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*From the Underworld: on the Origin of Images
between the Emblemata Iuris and Film Theory*

The Culturological theory of law developed by Peter Goodrich shows immediately its origins rooted in common law culture, for its exquisitely casuistic methodology. The tools of analysis derived from the ways and means of Critical Legal Studies, from deconstruction, or from a genealogy à la Foucault, allow the English scholar to reach a certain organic unity of discourse, remaining however, within an analysis that deploys cases and *exempla*, rather than building general theories based on postulates. Among the main purposes of Goodrich's theoretical discourse, there is the attempt to provide a precise theoretical status for the images of law: the so-called *legal emblems*. In this essay, we will attempt to articulate such status on three different levels: the epistemological, the hermeneutical and the aesthetic. Finally, we will try to identify which elements, in the thought of Goodrich, may fix points in order to develop a philosophical hypothesis on the origin and foundation of images in general, and on the indivisibility of such origin from the legal field.

Borrowing neologisms found in the titles of two recent works by Goodrich, we start to see the richness of the role of images in legal culture. On the one hand, images, as *obiter depicta*, are elements belonging to law itself, which enrich it with a multiplicity of meanings; on the other, they remind us that the category of the legal cannot be reduced to "the verbal" and that legal emblems themselves often arise to «modes of visual governance», which establish a real visiocentric regime².

Epistemology

According to Goodrich, the epistemology of law is summed up in the premises, i.e. the dogmas, which set up the doctrine³. They have a political nature and manifest themselves through the rhetoric of law⁴, which includes legal emblems; indeed,

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2 Cf. P. Goodrich, "Visiocentricity. On the Futures of the Fingerpost", in: *Critical Inquiry*, Vol. 39, No. 3, Spring 2013, pp. 498-531 (p. 501) and Id., *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*, Cambridge University Press, Cambridge, UK, 2014, pp. 46-47.

3 Cf. P. Goodrich, *Oedipus Lex: Psychoanalysis, History, Law*, University of California Press, Berkeley & London 1995, p. 13: «The positivized jurisprudence of common law, the *epistemology of doctrine*, is tied by precedent to a knowledge that is known in advance, to a prior determination of the forms, classifications, languages, and similitudes through which judgment will be repeated».

4 «[...] Scholars such as Jerry Frug and Peter Goodrich emphasise that law is simply

the images nourish and give life to the legal discourse, along with “the word”, which characterizes the doctrinal/dogmatic study of law.

Legal discourse, in Goodrich’s reflection, is just one among the many regulatory systems in competition with each other: in this context, law is closely related to the constructions of religion, ethics, or social customs. The maxim governing the rhetoric of this discourse is that of *control* and the dynamics that characterize it are *domination* and *subordination*⁵. The task of legal rhetoric is to publicly convey a peculiar image of the social power relations. It is abundantly clear in what measure the thought of Goodrich is influenced by the critical theory of the Frankfurt School, whose role was decisive for the rise of critical legal studies. Coming to the issue of the images, it is clear at this point, the reason why the construction of *emblemata iuris*, which help to transmit the meaning and sacredness of the law (we shall soon see in which sense), is «a question of epistemology»⁶. The meticulous and esoteric edification of the images of law is the device through which the rhetoric of the legal has been constructed and maintained and this rhetoric constitutes the cognitive support, the epistemology, of *the legal* as a category.

