

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg3>
Zitiervorschlag: Rechtsgeschichte Rg 3 (2003)
<http://dx.doi.org/10.12946/rg03/023-032>

Rg **3** 2003 23–32

Peter Goodrich

Retrolution

Abstract

Das Verhältnis des common law zur Geschichte ist schon immer ein schwieriges gewesen. Die Gelehrten des common law in der Frühmoderne gaben – nach dem Vorbild ihrer Kollegen in der Theologie – der Hierarchie den Vorzug vor der Geschichte, der Tradition vor den Texten und der zeitlosen Erinnerung vor den Zeugnissen der Vergangenheit. Am Beispiel des Fotos einer Juristin will dieser Artikel das Marketingkonzept der Retrolution – eine Retro-Fiktion – entwickeln und damit zeigen, auf welche Weise Juristen des common law die Vergangenheit so manipulieren, dass das Publikum der Gegenwart überzeugt werden kann.



Retrolution

In a recent and extremely popular book of photo portraits of women, the artist Annie Leibovitz includes a highly stylized photograph of a law professor.¹ Martha Nussbaum, a public intellectual and professor of law and ethics at Chicago University, is pictured in an emblematically legal pose. It is a complex and semiotically laden image and so deserves a detailed description.

The picture is interesting for its marginalia and for the framing of its subject but the eye is drawn initially toward the striking blonde subject of the portrait at the center of the image. Martha Nussbaum is staged judiciously. Doubly so. She is seated with a book on her lap, her hands hidden. In front of her, on a low table, a weighty reference tome lies open, in use. There are various other texts strewn around, their print out of focus and maybe airbrushed out so as to give the impression of a white and almost blank space. Moving up from this foreground of texts the immediate subject of the portrait has stopped reading and directs her gaze towards the camera and the viewer. Dressed in the academic equivalent of court dress, all in black, she sits not with the downcast eyes that traditionally marked the feminine subject of law but rather she looks up and out.² She sits as a judge within an equitable frame. She is somber yet accessible, learned yet engaged, reverent yet candid. Unusually for a portrait either of a lawyer or an academic she is not framed against a wall lined with books, she is not at a desk, nor is she in a library, classroom, or office. It is this displacement of the formality of texts that lends the necessary contrast between masculine and feminine and metaphori-



cally between equity and law. She is at home and at ease with her textual authority, she is in the world, in life. She is the bearer or inhabitant of her knowledge rather than its subject or functionary.

If Nussbaum seems in a formal sense comfortable it is because she is pictured in a living space, at home, in an emblematically domestic environment – there is a dining room table visible through an open doorway to her left – but

1 ANNIE LEIBOVITZ and SUSAN SONTAG, *Women*, New York 1999 at 194.

2 SIR JOHN FORTESCUE, *De legis natura naturae et de eius censura in successione regnorum suprema* (1466), in: *The Works of Sir John Fortescue, Knight*, London: Private Distribution 1869, at 321 depicting a justice and judgment that speaks »vultu ad yma dismisso« (with downcast eyes).

The usual depiction of the feminine in educational and instructional manuals was as »shamefast« or shame-faced, looking away. See JAN LUIS VIVES, *De institutione foeminae Christianae* [1523], London: Wakes 1557 at fol. K.1a-b. *Justitia* herself, of course, was also shamefaced – namely blindfold.

her dress, occupation and gaze all suggest she is in the home rather than being of it. It is in such a context of subtle displacements that the eye moves from the pose of the immediate subject of the portrait to the wall behind her. There hangs a painting, though only the lower portion of the picture is within the frame of the photo, as if it somehow exceeds the montage and links the present subject to an outside, a past or beyond. The incomplete painting is a jointure between the inside and the outside of the portrait, between past and future, and potentially between subject and law.

