the civilian and the common law traditions.³⁶ The model of such rule was of a divine law dictated by God who sent his only son to redeem the world and to prepare Christian humanity for eternal life in a world beyond human comprehension. God's law was at the pinnacle of the hierarchy of forms of law, and where the emperor or king made law within the western world, he did so explicitly as the mouthpiece of God the Father and in imitation of him, his son, and his laws.

The social image of a divine father whose paternal authority legitimated all other laws suffuses the western legal tradition. A myriad of differing secular depictions reveals this image. The primacy of the image of the father is significant. The tradition elaborates this figure of paternity within the differing jurisdictions and laws of the polity. *Regia potestas* and *patria potestas*, the power of the king and the power of the father, are two instances or jurisdictions of the same law. Thus, law is the speech of the father or, more technically, speech "in the name of the father."³⁷ The same image of paternity provides the model for the social family and the domestic family and the same genealogical method authorizes these laws. According to this genealogical method, a law is legitimate if it is issued by, traceable to, or promulgated in the name of the father. Resurrecting the familial and paternal metaphor of legal governance, the psychoanalytic tradition draws upon an antiquated tradition that never recognized any meaningful distinction between the different aspects or jurisdictions of legal rule. The secularization of the legal tradition in the modern period may have attempted, in the name of reason, to mask the paternal character and figuration of legal authority. However, it does so only by repressing the history of the different

36. See 1 THE DIGEST OF JUSTINIAN 2 (1985) (Ulpian) ("*Juris prudentia est divinarum atque humanarum rerum notitia.*" (Jurisprudence is the knowledge of things divine and human.)); PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 9-28 (1996) (comparing common law definitions of legal study).

37. See generally ROBERT FILMER, *Patriarcha*, in PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 49 (Peter Laslett ed., 1949) (1680) (discussing paternal metaphors of government). For an important feminist commentary on *Patriarcha*, see CAROLE PATEMAN, THE SEXUAL CONTRACT 82-89 (1988).

jurisdictions and plural forms of law. The monotheistic culture of the legal tradition survives in modernity only by pretending to a reason that is both external and superior to the symbolic reality — the contingent and imagistic theater of its institutional history.

The myth of Oedipus and the case of Lortie are similar narratives on the primary attachment of the human subject to the social order of law. In terms of legal history, this narrative was traditionally the subject matter of canon or ecclesiastical law and its governance of the soul. Thus, the church courts and canon law originally governed the interior life of the subject. Spiritual judges monitored and exercised what were explicitly termed the ghostly powers dictating how to judge conscience and how to order the soul in conformity with God's law. Psychoanalytic jurisprudence can thus be understood initially as bringing with it the inestimable message that the legal order is still predicated both internally and externally upon images of social paternity and upon the application of legal rules in the name of the father. The Freudian tradition endeavors to make conscious a structural feature of the western legal tradition that is largely unconscious in the modern era — that images of a paternal law have consistently bound together subject and society in the West.³⁸

Although it may define itself in reference to and specifically against religion, psychoanalysis is not a theology. Thus, it is important to distinguish the Freudian and post-Freudian accounts of the law of the father from their historical analogues within the patristic tradition.³⁹ For Freud, the subject's recognition of paternal authority and consequent obedience to the father's prohibition of the son's incestuous desire for the mother resolves the Oedipal crisis at the individual level. That recognition of authority and repression of desire founds the subjective order of law. The desire to kill the father gains fulfillment only in dream. In other words, the order of law is a symbolic order founded not upon the presence or authority of a real father, but upon what Lacan terms the "paternal metaphor" or "name of the father."⁴⁰ The social order of law has a comparable basis in the pre-historic

38. See GOODRICH, *supra* note 9, at 108-43, 223-47 (discussing this historical argument).

39. Freud, of course, was well aware of the psychoanalytic significance of Christian rites and discusses the relation between Christianity and the Oedipus complex in several texts. See generally 18 SIGMUND FREUD, *Group Psychology and the Analysis of the Ego* [hereinafter FREUD, *Group Psychology*], in THE STANDARD EDITION, *supra* note 12, at 69; 13 SIGMUND FREUD, *Totem and Taboo: Some Points of Agreement Between the Mental Lives of Savages and Neurotics* [hereinafter FREUD, *Totem and Taboo*], in THE STANDARD EDITION, *supra* note 12, at 1; MIKKEL BORCH-JACOBSEN, THE FREUDIAN SUBJECT 127-39 (1988) (elaborating on Freud's discussions).

40. See JACQUES LACAN, *On a Question Preliminary to Any Possible Treatment of*

murder of the tribal father by jealous sons, according to Freud's account in *Totem and Taboo*. Without attempting to repeat or justify the dubious anthropology of *Totem and Taboo*, it can be observed usefully that Freud formulates his thesis in terms of the foundation of social authority around the guilty memory of the murder of a tyrannical father and his replacement by rituals that bind the social group to a founding image of an absent father. The power of law derives precisely from the myth of an absent father in whose name the law can be spoken. It is the power "not of a real father, but of what religion has taught us to refer to as the Name-of-the-Father."⁴¹ From this it follows that the Father who authors the law and whose murder is the founding instance through which "the subject binds himself for life to the Law, the symbolic Father[,] is, in so far as he signifies this Law, the dead Father."⁴² A symbolic debt founds the social order and impels the filial subject to cohere the group, community, or social order around the ritual re-enactment of that inaugural parricide.

There are significant problems with the Freudian depiction of the primary bonding of the individual to the social or, more specifically, the bonding of the subject to the Father. Not least among these is the male or homosocial character of the specific narrative that Freud and following him, Lacan and Legendre, elaborate. The Oedipal myth and the law of the father depicted in *Totem and Taboo* both spell out a masculine definition of sociality and law. By analogy with the Christian tradition, both also privilege the relation of father to son. A legitimate counter to that position is an assertion of the priority of the relation of mother to daughter, as Irigaray has argued, or a reinterpretation of the Oedipal story around the feminine image of the sphinx.⁴³ While such arguments are important in political terms, it is also arguable that, at least with respect to the classical legal tradition and its modern variants, Freud accurately accounts the patriarchal constituents of legality and the patristic images of its authority: the messenger should not be

Psychosis, in *ÉCRITS*, *supra* note 9, at 179, 198-200.

41. *Id.* at 199.

42. *Id.* at 199. See generally SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT* (1994).

43. See LUCE IRIGARAY, *THINKING THE DIFFERENCE* 89-112 (1994) (discussing feminine mythologies). See generally CHRISTIANE OLIVIER, *JQCASTA'S CHILDREN: THE IMPRINT OF THE MOTHER* (1989) (discussing role of mother). For an analysis focusing on the sphinx and on matricide as the "unthought element of Freudian psychoanalysis," see JEAN-JOSEPH GOUX, *OEDIPUS, PHILOSOPHER* 23 (1993); J.C. SMITH & CARLA FERSTMAN, *THE CASTRATION OF OEDIPUS: FEMINISM, PSYCHOANALYSIS, AND THE WILL TO POWER* (1996). For a depiction of the homosocial imagery of law, see LUCE IRIGARAY, *The Poverty of Psychoanalysis*, in *THE IRIGARAY READER* 79, 79-104 (Margaret Whitford ed., 1992) (presenting a corrective feminine perspective). See generally BORCH-JACOBSEN, *supra* note 39; RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* (1995).

shot because of the message.⁴⁴ Freud's unveiling of the unconscious and, specifically, his socialized conception of the psyche, his politicization of the private, opened up the territory that feminism was later to occupy and rewrite. Additionally, whatever the flaws or idiosyncracies of the figures through which Freud and later psychoanalytic theorists develop their account of the primary bond of the individual to sociality and law, the critics of the Freudian theory of a paternal law do not deny the importance of the unconscious figures of authority. Rather, they question the political desirability or accuracy of a specifically male metaphor of legality. Thus, critics do not doubt the domain of the unconscious and the psychoanalytic method of its interpretation, but rather call into question the specific interpretation of the legal institution.