At the opening, we have defined the legal theory devised by Goodrich as “culturological”. American anthropologist Leslie A. White, to indicate the way in which ways of thinking, experiences and knowledge develop and spread, introduced the term “Culturology”⁷. Cultural issues are related to borrowings, sudden shifting of paradigms, prevalence of theoretical models, territorial conquests, or parallels between the material and technological innovations with philosophical, artistic or literary achievements. After White, the concept of Culturology has been employed by many other scholars, including a philosopher of science like Mario Bunge, who turned it in profitable account in the context of the sociology of scientific thought⁸, and an art critic and expert on aesthetics of phenomenological address such as Renato Barilli⁹. Despite many different theoretical approaches, all these scholars have set themselves the goal of showing that culture, as a product of human mind (to borrow the words of Popper, we could speak of the objects belonging to World 3), does not necessarily follow the same trends highlighted by biological evolution, but it has its own specific features and dynamics, linked to the multiple mentalities and peculiarities of the different social organizations. The first one, however, to have developed a theoretical

language and rhetoric»; contained in: Ian Ward, *Law and Literature: Possibilities and Perspectives* (1995), Cambridge University Press, Cambridge, UK 2008, p. 50.

5 Cf. P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques*, Blackwell, London 1986, p. 20.

6 P. Goodrich, *Legal Emblems...*, cit., p. 85.

7 L. A. White, *The Science of Culture: A Study of Man and Civilization*, New York, Farrar, Straus and Cudahy 1949, pp. 115-117 and 409-415; see also, by the same author, *The Evolution of Culture: The Development of Civilization to the Fall of Rome* (1959), Left Coast Press, Walnut Creek, CA 2007, pp. 28 and ff.

8 M. Bunge, *Social Science under Debate: A Philosophical Perspective* (1998), Toronto University Press, Toronto & London 1999, chapter 5 (pp. 219-256).

9 R. Barilli, *Scienza della cultura e fenomenologia degli stili* (1982) Il Mulino, Bologna 2000, almost entirely; but see, most notably, chapter 1 and chapter 2, § 1 and § 4.

system similar to the culturological method, was the Russian writer and philosopher of language Mikhail Bakhtin. He built the concept of “unitary language”, to indicate a force of regulation, which unifies the many different accents of social dialogue¹⁰. It is exactly the device hidden in the *control* activated by the law and fed by that legal rhetoric, which aspires to create a monoglossic “legalese”¹¹.

The dimension of legal wisdom is marked, as we have already pointed out, by assumptions and dogmas, which function as fingerposts for both the doctrine and judicial decisions. This fundamental feature joins law to theological knowledge. Even images contribute, as we have already mentioned, in appending sacral meanings to the practice of law: beside the word (and removed by the doctrine), legal emblems build the liturgy of the legal. The role of the images with reference to the epistemology of law is therefore ambivalent. On the one hand, it takes the form of an enriching of the meanings of law, uncovering the abyss of its irreducibility to the verbal element, whether of the scholar, or of the judge; on the other, the image reinforces the purposes of *control* put in place by legal rhetoric. From this point of view, even the legal emblems are tools that allow a certain legal system to obtain legitimacy. Already Carl Schmitt’s distinction between legality and legitimacy tended to put the latter, at the same time, inside and outside the legal system¹². The elements that justify a given legal form, belonging to the realm of *voluntas* rather than that of *ratio*, occupy precisely that “in between” position, which, according to Peter Goodrich, is also occupied by images. The place of legitimacy indeed unmask the deeper and disturbing meanings of the legal, but at the same time, shares in its keeping and reinforcing. Images (*emblemata iuris*) legitimize the system, but also show its multiple meanings and dark sides. As we will see at the end of this essay, this is an important first step towards the discourse on the origin of images itself.

Hermeneutics

The method, by which legal emblems should be studied in order to fully understand their rhetoric nature, is that of interpretation, which is what the philosophical language indicates with the term *hermeneutics*. In the context of Peter Goodrich’s work, interpretation must meet genealogical criteria, thus only being able to expose the contents of the historical-political-rhetorical devices. Genealogical interpretation was introduced by Michel Foucault, following Nietzsche’s *Genealogy of Morals*¹³. It tends to highlight how a given system of thought (in our case, a legal system, or the rhetoric artifices that support a given emblem) may be the result of contingent

10 M. Bakhtin, “Unitary Language” (1934-1935), English translation in: Lucy Burke, Tony Crowley, Alan Girvin (eds.), *The Routledge Language and Cultural Theory Reader*, Routledge, London & New York 2003, pp. 269 ff.