Immediately above Martha Nussbaum, *ecce mulier*, is a portrait of her mother.³ It is a primal scene of transmission and on inspection her mother transpires indeed to be depicted properly in an identical pose to that of her daughter. She too is seated, looking out, though as if to mark the difference of generations, she looks to the left, where Martha below her looks out to the right. What is significant is that as in a mirror the mother is emblematically framed in the same position, and even more strikingly she is surrounded by comparable tones, and by similar objects in similar places. The singular and explicit substantive difference, the one eye catching contrast between the two subjects is that where Martha is portrayed reading, her mother is painted knitting. Here then is seemingly the representation of a dramatic shift as also of an alternative lineage, a new law. The juxtaposition of mother and daughter, framed in the same way, one under the other, would appear to imply a matrilineal descent, a transmission from woman to woman, a feminine law. At the same time, however, that the subject is feminine, the frame and the form are classically juridical. The playfulness or parody of the portrait, the novelty of the public intellectual and lawyer in the same

position as her mother has to be contrasted to the genre of the representation and the structural message that it conveys.

Mother and daughter are portrayed as the mirror image of each other. The mother looks to her left, the daughter to her right, the daughter thus appearing as the inverse of the archetype, her reflection necessarily differing from the original that it reproduces. The difference, however, is superficial: the photo reflects back the same image in inverted form. As if to mark that very point, to Nussbaum's left, on a green chair whose hue matches the color and tone of the portrait hanging above her, a woolen shawl or throw blanket is draped, discarded but present, unneeded but available. It is significant, of course, that where the mother knits the daughter reads, that textile is replaced by text, but the overwhelming function of the portrait is that of portraying the daughter as a daughter, under her mother, carrying on the tradition, taking up her place in the institutional mirror of the present. In what follows I will argue somewhat wistfully that far from being a radical or subversive image the opposite is true. The portrait simply applies the principle of lineage to a novel form, the female law professor, and by association it repeats the existing pattern of juridical representation but this time in relation to the feminine gender. The apparent reversal is best viewed as a ruse. The photo interpellates its subject and while it does so in the inverted form of a feminine genealogy it nonetheless marks a juridical place and emblemizes the role of its current occupant in a highly conventional mode.

Portraiture has a tremendous significance in common law. The genre is one of the most visible and accessible forms of law's public presence. The portraits of past judges that mark the formal spaces of the Inns of Court, the courthouses, and

³ The image is overwhelmingly of her mother, whether or not it is actually a portrait of her mother it is staged as such and performs that function.

so too the pictures of judges, former deans, and distinguished professors that line the corridors and the other communal spaces of the law school are the emblems of the lineage and legitimacy of its current custodians. What is done is done and done well because it fits within an inheritance, a genealogical line and legitimacy, a family that stretches back beyond the time of memory to the immemorial, to nature, to God.⁴ The past as understood in common law is a prototype, a measure, a precedent that dictates contemporary forms. The genre of the portrait offers one particular species of emblem or dramatization of the past. It links the subject to her place and role within the family and thence the institution and law. It establishes provenance, the status and the priority of the source over its current and transient representation. In classical form the portrait is the *imago*, the death mask of the ancestor that rules over the family and represents the inheritance of law.⁵

The novelty and parody of the portrait of Nussbaum is undermined by its juridical form. It takes its place in the tradition of legal portraiture and not only follows precedent but also re-enacts it in relation to a novel subject, the law of the mother and the role of the daughter. The portrait would not stand out, in other words, in the law library or the courthouse corridor, it would take its place, it would hang with the rest, and if it elicited comment it would only be because it was a photograph of a woman in the place and garb of the law. Here then we witness what I will term a retrolutionary moment, the incorporation of a novelty in the form of the past, a significant *metalepsis* whereby the *novum* is rendered safe through insertion into the fictive pattern or established genre of its legally designated representation and place. The power of the portrait lies in its creation of a new emblem, the advent of

an additional fiction or precedent, in which the feminine too can take up its place in history and law. For all that such an image is exciting and politically remarkable, however, it repeats and indeed is overwhelmed by its retrospective aspect, by the formal elements of its homage to parent, filiation and law.

Attachment

It may seem curious to address the relation of law to history through the portrait of a woman photographed by an avowedly feminist artist. The curiosity of the juxtaposition and the novel medium of its representation, however, constitute a telling instance of transition, and a peculiarly explicit moment of transmission. It is in the representation of a rupture that the passage of the subject into her legal place, the instance of creation of a juristic fiction of the self, is rendered with a power that has been lost or is at least less obviously visible in the more familiar arsenal of decenal and judicial pictures.⁶ The retrolution functions in law to renew the prior fiction, to assert the prototype again, and in doing so it generates a new object of affection, a new way of loving the order and hierarchy of the past.