The myth of Oedipus is used by Freud to depict the homosocial form of the primary bonding of the subject to law. It takes the form of the renunciation of the subject's dual desire to murder his father and marry his mother. Freud's notion that the subject accepts the "paternal no" and so enters into the symbolic and into law is most significant at the level of method or interpretation. The most curious feature of this story is simply why the subject should renounce his desire or come to internalize the paternal prohibition and thereby identify with the paternal role and the social figure of authority. Analysts can address the same question to the anthropological version of the story told in *Totem and Taboo* by asking why the sons come to recognize and identify with the ritual re-enactment of the killing of the father in the various eucharistic ceremonies of totem and totemic food. Freud's specific answer to this question is that it is precisely through the rite of eating common food, through the shared guilt of ingesting the dead father, that the sons come to bond and identify with the social. Regardless of the prehistoric or Christian details of this homosocial and carnivorous bonding, the sons are bound together through a ritual which allows them to identify with the social. The cannibalistic feast, the later eucharistic rite of eating Christ's body and drinking his blood, and the ritualistic eating of dinners in

44. See JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* (forthcoming 1998). See generally ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* (1990). To add a personal note, Kate Green, *Book Review*, 2 SOC. & LEGAL STUD. 361, 361-367 (1993), criticized an earlier work of mine for using the masculine pronoun in discussing the history and theory of the western legal tradition and, specifically, for depicting Renaissance and early modern conceptions of the English constitution and common law in masculine terms. On a first reading, this struck me as a curious criticism insofar as the theories being discussed, and the constitutional tradition to which they referred were almost exclusively masculine in tenor and substance. I did not think that I could change that. On reflection, the criticism seems well-judged as a criticism of the Oedipal style and the limited narrative project of such historicism.

the Inns of Court all share the theme of binding a community through an identificatory ceremony. The images and the symbols that stage such rites work to bind subjects who were previously rivals. In Freud's words, "they have succeeded in identifying themselves with one another by means of a similar love for the same object."⁴⁵

Two aspects of this process of identification have an enduring significance for the psychoanalytic interpretation of law. The first is that the figure with which the sons identify is that of the image of the absent or dead father. The bonding of the subject to the social is thus effected through images. Hence, through interpreting the symbolic and addressing the images that bind the affections and attach the unconscious to law, psychoanalysis reads and interprets legality as a system of subjective attachment. In its most extreme form, that of professional attachment to law, the specifically homosocial quality of such erotic attachments is peculiarly clear. Only thinly veiled by the quotidian norms of institutional behavior, the competition that constitutes the everyday world of professionals is the rivalry of brothers based upon the similarity of the rivals and, by extension, upon the desire for the same, a homosexual love.

The second and correlative feature of this latent identification or unconscious bonding through figures of attachment is its binding of the subject in a libidinal or erotic relation to the social. The rivalrous subjects of the prehistorical scene come to identify with the social image of authority and do so by means of a similar love with an identical object of desire. Identification generates a positive bond with others not only by sharing the object of desire but also through the guilty mode of its acquisition and, in the myth under discussion, its ingestion. The cohesion of the group is based upon a sacrificial rite, the eating of the flesh and drinking of the blood of a totemic animal in order to remember an originary killing. In sum, desire and affect motivate and bind the subject both individually and socially. Identificatory images join *psyche* and *socius*. Scarcely hidden beneath the surface reason of institutional roles, latent within the homosociality of professional relations, is an erotic bond, a narcissistic love of a rival in whom the subject recognizes himself.⁴⁶ An emotional substance, an erotics, is latent in objective relations. This means that it is only through a reading of repressed desires and through an attention to the symptoms or figures that evidence the return

45. FREUD, *Group Psychology*, *supra* note 39, at 120; *see also* GOODRICH, *supra* note 36, at 72-94 (discussing eating rites and identification in law).

46. *See generally* RENATA SALECL, *THE SPOILS OF FREEDOM* (1994); KLAUS THEW-ELEIT, *OBJECT-CHOICE (ALL YOU NEED IS LOVE . . .)* (1994) (discussing the erotic in the social); SLAVOJ ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* (1991).

of the subjective in the objective that psychoanalysis can begin to address the unconscious of law.

Author and Authority: On the Paternity of the Legal Text

According to established common law tradition, judges do not create law, but "discover" and apply it, even when deciding cases in novel areas of doctrine.⁴⁷ Where the ambit of a rule is expanded or curtailed, traditional legal wisdom holds that the judge is not inventing or embellishing law, but rather exposing the inner logic and necessity of extant norms. The modern judiciary has on occasion admitted that this notion of judicial discovery of law and correlative objectivity of judicial determinations is broadly untenable. Nonetheless, this admission has not led to any extensive rethinking of the subjective or affective dimensions of judgment. Legal thinkers generally deem such dimensions to be imponderable aspects of an unknowable justice and not, strictly speaking, questions of law. For this reason, one of the first stylistic and semantic lessons of the legal curriculum is still that the student of law cannot write in the first person singular. The student's 'I' is instantaneously deleted or erased because law is objective and the affinities or opinions, experiences or beliefs, of the subject are deemed irrelevant and indeed heretical to the exposition and manipulation of legal rules. What is traditionally sought in the library of legal texts is authority and such authority or law is not a property of the living, but an attribute of the dead and of their texts. By the same token, living authors within the English common law tradition cannot be treated as authoritative, supposedly because the living can change their minds or contradict themselves.⁴⁸ Only dead treatise writers can be treated as having authority because only the dead parent or absent father can truly attain to the aura and absolutism of law. In Legendre's felicitous formulation, "in the epiphany of law, the jurist counts for nothing."⁴⁹

47. The strongest version of this tenet is to be found in 2 SIR EDWARD COKE, REPORTS, fol. b.5.a (1776), who argues that common law, stemming from time immemorial, from "beyond the memory or register of any beginning," is of such antiquity and self-evident veracity that not even historians are qualified to examine its records. By the same logic, attempts by parliament or unwise judges to reform the law are doomed to failure and to being reversed because *in hominis vitium non professionis* (it is not law but men who err). *Id.* at xi; see GOODRICH, *supra* note 10, at 83-90 (discussing Coke's theories).

48. See Lord Diplock, *A.L.G.: A Judge's View*, 91 LAW Q. REV. 457, 458-59 (1975); see also WILLIAM TWINING, BLACKSTONE'S TOWER 135 (1994) (lamenting the continued unwillingness of the English judiciary to take academic writings of living (or quite frequently dead) treatise writers seriously).

49. LEGENDRE, *supra* note 12, at 96.

This denial of identity and erasure of personality initially poses the question of what such repression costs. It is commonplace that lawyers take no ethical responsibility for their clients and make whatever arguments best suit their case or cause. In slightly more expansive terms, the lawyer's denial of emotion and suppression of subjectivity is likely to make the lawyer at the very least emotionally dishonest and ill-equipped to deal with the realms of feeling, of fear and desire, inhabited by their clients and indeed by their non-legal contacts. In one argument, the repression that initiates legal identity slowly transforms the lawyer into an emotional incompetent, a withdrawn, abstracted, and frequently lost soul. As many critics have argued, what was initially a mask becomes the person.⁵⁰ Trained systematically to deny their feelings and trained equally to communicate with others in conflicting and antagonistic forms, the lawyer's denial of subjectivity can easily become a form of life. The company of lawyers is customarily shunned because their training encourages alienation and self-estrangement. Such lack of feeling distances the lawyer from the lifeworld. One recent critical argument asserts that it is precisely this distance or suppression of affectivity that disables the lawyer from genuinely understanding or communicating with his clients or, in terms of judgment, with the parties to litigation.⁵¹ If, in the antique legal maxim, to do justice is to follow the heart — *corde creditur ad iustitiam* — then how can justice be done by a subject who cannot feel? At an even more basic level, how can a subject who is trained to deny his identity and to suppress both emotion and its expression begin to understand the lifeworld or existential context and so also the meaning of other lives? Who would choose a lawyer as a judge?

The professional detachment, the abstraction, and the dullness of the lawyer are psychoanalytically disturbing features of a profession that still clings to a religious past, the sacral aura of an archaic mythology of objectivity, a theistic phantasm of certainty and its accompanying science of rule application. It is at the very least highly ironic that law, the pre-eminent

50. See DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 1-32 (1983) (discussing legal education); BENJAMIN SELLS, THE SOUL OF THE LAW 99-128 (1994) (discussing the adverse emotional effects of joining the legal profession); PIERRE LEGENDRE, L'EMPIRE DE LA VÉRITÉ 160 (1983). "Speaking with the brutal directness of a pedagogue, I would say that jurists are distinct by virtue of the following trait: they do not even pretend to think, they merely practice the social art of putting texts into circulation. It is for this reason that the company of jurists is so commonly dreaded . . .". *Id.*

51. Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1248-52 (1996). For other developments of this theme, see generally Peter Goodrich, *Epistolary Justice: The Love Letter as Law*, 9 YALE J.L. & HUMAN. 245 (1997).

discourse of individual responsibility, should be dispensed by a profession which systematically denies the responsibility of the jurist and the judge for the rules they find, interpret, and apply. The deletion of the "I" in law students' essays is exemplary not only of an initiation rite or trauma in which the student embarks upon the ritual passage from laity to professionalism, but also of a repression that is intrinsic to the political logic of law. To distinguish legal judgment, and particularly its obscurity and violence, from other political practices requires what Freud termed a myth or fiction of legal authority that is capable of transferring the mundane exercise of power into a sacral or inaugural realm of incontestable meanings. Law must differentiate itself from secular speech by hiding the source of its authority behind the image of dead authors and an inexorable tradition of untouchable texts, immemorial precedents, and an initiate and frequently incomprehensible knowledge. By abdicating any direct responsibility for the creation of law, the judge can deny the affective dimensions of legal judgment and so also deny subjective responsibility for them. In modernity, the absent sources or dead authors of "the law" who thus protect the profession both from political criticism and personal self-reflection have taken the form not simply of the paternal image of an absent sovereign or author, but the more specific form of a textual tradition and of books that encompass and preserve an antique custom and law.