11 P. Goodrich, *Reading...*, cit., p. 188.

12 C. Schmitt, *Legality and Legitimacy* (1932-1958), English translation, Duke University Press, Durham, NC 2004, pp. 3 ff.

13 On this topic, cf. M. Mahon, *Foucault’s Nietzschean Genealogy: Truth, Power, and the Subject*, State University of New York Press, New York 1992, especially chapter 1 and pp. 107 ff.

changes in history, or in social systems, rather than the effect of rationally inevitable trends. In this perspective, the introduction of a cultural model or a representation able to impose itself on the other can result in changes of *Weltanschauung* and experience, either philosophical, political, or legal. For this reason, in Goodrich's theory, interpretation, whether of a legal, verbal or visual text, «must always be historicized»¹⁴, that is, it must refer to a precise historical and epistemological context. Genealogical analysis therefore, needs to be applied keeping well present the dogmas and the foundations that support a specific legal or “visiocratic” rhetoric.

The need of a genealogical approach derives from the occurrence that hermeneutics, as a specific method of legal interpretation, by means of the rhetorical tools belonging to each legal system, is certainly not the most correct method to get a critical knowledge of law as a culture, as a *discourse*. The interpretation of a legal text, «theological in its derivation», as it makes use of dogmatic premises, «is unjustifiably authoritarian in its practices»¹⁵: hence, the need for a different evaluative approach to legal exegesis. Genealogical hermeneutics provides us with the proper awareness, connecting the legal discourse to broader cultural dynamics and to other regulatory systems: the theological, the political, the aesthetic and so on¹⁶. From this point of view, the culturological method and the genealogical one are complementary figures. The first allows us to isolate the constants of change in a cultural context and to identify the dominant “unitary language”, while the second reveals such “movements” which, in history and social organizations, determine the shifting of paradigms and the way in which they find a representation in texts, meaning by this term, any evidence (*testis*) of human knowledge. Genealogy must then focus on any type of form and text, analyzing the “institutional imagination” and the unconscious of human constructions¹⁷.

Aesthetics

Aesthetics is the dimension that contains in itself all the rhetorical devices whose functioning is governed by a set of rules, which are normative in their inner nature. It can be said that the thought of Goodrich is, in its own way, entirely aesthetic, as it makes the same standards of rhetorical legal discourse (in its visual and doctrinal components or in the issues related to judicial decisions¹⁸), its main object of study.

14 G. L. Bruns, “Law and Language: A Hermeneutics of the Legal Text”, in: G. Leyh (ed.), *Legal Hermeneutics: History, Theory, and Practice*, University of California Press, Berkeley 1992, pp. 23-42 (p. 24).

15 P. Goodrich, “Historical Aspects of Legal Interpretation”, in: *Indiana Law Journal*, vol. 61, issue 3, 1986, pp. 331-354 (p. 333).

16 P. Goodrich, “*Ars Bablativa*: Ramism, Rhetoric, and the Genealogy of English Jurisprudence”, in: Leyh (ed.), cit., pp. 43-82 (p. 44).

17 P. Goodrich, *Oedipus...*, cit., p. 25.

18 P. Goodrich, “Legal Enigmas – Antonio de Nebrija, *The Da Vinci Code* and the Emendation of Law”, in: *Oxford Journal of Legal Studies*, vol. 30, no. 1, 2010, pp. 71-99.