The photograph is not a painting and its realism in many ways makes it a better mode of embalming or emblemizing the past for the present age. The photo portrait is the equivalent of a heraldic device, it is a heroic symbol, an aesthetic form whose function exceeds its substance. The portrait legitimates by passing title on: line and authority are transmitted through the portrait from ancestor to heir. Equally importantly, the photo portrait, like precedent, is both with and without authorship: what is significant is what is there, and the art of the composer lies thus in taking the real and colla-

4 My favorite example is J. Fortescue-Aland, »Preface«, in: J. FORTESCUE, *The Difference between an Absolute and a Limited Monarchy*, London [1475] private distribution, 1714, at IV, arguing that common law »secures the means of everlasting happiness«. BISHOP AYLMER, *An Harborowe for Faithful and Trewe Subjects against the late blowne blaste*, Strasborowe: n.p., 1559 at 39

even declares that God is English. These and related texts are discussed in PETER GOODRICH, *Poor Illiterate Reason: History, Nationalism and Common Law*, in: *Social and Legal Studies* 1 (1992) 7.

5 The most interesting discussion of this thematic is to be found in FLORENCE DUPONT, *The Emperor God's Other Body*, in: FEHRER (ed.), *Fragments for a History of the Human Body*, New York

1989. See also T. G. WATKIN, *Tabula Picta: Images and Icons*, in: *Studia et Documenta Historiae et Iuris* 383 (1984) 50.

6 It is an instance, I suspect, of the tearing, rending, or rupture that focuses GEORGES DIDI HUBERMAN, *Devant l'image: Question posée aux fins d'une histoire de l'art*, Paris: Minuit 1990.

ting, juxtaposing, glossing and interpreting its elements. The photo deals in other words with the combination and interlinking of the elements of the real in precisely the same manner that the law collates and juxtaposes the prior case law. It is a nice motif in this respect that Nussbaum's hands are hidden behind the book on her lap. It is well known that the hands are one of the key markers of the authenticity of a painting – being incidental the forger pays them less mind and so betrays the act of copying.⁷ The photo is unsigned and at least at one level it is without ostensible authorship in the same sense that precedent is the manner in which common law can claim to pre-exist the act that is judged. It is according to the traditional fiction of method found and declared rather than authored or made anew.

What is important is the staging, the composition and performance of the image or precedent. If the portrait shows the feminine taking its place in the roll call of law then what is significant is that the novelty of this transition be glossed over, that its fictive status be obscured. The portrait of Nussbaum is in this regard, in the form of its presentation, extraordinarily familiar and deeply conventional. She is taking up her place, assuming a given role, at ease, and without dissonance in her reverent colors and formal dress. She is seated under the portrait of her mother and that attests a thoroughly conventional relation to parent and law. The portrait of the mother is in classical terms the *imago*, and represents Joyce's passage from »the only beggetter to the only begotten«⁸ even better than the masculine principle. The father is always uncertain – *pater semper incertus est* – whereas the mother cannot be contested. That Nussbaum is portrayed so definitively as the daughter of her mother, juristically *portio est viscerum muterua-*

rum,⁹ offers a near perfect illustration of the legal principle of transmission from history to law. Adapting the theological maxim she substitutes *ego in matre et mater in me est* for the more traditional *ego in patre*. More than that, however, this matrilineal image expresses the priority of *amor matris* over an *amor fati* that comes much later and is at most an exterior coming to terms with what the mother tongue has already inscribed.

What is visible in the portrait and obscured in precedent is the affect that binds the contemporary legal subject to the past as the source of normative legitimacy. Whether it is a mother or father or some more distant relative, the mode of relation to the past is most immediately that of attachment and of loss. The portrait functions as an image, as a visible presence or spectacle of an invisible and prior law.¹⁰ It represents what cannot be present, the imaginary source or prototype, of which the subject is the representation. The lawful image is never simply an image. It has to represent a principle, it has to be an emblem, and in Legendre's useful phrase, it has to get under the skin.¹¹ The key to the Western dogmatic tradition is quite possibly the link between dogma and dream: the licit image is the exterior sign of an interior attachment. The portrait functions in a very visible way to illustrate a subjectivity. It stages an interior affect or shows a lawful subject, a potential author of laws, someone who writes, and someone to whom the citizen or student can attach and feel comfort in that attachment or belonging.