The mystery of law or *arcana iuris* in the western tradition is historically a scriptural one. Texts lock away the enigma of legal rule, and interpretation of texts reveals law — its rules, its dreams, and its practices.⁵² In Freudian terms, the primary attribute of such texts is their authority: the legal text or book of the law is historically and practically the word of the father, a word spoken in the name of an absent and absolute authority. The textual tradition that bears this authority traces back to the reception of Roman law in the West in the late eleventh century and the "interpretative revolution"⁵³ that accompanied the rediscovery of the *corpus iuris civilis*. Its strongest theological expression is not only in the sanctity of religious and secular legal texts, but also in the culturally more pervasive image of biblical

52. See generally Cornelia Vismann, *Cancels: On the Making of Law in Chanceries*, 7 LAW AND CRITIQUE 131 (1996) (providing a recent and highly suggestive analysis of the textual fabrication of law). Cf. RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY (1996).

53. The concept of interpretative revolution is one developed by Pierre Legendre. See, e.g., PIERRE LEGENDRE, LES ENFANTS DU TEXTE. ETUDE SUR LA FONCTION PARENTALE DES ETATS [CHILDREN OF THE TEXT. A STUDY OF THE PARENTAL FUNCTION OF STATES] (1992). For discussion, see Goodrich, *supra* note 17, at 1, 20-32; see generally HAROLD J. BERMAN, LAW AND REVOLUTION (1983) (presenting the notion of legal revolution).

authority and the various reassertions of the primacy of the scriptures and of the written word over its prophets and institutional interpreters.⁵⁴ The importance of this tradition of textual authority and priestly interpreters is not, however, the historical detail of rediscovery and renewal of the textual system and its interpretative principles so much as the form or dogmatic character of the legal knowledge it engendered. According to the dogmatic tradition, the text, the record of prior laws, contains the truth. All that one needs to find that truth is a proper appreciation of the principles of textual construction or legal hermeneutics. The text is everything. The interpreter is nothing but a simple tool or instrument of a law that speaks from elsewhere and with the full authority of its absent author. The Oedipal dead father, one might say, both exonerates and rules over the children of the text.

Psychoanalytic Hermeneutics

The alien written form of law serves the political purpose of hiding or masking the exercise of authority and the correlative violence of power behind the faceless image of scripture or of the interminable books of the law. One might say that the subject of law is buried in a morass of texts and scriptural rules that, according to the theory of dogmatics or legal science, inexorably determine the outcomes of contemporary cases. In the classical terminology that founds contemporary method, the law is a mute magistrate (*mutus magistratus*) or an inanimate justice (*iustitia inanimata*), a text which the lawyer must bring to speech.⁵⁵ Legal training teaches the lawyer, and most particularly the judge, to apply the law in a rational fashion. It teaches them to present the justification of judgment or reason for deciding as if objectively determined by discovered rules. The lawyer uses legal method to reformulate the subjectivity of judgment in the objective garb of rules. Legal training denies creative application of the law. The legal subjects who fashion the contemporary texts of law present themselves as instruments or servants of a law that would certainly exist and could probably just as well speak without them. The rhetorical form of this textual self-effacement is at times explicit — according to one well-established maxim, to govern is to dissimulate, to rule is to deceive — and the lawyer is an expert in precisely such rules or methods of self-concealment or deception.⁵⁶ In this regard,

54. See Peter Goodrich, *Traditions of Interpretation and the Status of the Legal Text*, 6 LEGAL STUD. 53, 53-69 (1986) (discussing the historical details of this tradition).

55. SIR JOHN DAVIES, LE PRIMER REPORT DES CASES AND MATTERS EN LEY RESOLVES AND ADJUDGES IN LES COURTS DEL ROY EN IRELAND fol. 7b (Dublin, Frankton 1615); see GOODRICH, *supra* note 10, at 249 (discussing Davies' work).

56. See GEORGE PUTTENHAM, THE ARTE OF ENGLISH POESIE 155 (London, Richard

psychoanalysis principally offers jurisprudence another method of reading legal texts, one which endeavors to address what is repressed or masked in the obscure and indirect language of law. In the first instance, the language of legal texts is the only, and most usually negative, expression of the motives, the affects, or desires of those who judge. As Benjamin Cardozo once observed, an unconscious element to the development of law always exists, not least in the repetition through which precedent, the contingent or accidental product of an agonistic practice, becomes an established rule or principle of law.⁵⁷

The Interpretation of Dreams and its subsequent revisions most fully develops the interpretative method of psychoanalysis. For Freud, the text is a symptom or code that must be deciphered, an enigma that must be unveiled or unmasked through analytic techniques of reconstruction. In its simplest form, psychoanalysis reads the text in terms of unconscious causes and so treats its surface as the trace or symptom of repressed meanings. The written text is treated as comparable to the language and images of dreams; it is a sign of erotic or violent affects, of the "remains of the day."⁵⁸ The text is to be interpreted in the psychoanalytic sense of being read with close attention to all its unwitting details, attentive as much to what it endeavors to hide as to what it consciously seeks to express. In general terms, the text is thus understood as a psychic production, an expression of desire or of erotic drive covered over or compromised by the demands of civility and law. The method developed in *The Interpretation of Dreams* is one that is thus gauged towards uncovering the primal or originary sources of the manifest text. In Freudian terms, what is originary and essential is sexual and constituted by the Oedipal structure of individual biography: "Our work of interpretation uncovers, so to say, the raw material, which must often enough be described as sexual in the widest sense, but which has found the most varied application in later adaptations."⁵⁹ Freud adds that "[d]erivations of this kind are apt to bring down on us the wrath of all non-analytically schooled workers, as though we were seeking to deny or undervalue everything that was later erected on the original basis."⁶⁰ Like the dream or

Field 1589) ("*[Q]ui nescit dissimulare nescit regnare.*" (He who knows how to dissimulate, knows how to rule.)).

57. See, e.g., *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

58. See Renata Salecl, *Love: Providence or Despair*, 23 *NEW FORMATIONS* 13, 13-24 (1995) (discussing the vestigial qualities of content of dreams).

59. SIGMUND FREUD, *Revision of the Theory of Dreams*, in *NEW INTRODUCTORY LECTURES* 7, 23 (1965).

60. *Id.*

indeed any other psychic production, the legal text covers over the primal, or in our terms, affective material that originates it. The text hides and transforms what Freud calls the enigma or riddle of its cause: "The analysts work of construction, or, if it is preferred, of reconstruction, resembles to a great extent an archaeologist's excavation of some dwelling-place that has been destroyed and buried or of some ancient edifice."⁶¹

To pursue the unconscious meaning of a text leads Freud to develop certain classical tools of rhetoric as the method most appropriate to deciphering the emotional content of language.⁶² The text is a product of conflicting forces. Indeed, every text is a compromise between desire and its prohibition, between eros and law, and its surface must be analyzed for the signs or traces of that conflict and its unconscious roots. What this means in terms of legal texts is not very different from the method developed to read the individual psyche — in terms of the traces or figures, of earlier experiences or repressed histories. A successful interpretation or better construction will lay before the subject "a piece of his history that he has forgotten."⁶³ By the same token, analysis of a legal text will ideally reconstruct the invisible desire or repressed affectivity of its author. The method for doing this is one of detail in that it requires the textual reconstruction of an individual or collective past through fragments, symbols, figures, and other lacuna or clues within the surface text.⁶⁴ Truth, in psychoanalytic terms, is given only in distortions. The trace is what remains of what has been repressed and denied, modified, and removed from its context, or displaced. For this reason, Freud, in conformity with earlier theories of dream analysis, argues that every detail, however apparently accidental is significant and must be attended to.⁶⁵ Indeed, the seemingly incidental features of the text, the repetitions, apparently innocent embellishments or metaphoric digressions, will often transpire to be the most vital clues as to the hidden sense or desire of the text. The latent content of the text can only be read in terms of its effacement, in terms of the traces that are all that are left of the past. The traces are clues that put one on the track of the repressed. In a suitably Oedipal metaphor, Freud argues that

61. SIGMUND FREUD, *MOSES AND MONOTHEISM: THREE ESSAYS* 259 (1953).

62. This argument is developed in GOODRICH, *supra* note 9, at 181-89. See generally SEBASTIANO TAMPANARO, *THE FREUDIAN SLIP: PSYCHOANALYSIS AND TEXTUAL CRITICISM* (1976) (presenting a contrary view).