Again, we are faced with the ambiguity of the *legitimizing dispositive* that characterizes the entire thought of Goodrich, in which legal emblems are the elements most directly related with this interstitial dimension. The problem of the aesthetic, in its relations with the theological (for the use of common epistemological strategies) and the political (for the common aim of social control), is the problem of the *foundation*. Whether we will see in the foundation a fictional place giving life, meaning and legitimacy to the law and to social systems, or, à la Schmitt, we will interpret it as the material act that lies behind the establishment of the legal norm, it is an ambiguous object. Both the aesthetic (as a category) and the foundation legitimize the legal, but, in placing themselves outside the positivized system, they will, at the same time, destabilize law itself. They bring out the hidden meanings, the rhetorical mechanisms that underlie the law and they call into question the same philosophical problem of the origin.

According to Goodrich, aesthetics, for the reasons stated above, is not so much the realm of the visible, but that of the *not shown*. Images, as legitimating devices, as denizens of the place of the foundation, do not matter by themselves, but because of the removed elements, that yet they continue to represent through tracks, signatures, and rhetorical rules. The images and aesthetics, in this context, refer to an *absence*. Goodrich reconnects aesthetics to genealogy, relying on the figure of the widow, which justifies her behaviors (her liturgies) through the memories of her deceased husband; so to say, with a present absence¹⁹.

The foundation, aesthetic by virtue of a constant reference to an absence (in this case, its very absence), is opposed to the doctrinal dimension of the word (the logocentrism of law), while giving it, at the same time, more meanings and legitimizing its political devices. This ambiguity is interpreted by Goodrich in psychoanalytic terms: in the legal field, aesthetics and legal emblems represent the feminine, the place of the origin²⁰. Then, if the image itself comes from the feminine and represents the removed origin (the fictional place, aesthetics), also its influence on the practice of law (the rhetoric of *the word*) and the methods of both analysis and reading, developed by critical legal studies (genealogical hermeneutics, literary theory), will belong to the feminine. They flow from a common source. Interestingly enough, in Carl Schmitt's work on the distinction between legality and legitimacy, the second is subsumed in a *voluntas* that gives life to the law and not in a *ratio* that guides its mechanisms²¹ or, as Derrida would say, its calculations²².

19 Cf. Goodrich, *Oedipus...*, cit., chapter 2.

20 This idea permeates entirely *Oedipus Lex*; see, in particular, the sixth chapter.

21 E. Castrucci, *Introduzione alla filosofia del diritto pubblico di Carl Schmitt*, Giappichelli, Torino 1991, pp. 30-31. This author links the founding will (*voluntas*) to a mythical-sacral effect analyzed by René Girard in relation to violence and the will of the people.

22 J. Derrida, "Force of Law: The "Mystical Foundation of Authority", English translation in: D. Cornell, M. Rosenfeld, D. Carlson (eds.), *Deconstruction and the Possibility of Justice*, Routledge, New York & London 1992, for example, p. 16: «Law is the element of calculation». Entire essay: pp. 3-67.

Goodrich's reflection leads us to an interrogation about the origin of images themselves, especially in its psychoanalytic outcome, where the origin is placed in the feminine and in the ambiguity of legal emblems, images which are suspended between the legitimation of the legal system and the exposure of its repressed components. This shows many points of contact with the theories developed by an American philosopher, who, a few decades ago, asked himself this same question, but in reference to cinematic images. This philosopher is Stanley Cavell.