While lawyers tend to view the text as the primary site of attachment to law, it is important to recollect that historically and functionally, the text is no more than a final instance and is itself a sign or complex image. The text, in other words, is in many respects the least visible moment of

7 The so called »Morellian method« is discussed in CARLO GINZBURG, *Myths, Emblems, Clues*, London 1990.

8 JAMES JOYCE, *Ulysses*, London 1965 at 207.

9 FORTESCUE, *De natura legis naturalis*, at 240.

10 On the theology of the image as »a spectacle of things invisible« see JAMES CALFHILL, *An Answer to the Treatise of the Cross*, Lon-

don: Denham 1565 at 169v. For discussion, see PETER GOODRICH, *Oedipus Lex: History, Psychoanalysis, Law*, Berkeley 1995.

11 For elaboration of this theme, see PIERRE LEGENDRE, *L'Inestimable objet de la transmission*, Paris: Fayard 1984.

legal regulation. It inhabits a domain of anterior fictions or takes its place by virtue of a precedent lexicon of symbols that manifest the order and hierarchy of law. What the baroque termed the theatre of justice and truth is the staging of law, the rites of solemnity and ceremony that mark what is spoken or written as something more than ordinary speech or bare text. Such fictions or visible forms do not take the place of written law but rather provide it with its place, its aura and figures of authority, its sites of enunciation as also the modes of transmission from writing to precedent, to the book or code of laws.

A first hypothesis: history is the material of legal affect. It seems strange in the context of a discipline as dry and dogmatic, as disciplined and doctrinaire as law to speak of affect or feelings for law. That peculiarity is symptomatic. Dogma is an affect and doctrine an aesthetic, a drive to order and to transmission of a tradition and textual form. Law institutes, as Legendre fondly repeats, a structure of love – an Augustinian *structura caritatis*. To be effective, law must be affective. Its primary responsibility is to tell the social story of how we are who we are and that means beginning with genealogy, with the signs of the most immediate order, that of the family. The subject is a child and has to be taught: this is the father, this is the mother, love them and respect his word – now their word – as law.¹² It is no accident, in other words, that common law was explicitly deemed »a nursing father«,¹³ and that such a parent was implicitly both masculine and feminine or in Selden's version, Janus faced.¹⁴ In a sense it was already implicit in Sir Edward Coke's notion of law as inheritance that it was not simply the past or mere history that law represented, it was flesh and blood, love and death, it was more even than life, a principle, an institution, a code.

Hostility to History

The English are ambivalent about their emotions. They prefer not to show them. Certainly the common lawyers have felt it better to mask emotions than to express them directly. Precedent is precisely such a mask, the fiction of an historical order or more precisely of a trans-historical structure that constitutes the eternal *habitus* of our emotions. If, according to my initial hypothesis, history is the material of legal affect, the source of the fiction of attachment to an undying tradition and cause, then it makes sense that such profound affect would be masked, which is to say treated ambivalently, hidden or disguised as private. There is no register of attachment to law, there is simply its inverse, a tabulation of penalties for transgression or for failures to love, respect, or care. In the same vein, the lawyer as a disciplinarian has tended to express hostility to history rather than affection or desire. They have covered over their affections, their amorous feelings for their inheritance, precisely so as to institute a deeper affect, an unquestioned or unconscious love.

In moments of crisis or threat, common lawyers have needed to fall back upon an unconscious or default mode of political advocacy. The early modern period is exemplary of this. Common law had to assert its independence, its national distinction, its place and role within a polity that was extremely hostile to the Latin tradition – to the ›tincture of Normanism‹ or the Romanist ways – of the law; and also strongly critical of an expanding and expansionary profession.¹⁵ Church and law had to assert a counter-intuitive and non-historical account of an Anglican theology and law and they had to do so in a manner that would escape the more obvious criticisms of contemporaries and speci-

12 Digest of Justinian, ed. by ALAN WATSON, Philadelphia 1984 I.I.2. For lengthy and illuminating expansion on this theme, see DESMOND MANDERSON, *From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature*, in: *Law and Literature* 15 (2003) at 87.