63. FREUD, *supra* note 61, at 261.

64. See Freud, *supra* note 59, at 81.

65. For an earlier version of this argument, made in relation to what was then the discipline of *onirocriticism*, see generally HENRY CORNELIUS AGRIPPA, *OF THE VANITIE AND UNCERTAINTIE OF ARTES AND SCIENCES* (London, Bynneman 1575).

if you were a detective engaged in tracing a murder, would you expect to find that the murderer had left his photograph behind at the place of the crime, with his address attached? Or would you not necessarily have to be satisfied with comparatively slight and obscure traces of the person you were in search of? So do not let us under-estimate small indications⁶⁶

Affect and Judgment

Moving to the specific realm of legal texts, the requirement of minute attention to detail should in many senses be attractive to lawyers. It also recalls the techniques of forensic rhetoric whereby analysis of legal texts paid close attention to the forms of expression or figures of speech to be found in legal language. The rhetorician studied the figures of speech as indications of emotion or affective content.⁶⁷ The figures were symptoms of a repressed passion. It is precisely in this rhetorical sense that Freud returns to the theory of figures as a theory of the imagistic and emotive residues of archaic experience in contemporary language.⁶⁸ The figures of speech, in other words, are an exemplary site of psychoanalytic interpretation and any attempt to reconstruct the latent meaning of legal judgments will ideally start with the textual figures that mark the affective content of the judgment. The case of *Masterson v. Holden*⁶⁹ can provide a peculiarly English example of the utility (and the melancholy) of psychoanalytic method in law.⁷⁰

The apparent logic of the case can be stated succinctly. Decided in 1986, the case concerned two men, Simon Thomas Masterson and Robert Matthew Cooper who were "kissing each other on the lips"⁷¹ and cuddling at a bus stop in the center of London.⁷² The justices found that

Cooper rubbed the back of Masterson with his right hand and later Cooper moved his hand from Masterson's back and placed it on Masterson's

66. 15 SIGMUND FREUD, *Introductory Lectures on Psycho-analysis*, in THE STANDARD EDITION, *supra* note 12, at 27. For an excellent development of this analogy in terms of decipherment in art history, see Carlo Ginsburg, *Clues: Roots of an Evidential Paradigm*, in MYTHS, EMBLEMS, CLUES 96, 96-125 (1990).

67. This argument is made in detail in Peter Goodrich, *Jani Anglorum: Signs, Symptoms, Slips and Interpretation in Law*, in POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES 107, 107-144 (Costas Douzinas et al. eds., 1994).

68. FREUD, *supra* note 4, at 442.

69. 3 All E.R. 39 (C.A. 1986).

70. See *Masterson v. Holden*, 3 All E.R. 39 (C.A. 1986); GOODRICH, *supra* note 10, at 230-59 (discussing *Masterson*); LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 170-71 (1996) (same).

71. *Masterson*, 3 All E.R. 39, 40 g.

72. *Id.* at 40 g.

bottom and squeezed his buttocks. Cooper then placed his hand on Masterson's genital area and rubbed his hand round this area. The defendants continued kissing and cuddling.⁷³

The state charged the couple and found them guilty of a breach of the peace under Section 54 of the Metropolitan Police Act of 1839, a statute approximately one hundred and fifty years old.⁷⁴ The section under which they were convicted states that an offense is committed by "Every Person who shall use any threatening, abusive, or insulting Words or Behaviour with intent to provoke a Breach of the Peace, or whereby a Breach of the Peace may be occasioned."⁷⁵ On appeal, the decision at first instance was upheld on the basis that the magistrates' interpretation of the statute was correct, and that the behavior in question was capable of being and indeed was insulting.⁷⁶ More dramatically and surprisingly, the court expressly stated that the fact that the couple kissing was gay was irrelevant to the decision.⁷⁷

A psychoanalytic reconstruction of the justificatory argument of Lord Justice Glidewell in the Court of Appeal will attend to a number of incidental features, or more properly figures, in the judgment. The first is a grammatical slip — in rhetorical terms a solecism, legally a misprision — in the legislation itself. Glidewell remarks: "I note in passing that the wording of the offence under the 1839 Act uses the verb 'may' have been occasioned in relation to the question of breach of the peace. Grammatically perhaps it should be 'might', though nothing turns on that"⁷⁸ Note first that it is highly curious that a judge trained in a common law tradition in which each "syllable is significant and known to the law" and in which the "infinite particulars" of the text constitute the law should deny the relevance of a grammatical slip, or what rhetoricians called *cacozelia*.⁷⁹ The figure, it will be argued, reveals a hidden sense. In psychoanalytic terms, the denial of the relevance of this slip is even more significant. Why draw attention to a grammatical defect if its only significance is that it is of no relevance? The conscious disavowal of the relevance of the use of the wrong tense may be

73. *Id.* at 40 g-h.

74. *Id.* at 40 e.

75. *Id.* at 39 n.a.

76. *Id.* at 44 b.

77. *Id.* at 44 c-d.

78. *Id.* at 40 e-f.

79. See 10 COKE, *supra* note 47, at 130 (discussing "[w]ords significant, and known to the sages of the law, but not allowed by grammarians, nor having any countenance of Latin" (citing *James Osborne's Case*)).

a clue or symptom of a deeper investment or unconscious meaning to the slip. In strict Freudian terms, the disavowal is a negation, "a way of taking cognizance of what is repressed" while simultaneously defending oneself against it.⁸⁰

One reading of the change of tense would thus suggest that it is significant of the emotional charge of the case. The judge is determined, at any cost, to represent the decision as one which is clear in law and unrelated to any feelings, experiences, or phantasms that might, for him or for others, be occasioned by homosexuality or homosexual behavior. The negation, in other words, is defensive. It disowns the repressed thought, namely that the decision clearly discriminates against homosexuals and refuses to address the rights or permissible forms of representation of a victimized group. In short, the use of the present tense "may" is of much wider semantic ambit than would be the past tense "might." Anything "may" be insulting, whereas a smaller category of behaviors "might" be deemed insulting. May connotes possibility; might suggests a domain of probability. That Glidewell deems this distinction irrelevant consciously indicates that he sees the decision as remarkably unproblematic. In unconscious terms, the opposite is true. The assertion of irrelevance masks a powerful latent significance.

One can strengthen the psychoanalytic argument by turning to a second striking feature in the judgment, one of comparison or, in technical terms, *syncrisis*, the comparison of contrary things in the same sentence.⁸¹ The sentence in question comes as part of a discussion of the meaning of "insulting behavior" and reads as follows: "Overt homosexual conduct in a public street, indeed overt heterosexual conduct in a public street, may well be considered by many persons to be objectionable, to be conduct which ought to be confined to a private place."⁸² The most obvious and probably intended implication of the comparison is that there is no difference between homosexual and heterosexual behavior in public and that in consequence the law in its majesty will treat each the same and with equal severity. Again, the judge is engaged in a surprising denial: the case concerns overt homosexual behavior in a public space and the charge is that this behavior was insulting to unspecified members of the public, particularly women.⁸³ To claim that the homosexual nature of the behavior is immaterial either to the charge

80. 19 SIGMUND FREUD, *Negation*, in THE STANDARD EDITION, *supra* note 12, at 235, 235-36.

81. HENRY PEACHAM, THE GARDEN OF ELOQUENCE 162 (Harry R. Warfel ed., Scholars' Facsimiles & Reprints 1954) (1593).

82. *Masterson v. Holden*, 3 All E.R. 39, 44 c-d (1986).

83. *Id.* at 40 e-j.

or to the law is not simply a denial of the cultural meaning of the behavior, but is also a direct refusal to address the facts of the case and the questions of sexuality that they raise.

The comparison is charged with unconscious meaning. It is uncanny in its denial of the behavior that is at the heart of the case. To borrow from Sarah Kofman, "[i]t is in its very veiling that the text displays what it is hiding, which is to be found nowhere as a present meaning."⁸⁴ In other words, it is probable that the conscious denial of the relevance of the homosexuality of the conduct at issue in the case is a failed form of expression of the opposite, namely that the judge is threatened by this issue, by the question of homosexuality, and this fear silently and unconsciously determines the whole course of the decision. Put differently, why would the judge deny the essential nature of the conduct at issue in the case, if not to disassociate himself from it and so to continue to defend himself against it?⁸⁵ The innocence of the lawyer, here Glidewell's refusal to take responsibility for his decision as to the meaning of insulting behavior on the facts of the case, is further evidenced through the use of determinedly hypothetical reconstructions of the behavior. In this instance, the rhetorical figure is that of *mimesis* or mimicking of another's speech.⁸⁶

Immediately after likening homosexual to heterosexual behavior in public, Glidewell continues to argue that "the display of such objectionable conduct in a public street may well be regarded by another person, particularly by a young woman, as conduct which insults her by suggesting that she is somebody who would find such conduct in public acceptable herself."⁸⁷ Glidewell states that the legal basis for this hypothesis is a precedent decision, *Parkin v. Norman*,⁸⁸ in which the Queen's Bench defined homosexual behavior capable of being insulting by asking whether the behavior was "tantamount to a statement, 'I believe you are another homosexual,' which the average heterosexual would surely regard as insulting."⁸⁹ The explicit homophobia of this imaginary statement is striking not least because it precisely distinguishes homosexual from heterosexual behavior. A woman would not by this logic be insulted by behavior that was tantamount to the

84. KOFMAN, *supra* note 15, at 55.

85. See J. LAPLANCHE & J.-B. PONTALIS, *THE LANGUAGE OF PSYCHO-ANALYSIS* 261-63 (1973) (explaining negation).

86. PEACHAM, *supra* note 81, at 138-39.

87. *Masterson*, 3 All E.R. at 44 d.

88. 2 All E.R. 583 (Q.B. 1982).

89. *Parkin v. Norman*, 2 All E.R. 583, 588 (Q.B. 1982); see also *Masterson v. Holden*, 3 All E.R. 39, 42 f to 43 b (1986).

statement: "I believe you are a heterosexual." However much he may deny or endeavor to veil it, it is precisely the homosexual character of the behavior which is objectionable to the judge.