In his book *The World Viewed*, Cavell questions about the origin of the moving image. On a closer inspection, it can be said that the reconstruction he actuates is both culturological and genealogical: cinema itself is the result of continuous interconnection between ideas, which move an "artistic urge", and technological innovations that, on the one hand, feed the ideas and, on the other, allow to realize the wishes of the artist. However, the pivotal point in the discussion of Cavell lies in the bond between the origin and *religion* (but we could easily speak about the category of the "theological"). However, for what concerns cinematic image in particular, there is a connection between the origin and something even more archaic and "destabilizing", which can easily be compared with the feminine, identified by Goodrich through the suggestions of psychoanalysis. The origin of the moving images can be placed in the historical and artistic context of the late nineteenth century and the early twentieth, when the "obsession" of many writers, playwrights and artists was *realism*, which was the illusion of being able to reproduce the world as it appears, in its forms and in its dynamics. From this point of view, the new medium perfectly embodies the myth of the «world re-created in its own image»: the aim of realism is thus made possible by a myth, by a fictional element which nourishes it, at the same time exposing its rhetorical underpinnings. Stanley Cavell wonders how this incarnation of the myth has been made possible in the case of cinematography, given the fact that, unlike most forms of art, film has not arisen from religion, understood as the materialization of a creed in liturgical forms. The answer that he provides is simple: movies derive precisely from that desire of reproduction of the world, wish that moving images realized by means of *magic*. The true foundation of cinema is magical, as it has been sensed by some of the best-known filmmakers of the twentieth century, from Méliès to Orson Welles, from Fritz Lang to Christopher Nolan. As Cavell flamboyantly says: «movies arise out of magic; from below the world»²³.

There is also a further homology with Goodrich's theoretical construction, whose horizon remains, it should be remembered, the law and, in particular, common law's cultural framework. The destabilizing foundation of the cinematic image, which wishes to be mimetic, shows itself, according to Cavell, through a concealment: that of the spectator. From the Platonic myth of the Ring of Gyges to Tolkien, invisibility is a recurring theme of the archetypal narratives. Film then, reproduces the world not by the simple projection of images on a screen, but allowing the viewer to watch the show, remaining unseen at the same time. As we

23 S. Cavell, *The World Viewed. Reflections on the Ontology of Film* (1971), Harvard University Press, Cambridge, MA, 1979 (enlarged edition), p. 39. For the entire reflection on the origin of the moving image, see pp. 37-41.

previously declared, the meaning of legal emblems emerges within an aesthetics of the absence, of the removed: according to Goodrich, images refer to something that is not present, but which is represented through the not shown, using, precisely, an absence. The same fictional place, as the feminine source of the emblems, which legitimates the law, is systematically suppressed and removed by the doctrine, which places at its core the *word*, the *ratio scripta*. Using the terminology coined by the Italian legal philosopher Paolo Heritier, World 0, i.e. the fictional place, the set, containing the underpinnings of positive law²⁴, is, for the logocentrism of legal epistemology, something perturbing (*unheimlich*). The fictional place of the origin be it magic, mythical, theological, aesthetic, feminine, or pertaining to the element of *voluntas*, is a disquieting (absent) presence for the political and doctrinal-epistemic project of the *lex lata*. A project of both *control* and legitimation-conservation of law's own methods, which are based on the rhetoric of the word, as the only key to the *ratio's* door.

If then film occults the viewer to reveal its "magic" origin, law instead, will occult its same origin (its place in World 0), to create a rhetoric based only on the role of *the word*, removing its multiple meanings and all the connections with the other regulatory systems.

The Origin and Theology

At the end, we have to evoke an area of knowledge (which is both one of the multiple normative discourses parallel to the law), which has appeared several times in this article: that of the theological. We have mentioned the way in which legal emblems refer to the sacral meanings of law, and how the genealogical method emphasizes the liturgical nature of legal practices and policies, and finally to the fact that, in the thought of Cavell, most art forms derive from religion. Furthermore, theology will play a central role in the question of the foundation, if we want to see, in the fictional place of World 0, the source from which all areas of human knowledge flow out²⁵. It is also well known that legal theory, from Leibniz²⁶ to Schmitt²⁷, in Legendre, Ellul and in Goodrich himself²⁸, pointed out that the category of the theological resides, with legal emblems, myth and magic, in the

24 P. Heritier, *Estetica giuridica*, vol. I, *Dalla globalizzazione alla secolarizzazione*, Giappichelli, Torino 2012, especially chapters I and II of the *Introduction*.