It would be possible to carry the analysis further and to speculate at length upon why the judges are possessed of this fear that dare not speak its name, but the hermeneutic value of psychoanalytic method should by now be apparent.⁹⁰ Legal training was classically a sacred rather than a secular calling and, among other virtues, it inculcated those of celibacy, restraint, reverence, and modesty. Obviously, the modern profession is no longer explicitly religious in its public representations, even though aspects of the monastic origins of the profession and, particularly, the trappings of a homosocial community remain to direct the neophyte lawyer to the self-effacing goals of a venal practice. In its modern form, the profession replaces belief in the divine source of law with a strictly demarcated faith in its objectivity. To the extent that it is distinct as a social practice, law presents itself as a species of logic that deals with the necessary forms of manipulation of established rules. The subject is nothing within this self-conception of a dogmatic or scientific practice. Psychoanalysis offers another reading of the texts and the logic of law. It recollects the classical definition of law as an art (*ars iuris*) and of legal practice as being, among other things, a branch of aesthetics. It seeks the subjectivity, the eros or desire, in law that motivates a subject to think or a lawyer to act. Psychoanalysis offers a "double reading,"⁹¹ an analysis that reconstructs the subjective history of the text and recoups the images and other phantasms that play upon the legal soul. The truth of the psychoanalytic reading is thus one that exists at a different level to the surface text or conscious manipulation of legal rules. The psychoanalytic reading seeks out an affectivity that lawyers are traditionally constrained to hide or deny. It analyzes the creativity of judgment in a text that can only express that creativity in the form of repression. It addresses the femininity of a masculine profession and, ironically in light of the example of *Masterson*, reconstructs the traces of that femininity in the slips and other figures and images of the books of law.

Eros in Legality

The success of a psychoanalytic interpretation of legal texts depends upon an understanding of the text, like the psyche, as being the product of conflicting forces. The text is a tissue of differing meanings, and it can be

90. For other examples of the use of a psychoanalytic method of interpreting cases, see GOODRICH, *supra* note 9, at 181-222.

91. KOFMAN, *supra* note 15, at 53-103.

read both as an intentional and rational expression of normative decision-making and as the trace of a conflict between desire and prohibition, eros and legality. This implies that there is more than one logic or reason to the text, that the surface reasoning conceals "another scene" or "beyond" of legal meaning and rule that one must reconstruct from the traces or vestiges of unconscious desire. This does not mean that this other dimension of the text is wholly negative or that the fact of repression should lead the analyst to discount the phantasms and other images of the unconscious. The conflict or compromise that produces the legal text is not merely productive. It is also in many respects positive, and the legal tradition has always in part acknowledged and venerated the existence of this unconscious or phantasmic level of meaning.

Early modern treatises on legal method mimicked theological hermeneutics by referring to a meaning that lay beyond words — out of hearing (*subauditio*) or underneath discernment (*subintellectio*) — in a power or spirit of law that no text or bare words could wholly encompass. Thus, most famously, Coke talked of a truth of law that cannot be read in words, but which ought to be loved.⁹² The civilian Sir Robert Wiseman, in *The Law of Laws*, was even more expansive:

The law does not lie in the word but in the feeling, not in the surface or leaves of the text, but in the innermost affection or interior meaning No words, forms, niceties, or propriety of language, is of any regard in the Civil Law, in comparison of truth, faithfulness and integrity.⁹³

In more contemporary and less explicitly erotic terms, judges frequently refer to a particularistic reason, common sense, or conscience of law that escapes any precise formulation in precedent or any explicit statutory definition. Rather, it develops out of the agonistics of pure practice, the pragmatic and particularistic intuition of judgment. More formally, one could say that the conventions of custom, the maxims of equity, principles of method, unwritten tradition (*communis opinio iuris*), and erudite opinion (*tradio*), all form reservoirs of an indistinct authority that belongs to the truth or power and force of law (*vim ac potestatem*) and not to its more prosaic forms.⁹⁴ Behind the rules of law and the calculations of decision making lie

92. 3 COKE, *supra* note 47, at xxii (stating "[i]n lectione non verba sed veritas est amanda"); see IAN MACLEAN, *INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW 158-178* (1992) (discussing this theme and relevant maxims from the DIGEST to the Renaissance); GOODRICH, *supra* note 9, at 16-40.

93. SIR ROB. WISEMAN, *THE LAW OF LAWS OR THE EXCELLENCY OF THE CIVIL LAW* 70-71 (London, Royston 1656) ("*Lex non in verbis sed in sensu, non in superficie et foliis verborum, sed in medulla consistit . . .*").

94. THE DIGEST OF JUSTINIAN, *supra* note 36, at 12 (Celsus) (stating "[s]cire leges non

a series of images or phantasms of justice that are inaccessible to rationalistic forms of legal analysis. Yet, they play a crucial role both in the art of judgment and the public presence of law. Images of legal authority, emotive depictions of justice, incidental figures of legal language, and colors of judgment all provide a psychoanalytic jurisprudence with glimpses of what lawyers desire and what the subjects of law "addict" themselves to, believe in, or learn to love.⁹⁵

At the level of the social recognition of the legitimacy of sovereignty and acceptance of the absolutism and violence of law, the subject is fascinated by and attached to images and not to rules. The love of law is a mystical love, a strange love, addressed to an indistinct power or authority that lies beyond the text or black-letter forms of legal rule. Prior to examining the positive form of such addiction to law or love of power, the motivating features of legal life and professional practice, it is again necessary to comment upon the problem of resistance. One of the most novel and yet least developed aspects of Freud's thought was the discovery — or more properly reassertion — that the unconscious thinks in images.⁹⁶ For this reason, a psychoanalytic hermeneutics analyzes the legal text for traces of images or for figurative signs of the phantasmic presence of repressed memories.⁹⁷ The logic of memory is associative and imagistic, reconstructing by reference to affects and to phantasms or projections of the past that have nothing to do with the linear representation of time and reason in consciousness. Thus, in his essay on *Screen Memories*, Freud compares the construction of childhood memories to that of works of fiction. It is a phantasmal construction from memory traces and has a plastic or theatrical form. It puts the past into play by distorting it. "It may indeed be ques-

hoc est verba earum tenere, sed vim ac potestatem").

95. The theme of addiction to law is a common one within the tradition. See, e.g., SIR EDWARD COKE, *A BOOK OF ENTRIES* (London, Streeter 1610) (pursuing similar themes of addiction to and desire for law); SIR ROGER NORTH, *A DISCOURSE ON THE STUDY OF THE LAWS* (London, White 1650) (providing eloquent discussion of the obsessive and relentless quality of legal study). WILLIAM FULBECKE, *A DIRECTION OR A PREPARATIVE TO THE STUDY OF THE LAW* (1980) is subtitled "wherein it is showed what things ought to be observed and used of them that are addicted to the study of law."

96. FREUD, *supra* note 4, at 82 ("Dreams think essentially in images."). The medievals, of course, already recognized that thought was a combination of images of things — *formae imaginariae*, or more properly *rei effigies* — and understanding (*intellectus*). See BRIAN STOCK, *THE IMPLICATIONS OF LITERACY* 329-85 (1983) (providing informative discussion of this theme in relation to early theories of text). See generally M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD* (1979); Peter Goodrich, *Literacy and the Languages of the Early Common Law*, 14 J.L. & Soc. 422 (1987).

97. See KOFMAN, *supra* note 15, at 58-64; see also Jacques Derrida, *Freud and the Scene of Writing*, in *WRITING AND DIFFERENCE* 196, 196-231 (1978).

tioned whether we have any memories at all *from* our childhood: Memories *relating to* our childhood may be all that we possess. Our childhood memories show us our earliest years not as they were, but as they appeared at the later periods when the memories were aroused."⁹⁸ In short, the subsequent arousal forms the memory rather than merely and passively discovering it.

For Freud, the model of childhood memory was of general significance, and collective memory, history, and in legal terms precedent obey a similar logic of construction.⁹⁹ In memory the past appears in a distorted and deferred form. It answers to the desire of the historian or to the legal source of its arousal or invocation. In this context, we should understand and address it in terms of the images and imaginations that form and govern it. By the same token, an analysis of law as a culture or form of life will need to look at lawyers, and by extension, the whole institution of law, of sovereignty, precedent, and judgment, as also being an aesthetic enterprise or, in Freud's terms, an erotic undertaking. It is pre-eminently a tradition, a projection and reconstruction of the past, a work of memory. At the level of legal texts, at that of law's professional community and at that of the social identification or recognition of governance, the logic of subjective attachment to law and so also of obedience to law or application of it depends upon the logic of imagination and the power of images far more than it relies upon scholasticism or the cold dead form of legal prose. The libidinal relay of legality is comprised of a love of texts, a reverence for the past, a strict observance of the icons of authority or licit images of legal paternity, and a powerfully homosocial sense of normality and community. As the analysis of *Masterson v. Holden* began to suggest, one can depict the western legal institution as aggressive, white, heterosexual, and carnivorous. To look for the truth, the power or faith that lies beyond the compromises and rationalizations of the text, the mere words of the law, is thus to look at a community of (repressed) affections, a system of phantasmic reconstructions, a structure of erotic attachment or of legal love. The point to be stressed is that the images that govern and move legal judgment are an essential resource for the understanding of legal practice. They are a reservoir of positive knowledge and one should address them as such. One example will have to suffice.

98. 3 SIGMUND FREUD, *Screen Memories*, in THE STANDARD EDITION, *supra* note 12, at 302, 322.

99. See FREUD, *Totem and Taboo*, *supra* note 39, at ch. 3 (providing most striking analysis of construction of social memory); see also KOFMAN, *supra* note 15, at 62 ("The historical memory of nations constructs a history in an after-the-fact temporality, based on real events and with a pragmatic aim. All that remains of the actual past is an obscure tradition preserved in legends, which poets — especially epic poets — take hold of.").

Anima Legis or the Spirit of Law

In the 1987 case *Attia v. British Gas plc*,¹⁰⁰ the English Court of Appeal dramatically extended the law relating to the recoverability of damages for psychiatric harm.¹⁰¹ The case, though anomalous, is highly instructive in that it provides a dramatic and reasonably accessible glimpse of the legal soul. Mrs. Attia employed the defendants to install central heating in her house in Middlesex.¹⁰² "[R]eturning home at about 4 pm on 1 July 1981 she saw smoke coming from the loft of the house. She telephoned the fire brigade but, by the time the firemen arrived, the whole house was on fire [O]bviously the house and its contents were extensively damaged."¹⁰³ The defendants admitted liability in negligence for the physical damage to the house, but the question remained whether the plaintiff could recover damages for "nervous shock," the psychiatric harm occasioned by seeing her "home and its contents ablaze" for a period of somewhat over four hours.¹⁰⁴ The Court of Appeal unanimously held that the psychiatric damage occasioned by seeing "her home and possessions damaged and/or destroyed"¹⁰⁵ was recoverable. In some respects the decision was an obvious one, simply extending the general criterion of foreseeability to a new situation. The categories of negligence, as Lord Macmillan once observed, are never closed. The stronger argument, however, is that the decision is anomalous both in terms of lacking doctrinal justification and in terms of failing to accord with existing precedent.

The extant law on recoverability of damages for psychiatric harm at the time of the *Attia v. British Gas plc* decision was the recent House of Lords decision in *McLoughlin v. O'Brian*.¹⁰⁶ In terms of doctrinal development, the *McLoughlin* decision explicitly established a multiple test of proximity.¹⁰⁷ In that decision, Lord Wilberforce stated that three elements were inherent in any claim: "the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused."¹⁰⁸ In *British Gas*, the first head of foreseeability is most significant.

100. 3 All E.R. 455 (C.A. 1987).

101. *Attia v. British Gas plc*, 3 All E.R. 455, 462 (C.A. 1987).

102. *Id.* at 456.

103. *Id.* at 456.

104. *Id.* at 462.

105. *Id.* at 455, 456.

106. *McLoughlin v. O'Brian*, 2 All E.R. 298 (H.L. 1982).

107. *Id.* at 304 f-g.

108. *Id.*

As regards the class of persons, the possible range is between the closest of family ties, of parent and child, or husband and wife, and the ordinary bystander. Existing law recognises the claims of the first; it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life or that defendants cannot be expected to compensate the world at large.¹⁰⁹

Without discussing whether *British Gas* was a recognized calamity of modern life, Lord Wilberforce may finally be cited as authority for a striking image of method. In situations of the type under discussion, "the courts have proceeded in the traditional manner of the common law from case to case, on a basis of logical necessity."¹¹⁰ The expression "logical necessity" is in rhetoric the figure of *sylogismus*, defined as "a form of speech whereby the orator amplifies a matter of conjecture . . . offering a sign or token to the reason of the hearer, from which his meaning may be gathered," and deserves brief comment.¹¹¹ To claim that reasoning by likeness, by metaphor or simile, by translation from one image to another or from one affection or experience to the next, is a procedure of logical necessity can only be understood as irony or dissimulation. It is no more possible to "deduce" a relation between one context and another than it is feasible to claim any strict identity between the legal reconstruction of different events occurring at different times and affecting different parties. The "logical necessity" of analogy is at most a subjective necessity imposed by custom and habit. While Roman law long recognized the logical weakness of such arguments predicated upon similarity, the common law returns continuously to an empiricism which claims somewhat mystically that analogy is the "natural tendency of the human and legal mind."¹¹² The analogy then suggested by Lord Wilberforce is that of the different situations in which parents can recover for psychiatric harm caused by injury to their child. Lord Scarman added laconically, "I foresee social and financial problems if damages for 'nervous shock' should be made available to persons other than parents and children . . ."¹¹³ The Australian case of *Jaensch v. Coffey*,¹¹⁴ which stipulated no specific kinship tie but a "close, constructive and loving relation" between the parties probably hit upon a formulation that best describes the current law — the tie must

109. *Id.* at 304 g-h.

110. *Id.* at 302 f-g.

111. PEACHAM, *supra* note 81, at 179-80.

112. *McLoughlin v. O'Brian*, 2 All E.R. 298, 303 a-b (H.L. 1982).

113. *Id.* at 311 e.

114. (1984) 54 A.L.R. 417.

be close and affectionate and, while it need not necessarily fall within the conventional classifications of lineal or familial proximity, it does require an affection lodged between human partners.¹¹⁵

With the well-canvassed exception of rescue cases and the unique example of claims based upon fear of injury to a workmate, legal doctrine has consistently maintained that proximity with regard to the class of persons allowed to recover means a tie of blood or a recognized relationship. Such a relationship has always meant a relationship between persons. Even taking account of judicial paternalism or the doctrinal desire to keep legal judgment separate from the sphere of domesticity, it is hard to see that it falls within the "natural tendency of the human and legal mind" to perceive a house either as, or as being like, a relative or analogous to a person. Nor does precedent provide any examples of logical necessity leading from person to property or from animate to inanimate. A person is not in ordinary speech, art, or legal language "like a house." The only precedent offering any support for the Court of Appeal decision is the somewhat obscure earlier decision of the Court of Appeal in the case of *Owens v. Liverpool Corp.*¹¹⁶ In that case, the plaintiffs witnessed an accident involving a dead relative, an inanimate person.¹¹⁷ The dead relative's coffin was dislodged by an omnibus operated by the defendants.¹¹⁸ Close relatives of the deceased in obvious proximity to the accident experienced shock as a result.¹¹⁹ On the grounds that it is the dignity or office of the dead to be in repose, the court found that the disturbance to the coffin and the threat that it might at any moment slide out of the damaged hearse and fall to the street was sufficient ground for recovery.¹²⁰ The court recognized that the threat of injury to the dead was a marginal if not tenuous analogy to earlier situations, but suggested that what was significant was the proximity or strength of affection between the parties.¹²¹ Lord Justice MacKinnon went further to suggest consideration of the moot case of damage caused by the death of a much loved pet dog.¹²² The "beloved" dog is the Englishman's best, most trusted, and most loyal friend, and it is easy to imagine that the court might well have difficulties distinguishing the family dog from other members of the family. It remains

115. *Jaensch v. Coffey* (1984) 54 A.L.R. 417, 457.

116. *See Owens v. Liverpool Corp.*, 4 All E.R. 727 (C.A. 1938).

117. *Id.* at 729 c-d.

118. *Id.* at 729 b.

119. *Id.* at 729 c-d.

120. *Id.* at 731 a.

121. *Id.* at 730 e to 731 a.

122. *Id.* at 730 f.

the case, however, that the subjects of injury in precedent cases extended no further than a hypothetical living non-person or a dead relative.

Returning to the decision in *Attia*, it is evident rhetorically that more is at stake than a simple question of the foreseeable consequences of damage to property. That case involves an immediate shift in the depiction of the facts from the cognitive to the affective and from description to evaluation when the object of damage is renamed and becomes not a house but a home. The figure in question is that of *antonomasia* or change of name. It is described by Smith as a sentential figure (*figura sententiae*), which "is a figure . . . for the forcible moving of affections, doth after a sort beautify the sense and very meaning of a sentence."¹²³ Its rhetorical effect is depicted by Peacham as that of metonymically transferring the value of some "dignity, office, profession, science or trade" from its proper referent to a novel *comparata*.¹²⁴ In its usual rhetorical manipulation, the substitution of name is metonymic in the sense of selecting a quality or essence that is representative of the whole: Cicero for eloquence, the Philosopher for Aristotle and so on, where the substituted name elects to qualify the object or subject in either a positive or negative fashion. The attribution is the more powerful for being unmarked or tacit; its force and accuracy are simply assumed and the lauded or denigrated part not only is taken for the whole but also moves from passive to active, from description to qualification, and in sum from object to *telos* or goal. Whether or not one term or another, house or home, is more properly descriptive of the structure that formed the subject matter of the decision, the shift or slippage from one term to the other, from species to species or from the descriptive to the evaluative, gives occasion for analytic concern. The trope is an indicator of an affect or unconscious intent, a figure of a subtle argumentative shift and it is precisely the hidden, oneiric or repressed connotations of "home" that the analyst should pursue. One can argue that these connotations are institutional and so are largely unconscious. Certainly, the judgments did not address the legal status or meaning of a home, nor did counsel appear to raise this issue in its argument. The institutional connotations of the shift from one noun to another have to be reconstructed in these circumstances both in terms of the particular judgment and in the longer term context of the doctrinal text of which the decision in *Attia* is but a minor incidence.