25 P. Heritier, *cit.*, p. 45.

26 G. W. von Leibniz, *De nova methodo descendæ docendæque jurisprudentiæ* (1667), Parisiis, Tholin, 1868, part II, p. 28; according to the German philosopher, both jurisprudence and theology are grounded on a *duplex principium*, made of *ratio* and *scriptura*.

27 «All significant concepts of modern theory of the State are secularized theological concepts»; C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), English translation, The University Press of Chicago, Chicago & London 2005, p. 36.

28 P. Goodrich, «Historical...», *cit.*, in particular: pp. 333; 335; 344; 354. In his conclusions, Goodrich relies upon the concept of "legitimizing theology" as constructed by U. Eco, in his book *Semiotics and the Philosophy of Language* (1984), English translation, Indiana University Press, Bloomington 1986, p. 163.

removed place of the origin of law. As Cavell rightly observed with reference to the cinematic form, the origin, even in the area of law, is a problem that has to be addressed philosophically and not only historically.

We will now come back for a moment to the movies, which we used as a tool to better understand the role of images, in relation to the *leitmotif* of the origin and to what we called the “indivisibility” from the legal. It is useful to remember that some scholars claimed that the moving image shares a theological source, which is the same for all western art (Jean Mitry²⁹), or that film is inherently theological, because it is liturgical in its form of fruition (Amédée Ayfre³⁰). This concept makes us aware of the fact that film represents the world (by showing it on the screen) and it is directed, in the darkness of the movie theater, to spectators participating in a ritual situation, precisely liturgical in its mechanisms³¹. It is the liturgy to act as a strong connection between the theological origin of law and the theology of cinematic image envisioned by these theorists. Ayfre elaborates an onto-theology of the moving images echoing both modern social sciences (comparing film screening to the performing of a ritual) and pauline theology (reality as seen *per speculum in aenigmate*), while Mitry states that the same theological source of the arts, is also shared by more rational areas of human knowledge like philosophy and science³². None of them mentions law, but here, we can easily rely on Goodrich. According to him, the visual elements of the law, the *emblemata iuris*, stand precisely for this theological foundation: icons, symbols, and indexes through which the images convey their multiple and frequently ambiguous meanings yearn to be universal, to represent eternal significances and values. The truths transmitted by legal emblems are connected to the feminine origin, to *magic*, to ritual, and to the regulatory system of theology, via their universal character³³. The *universalia* of legal emblems, even if they are rhetorically constructed in the same way as the doctrine is, are more directly linked to World 0, which is probably the place where positivized law relegated the ideas of both natural law and customary law³⁴. Again, we are confronted with the dual nature of images and legal emblems, because they are rhetorical tools legitimizing a legal system, but, at the same time, the items which asymptotically, move towards the origin.

29 J. Mitry, *Esthétique et psychologie du cinéma*, vol. I, *Les structures*, Éditions Universitaires, Paris 1963, pp. 15-16.

30 On Ayfre, see: J. D. Andrew, *The Major Film Theories*, Oxford University Press, Oxford & New York 1976, pp. 249-253.

31 On this conception, which is related to the theory developed by the jesuit French film theorist Amédée Ayfre, see: E. Cassini, “La teologia dell’immagine di Amédée Ayfre. Fenomenologia, fonti del diritto e schermi cinematografici”, in: *The Cardozo Electronic Law Bulletin*, Spring-Summer 2011, available at: https://www.academia.edu/695145/La_teologia_dellimmagine_di_Am%C3%A9d%C3%A9e_Ayfre._Fenomenologia_fonti_del_diritto_e_schermi_cinematografici.

32 J. Mitry, *cit.*, *Ibidem*. See also: F. Casetti, *Theories of Cinema, 1945-1995*, University of Texas Press, Austin 1999, p. 68.

33 Cf. for example, P. Goodrich, “Visiocracy...”, *cit.*, pp. 509-510.

34 See: P. Heritier, *cit.*, vol II, *A partire da Legendre. Il fondamento funzionale del diritto positivo*, particularly pp. 137-147.