The Court of Appeal recognized that the claim broke new ground. Indeed, "[n]o analogous claim has ever . . . been upheld or even advanced."¹²⁵

123. JOHN SMITH, *THE MYSTERIE OF RHETORIQUE UNVAIL'D* 7 (London, E. Cotes 1657).

124. PEACHAM, *supra* note 81, at 22.

125. *Attia v. British Gas plc*, 3 All E.R. 455, 464 c-d (C.A. 1987).

Nonetheless, the court managed to discover a duty of care and to deem it possible that, as a matter of fact, it was foreseeable that the plaintiff would suffer psychiatric harm. Lord Justice Bingham went so far as to list other objects of affection that might, if destroyed, so unsettle the seemingly restrained emotional world of their owner that the court should probably allow recovery, namely a scholar's life's work of research or composition and a householder's "cherished possessions" or heirlooms.¹²⁶ In the present instance, the damage was not simply to the contents but to the structure and place of the home itself.¹²⁷ In the absence of any manifest legal reason in doctrine or in precedent for the extension of liability for psychiatric harm to cover damage occasioned by injury to things, it is necessary to follow the trope or textual symptom, the path of affect, and inquire into the legal significance of the home. The conscious surface of the decision is here less important than its unconscious connotations; what is proffered as immediate justification is of less moment than the longer term, structural causes of judgment.

Two important legal connotations associated with the home and traceable to the very dawn of the modern common law arise. First, both in case law and in doctrinal writing, the Englishman's home is his castle. As early as *Semayne's Case* in 1605, the court held that the home was a place of sanctity, tranquillity, and peace.¹²⁸ It was the safest of all refuges ("*domus sua cuique est tutissimum refugium*").¹²⁹ It was a place of some sanctity, a hiding place, an escape, a castle, a fortress, and a space of repose and of defense.¹³⁰ In *Institute of the Laws of England*, Thomas Wood discusses *Semayne's Case* and cites it as authority for the rule that, whereas an assembly or meeting of three or more is an offense, it is not punishable if it is "for Safeguard of His *House*, and for the Defense of the possession thereof."¹³¹ It is permissible to gather friends to prevent any unlawful entry into one's own house, "but he cannot assemble his friends for the defense of his *person* against those that threaten to beat him, while he is out of his house."¹³² Wood provides a variety of definitions of house (*domus*) and mansion house (*domus mansionalis*). The fact that "a chamber in an Inn of Court, where

126. *Id.* at 464 e-f.

127. *Id.* at 456 g.

128. *Semayne's Case*, in 5 COKE, *supra* note 47, at 91, 91.

129. *Id.*

130. *Id.*

131. 2 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 735 (Savoy, Sare 1720).

132. *Id.* at 736.

one usually lodges, is a mansion-house" no doubt did much to aid the longevity of the legal profession.¹³³

Later case law reiterates and emphasizes the sanctity of the home and garden. The most famous statement of right comes in *Entick v. Carrington*¹³⁴ in which Lord Camden asserted the legal protection of the home to be an "extraordinary jurisdiction" coeval with the law itself and so without origin or evidence beyond its statement, save that "precedent supports it."¹³⁵ The Saxon concept of "house-peace" and the liberties spelled out in the *Magna Carta* are likely sources of such precedent, though none is needed for so ancient a rule. Lord Camden subsequently remarks upon the ethical legitimation of the rule as being coincident with the end or *telos* of law and of society itself: "The great end, for which men entered society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole."¹³⁶ With a measure of hyperbole suitable to the occasion and the threat to this admittedly defeasible right, Lord Camden concludes with the celebrated defense of the English home and garden, stating that "[n]o man can set foot upon my ground without my licence, but he is liable to an action, though the damage be nothing . . . [even for no more than] bruising the grass . . . or treading upon the soil."¹³⁷ Later cases state a similar exaggeration of an impermanent right in terms of the protection of every single room in the house by separate writs of trespass. The house, of course, was many things in legal terms and was certainly not free of legal and ecclesiastical interference with regard, for example, to "good government" or with respect to the proper forms of worship or the duties of husband and wife. It was in an express sense a symbol, a condensation of numerous narratives of English identity, an image to which the judges attached a peculiar if unwitting legal force.

Whether or not the common law protection of the house as home of the subject is viewed as successful or otherwise effective, the home is a legal term that carries a remarkable significance. The home is autobiographically both domesticity and family. It is the site of the originary law of paternity, and also, in its earliest stages, the *gynaecium* or maternal domain. The home psychoanalytically connotes emotional security, nurture, and the immemorial, that which is — like common law — a record or testament *aere*

133. *Id.* at 652.

134. 19 Howell's State Trials 1029 (1765).

135. *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (1765).

136. *Id.*

137. *Id.*

perennius. The home represents tradition in the precise sense that the home is external to and survives its occupation. It is the place of the forefathers, the image as *imago* or mask of the ancestor, and all that *in nuce* to which we belong. The instant that the Court in *Attia v. British Gas plc*¹³⁸ turned from house to home or simply categorized the injury as being occasioned not by damage to property, but far more specifically indicated that the damage was caused by the burning of the home, it returned unconsciously to a category of legal tradition with an extraordinary though heavily veiled affective force. The description — by the figure of *prosographia* — of the burning home as the material cause of the harm suffered carries with it an unconscious sense of an absolute violation: to destroy a sacred place is a sacrilege by ecclesiastical law. It is a transgression of the boundaries between species or profanation of the marks of an iconic space. In more secular terms, destruction of the home is disrespectful of tradition and contemptuous of lineage, ancestral virtue, and what lawyers term the "titles of antiquity" that families pass on through the home. One can go further to suggest that destruction of the home connotes a challenge to the most basic law, not simply that of kinship, but in legal terms that of the first *societas*, the family and its order of succession.

The fact that the plaintiff was a woman is also significant. In *Owens v. Liverpool Corp.*,¹³⁹ the court questioned, "[i]f real injury has genuinely been caused by shock from apprehension as to something less important than human life (for example, the life of a beloved dog), can the sufferer recover no damages for the injury he, or perhaps oftener she, has sustained?"¹⁴⁰ It is not clear what weight this shift in gender would have in determining the factual outcome of either case, but one should undoubtedly observe that in affective terms the home is a gendered category. In constitutional doctrine, Sir Thomas Smith, following Aristotle, finds that the household is the internal domain of the woman, while the external world is the sphere of men.¹⁴¹ In terms of the ecclesiastical law of marriage contemporary with the earliest surviving statements of the privacy and sanctity of the home, it is clear that protection of the home is protection of the vulnerable, the women and children, for whom the home is the world. In this respect the portrait of the facts in *Attia* again betrays an unconscious reservoir of institutional emotions

138. *Attia v. British Gas plc*, 3 All E.R. 455 (C.A. 1987); *supra* notes 100-05, 124-26 and accompanying text (discussing *Attia*).

139. *Owens v. Liverpool Corp.*, 4 All E.R. 727 (C.A. 1938); *supra* notes 116-122 and accompanying text (discussing *Owens*).

140. *Owens*, 4 All E.R. at 730.

141. SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* 58-59 (Mary Dewar ed., 1982).

or structures of value that persist over the *longue durée* of common law. The figure of *antonomasia* indicates a slip or unconscious motive and allows for the reconstruction of "another scene" of legal judgment, that of affect and desire. In terms, finally, of the structure of the legal unconscious, the case of *Attia* is representative of one dimension of the conflict that constitutes the dogma, dream order, or delirium of the institution. Psychoanalytic reconstruction of the case opens up a zone of affects and redefines the house as an object amongst other objects of identification and love. The judges are trained to deny the emotive basis of their reason. They nowhere discuss the affective source of their decision. Yet, it is evident from the analysis of the figures of the decision that, in this case, as in others, judgment follows an affective course, the logic being one of a political desire or legal aesthetic. It is striking and sad that one cannot address this logic within the terms of law. The soul of the lawyer must remain an artifice that denies its affectivity and remains estranged even from its own representations.

Conclusion

The aesthetic and affective dimensions of legal community are not readily accessible primarily because legal training and the jurisprudential self-representations of law direct practitioners to deny the affectivity, emotions, and imaginations that underlie the sober appearance, the order, hierarchy, and reason of legal rule. In one classical legal formulation, "nothing is more beautiful than order."¹⁴² That order or legality was to be represented in the form of logic or *more geometrico* because the beauty that law promulgated was one of abstract geometrical precision, of exact calculation and repeated norms. Observers within the jurisprudential tradition have directed little attention to the possibility that such a representation of law was itself an image or more properly an icon, that it had its origins in the acquisitive and military concerns of imperial Christian powers, that it feared other images of power or community because they represented an unwarranted freedom of thought. Law fears the image and the correlative logic of affections because the legal profession and the legal order require social recognition of a very specific and specialized icon of justice, the residue of a monotheistic source of law, a singular and hierarchically placed sovereign, a unique social subject with which the legal subject can identify exclusively and jealously.

Lawyers also fear images because the associative (or metonymic) logic of images is unamenable to legal forms of control in the same sense that one

142. LEGENDRE, *supra* note 53, at 55 ("*Nihil pulchrius ordine*"). "[T]he power of institutions is a product of their use of images . . . to train the subject aesthetically." *Id.*

must listen, rather than speak, to the unconscious — and lawyers, at least in their professional persona, are bad listeners. Law fears images because images are the bearers of emotion and lay bare an affectivity of law that jurisprudence historically has sought to repress or at least to train and to restrain in the particular image of an abstract and disembodied logic of law.¹⁴³ One must acknowledge that the singular image or icon of modern law, that of a science of abstract rules and of their disembodied manipulation, lacks aesthetic force and represents a false self, an artifice that has for some time seemed archaic and of decreasing relevance to the technologies and virtual presences of the postmodern world. For all that, the lawyer is peculiarly ill-equipped, by training and by habit, to develop new forms of self-representation or to expand and diversify her understanding of the images and emotions that underpin the practice of law. The malady of the legal soul is precisely a malady of representation, an inculcated inability to relate legal discourse to the psyche or to its affects and drives. It is an estrangement from law's own intellectual life, from the eros within.¹⁴⁴ Psychoanalytic method, and particularly the analytic concern with the unconscious logic of the image, requires that law in both its plastic and textual forms be thought or analyzed in very different ways. The psychoanalytic hermeneutics outlined above has suggested one avenue of pursuit of the other scene or "other dimensions" of law through the figures, the images, and other signs in the language of judgment. Such a hermeneutics is invaluable in that the textual tradition forms the almost exclusive focus of legal doctrine. It is arguable, however, that even the text is just another image, an icon of reason and rational governance, that should be subject as well to the analysis of the lawyer's subjective attachments and professional affections.

Lawyers love texts and are classically portrayed as addicts of a sedentary and scriptural life. No day can pass without its texts.¹⁴⁵ No legal life can progress without a steadily accumulating library and the passion of literary study.¹⁴⁶ The Renaissance lawyer Fulbecke speaks amusingly in this

143. For an overview of legal antipathy toward images, see generally Costas Douzinas, *Whistler v. Ruskin: Law's Fear of Images*, 19 ART HIST. 353 (1996); GOODRICH, *supra* note 9, at 68-107.

144. See JULIA KRISTEVA, *NEW MALADIES OF THE SOUL* 3-44 (1995) (discussing maladies of the soul in psychoanalytic terms).

145. NORTH, *supra* note 95, at 7 ("*nulla die sine linea*").

146. There is in this respect the story of the Renaissance French lawyer Guillaume Budé who is reported to have loved his books, *literarum studium*, more than his wife or his children, and who is commended for this philological passion by another lawyer, Jan-Luis Vives. See GOODRICH, *supra* note 36, at 138-41.

context of the scourge of lawyers, men so transformed and consumed by law that they

are so full of law points, that when they sweat it is nothing but law, when they breath it is nothing but law, when they sneeze it is perfect law, when they dream it is profound law. The book of Littleton's *Tenures* is their breakfast, their dinner, their boier [tea], their supper and their rare banquet.¹⁴⁷

Love of texts in this respect is a symptom, however, not of a strictly normative content, but of an image of temporal distance and an aura of mystical authority. To the legal mind, the text harbors a paternal authority that pre-exists and is for that reason impervious to the contemporary techniques of historical, literary, and psychoanalytic criticism. The text is an emblem of attachment. It represents an order and hierarchy of meaning, tradition, and continuity that structures and supports the established community of law and its image of professional integrity. The lawyer's love of the text is classically a filial love, that of the attachment of a child to a parent. It is one of faith, fear, and respect, but one that can also mask a murderous desire.¹⁴⁸ In either event, it is a passion that is greatly threatened, as is the textual order of legal meaning, by the psychoanalytic assertion of the Oedipal character of this love, of the phantasmic quality of its interpretative practices and other forms of dissemination.

The text allows the lawyer to say "it is written" and so evade accountability for the rule or judgment made. In writing a judgment that somewhat counter-intuitively and illogically denied the relevance of the homosexuality of the couple who were held to have been in breach of the peace for kissing in public, the court in *Masterson v. Holden*¹⁴⁹ pretended to a simple or unwitting application of precedent rules. The judge, in other words, refused to address the substance of the offence or the specific subject who had acted offensively. Justice, at least in the sense of hearing or simply seeing the other who comes to be judged, was not done. Law was applied merely calculatively and not casuistically. In that sense, modern law is an unthinking exercise of power, a simple circulation of texts rather than an exercise of art or judgment. In Freud's argument, this disembodiment of the source

147. 2 WILLIAM FULBECKE, A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND sig. B2r (London, Society of Stationers 1618).

148. See generally SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* (1979) (depicting a filial fear of the text).

149. *Masterson v. Holden*, 3 All E.R. 39 (C.D. 1986); see *supra* notes 69-78 and accompanying text (discussing *Masterson*).

of power or author of law was necessary to the process of identification through which law becomes an object of attachment. For law to be an object of communal love, courts must represent it as a mythic or totemic object with which the subject can identify. Such identification is erotic, "binding the members of the community together in a libidinal way."¹⁵⁰ *Eros*, in other words, is at the basis of law because it is a collective love in the form of a shared identification with the icons of legality, with the images of the sovereign author of law, whether Parliament, President, or people, nation, necessity, or nature, that binds the group and limits the individual's pursuit of power. Christianity and law inherit the maxim that we love our neighbor from a basic psychological principle which Freud interprets in terms of the necessity of loving ourselves in others. In the absence of such love or of the civilizing force of *Eros*, man would simply be a predator upon other men. *Homo homini lupus*.¹⁵¹

An obvious point remains. If desire underpins legal order and if its surface reason masks a thinly veiled sexual love, to date a homosexual love, it has been a competition pursued between male rivals. Freud treated this issue not only in terms of the Oedipus complex, but also in terms of his theory of infantile sexual development. In that theory, he admitted that social feeling is closely connected to homosexual love: the rival — the father or the brother — is transformed, by identification, into a love-object.¹⁵² According to the Freudian theory of the subject (ego), the social relation with the other is a relation to oneself. It is simultaneously social and narcissistic. Hence, it is a homosexual love, an amorous fixation between similars which first integrates the rivalry of brothers or the social tensions imposed by instinct.¹⁵³ Whatever the wider theory of normalization that this thesis implies, in legal terms it supports the characterization of the professional community as being homosexually bonded. The competitiveness, rivalry, and professional competition that mark the lawyer as a successful member of the legal community are predicated more upon the similarities of the group members than upon their differences. Intrinsic to the professional community is a group identification by means of which rivals identify

150. FREUD, *supra* note 3, at 55.

151. Man is a wolf to man. FREUD, *supra* note 3, at 58 (citing Plautus, *Asinaria* II, iv, 88); see J.C. SMITH, *THE NEUROTIC FOUNDATIONS OF SOCIAL ORDER: PSYCHOANALYTIC ROOTS OF PATRIARCHY* 348-55 (1990) (discussing this theme).

152. 18 SIGMUND FREUD, *Some Neurotic Mechanisms in Jealousy, Paranoia and Homosexuality*, in *THE STANDARD EDITION*, *supra* note 12, at 221, 231-32; see BORCH-JACOBSEN, *supra* note 39, at 200-04 (discussing this Freudian theory).

153. See generally ÉCRITS, *supra* note 9, at ch. 6; MIKKEL BORCH-JACOBSEN, *LACAN: THE ABSOLUTE MASTER* 21-41 (1991) (discussing Lacanian theory).

themselves with one another through a similar love of the same object. As the example of *Masterson* suggested, the latent homosexuality of the profession itself renders recognition of the erotic substrate of social interaction so immediately threatening and so rapidly in need of official denial.¹⁵⁴

Freud and those who follow him depict a law that is modeled upon the power of the father. They elaborate a symbolic order that is patriarchal in its norms and in its methods. To some extent that account of the legal order reflects an institution embedded in a history of homosocial power and a continuing male privilege. It would be wrong, however, to leave the psychoanalytic interpretation of law without also acknowledging its subversive potential. As a hermeneutic or technique of textual interpretation, psychoanalysis provides a radical method for exploring the repressed affectivity and so also the potential of lawyering. The analysis of textual traces and rhetorical figures allows for the reconstruction of an affectivity of judgment that lawyers have seldom paused to admit or analyze. The erotic basis of legal order, its foundation in desire, is open to other readings. The subject's attachment to law is also an unconscious fascination or bonding, a matter of phantasms and images of power and community. To understand that other dimension of law is to facilitate a critical apprehension of the symbolic nature of the power of legal community and to foster the possibility of its revision according to other dictates and other desires. "The history of dreams, if it were to be written, would also be a history of law."¹⁵⁵ The interpretation of the relation of laws to dreams can help the critic understand the soul of the lawyer and so also the affectivities of law and of legal judgment. It can thus further play a role in freeing the subject of law from the initial and initiatory erasure of individual subjectivity, of experience and affection, the deletion of the "I" with which the trauma of entry into law begins.

154. See *supra* notes 69-78 (discussing *Masterson*).

155. Vismann, *supra* note 52, at 134.