13 ROGER COKE, *Justice Vindicated from the false focus put on it by*

Thomas White Gent, Mr Hobbes, and Hugo Grotius, London: Newcomb 1660 at 43. For discussion, see PETER GOODRICH, *Oedipus Lex: Psychoanalysis, History, Law*, Berkeley and L. A. 1996, 6–15.

14 JOHN SELDEN, *Janus Anglorum facies altera* [1610], London: Bassett 1683.

15 There is a wealth of literature on the unpopularity of the *rabulae forenses*; the wheedlers, vipers,

and pettifoggers; the ›grand little mootmen‹. See, for example, C. W. BROOKS, *Pettyfoggers and Vipers of the Commonwealth*, Cambridge 1986.

fically of fellow scholars. The outcome was a mixture of apologetic populism and explicit mythology. In each case, common lawyers used Anglican theology as their primary resource and followed the same Trinitarian path. Father, son and Holy Ghost, became in both religion and law the trinity of the book, the face, and tradition or the spirit of law.

The greatest resource and the most obvious weakness of law's claims to eternity lay in the historicity of the text. The Christians at least had the *Bible*, and the continentals had the *Corpus Iuris Civilis*, but the poor common lawyers had an unwritten tradition. Unlike Hotman's contemporaries on the continent, the English lawyer could not travel to Italy and examine the sacred texts of Justinian by the dim light of candles in a windowless room.¹⁶ It is true that Coke was able to eulogize *Domesday Book* and *Magna Carta* but he had also to rely upon a book of nature that preceded and underpinned any merely positive writing. Coke famously warned the historians »that they meddle not with any point or secret ... [of] the laws of this realm, before they confer with one learned in the profession«, and further dictated that the laws of the realm were »of that authority that they need not the aid of any historian«. ¹⁷ The texts of law, in Coke's representation, preceded history: law made history possible rather than history making our access to law possible.

If the ground of law was nature, or in the jargon of common lawyers »time immemorial« or »beyond the memory or register of any beginning«, ¹⁸ its presence depended upon the skill of sages and judges who could overcome the impediments or transience of the merely historical. History did not help because history studied the ephemeral, what had happened, as opposed to what survived its happening and happened

again, and remained yet to happen in the manner of law. If the concept of the books of an unwritten law borrowed from the theology of a scripture without author, the face of the law, the common lawyers equivalent of the face of Christ, came in the curious form of a great judge. It was Littleton and specifically Littleton's *Tenures* that Coke turned to as the *prosopopoeia* or face of common law. Littleton was the »English Justinian«, and his tenures the equivalent of the Corpus of the civil law. Littleton was Leviathan as figured in the famous frontispiece to Hobbes' eponymous book: Littleton was not the name of a man but of the law itself, he embodied the tradition, he carried the laws in his breast.¹⁹ Other judges and sages followed Littleton (and Bracton, and Glanvil, and Fleta) as bearers of a near perfect form, and certainly one that required custody and reproduction more than it needed interpretation or supplement. The bearer of the text, the name of Littleton, shone, as it were, with the reflected glow of the *natura naturae* or law of nature that it bore.

As the principle of portraiture evinces, the necessity of the face of Christ lies in the requirement of subjective attachment. Anyone who is unlike their parents, is in law defined as monstrous and cannot be loved.²⁰ The face of the law thus establishes its human form and so too the possibility of the subject identifying with it and belonging to it. Ironically the face itself is emblematic, it is an icon of subjectivity, a principle of lawgiving, and a sign of attachment rather than a person or thing. The face is a mask and through that mask passes the living tradition or spoken form – quite literally the myth – of tradition and law. Again it deserves reiteration that in these terms the face does not represent a person, either a living or historical entity, but rather it marks a site of enunciation

16 FRANCOIS HOTMAN, *Anti-Tribonian ou discours d'un grand et renommé jurisconsulte de nostre temps sur l'estude des loix*, Paris: Perrier 1603 at 110–111.

17 SIR EDWARD COKE, *Reports*, London: Rivington 1777 at vol. II, Pt iii, fol. B5a.

18 COKE, *Reports*, vol. IV, Pt. viii, fol. Liiia. For discussion, see PETER GOODRICH, *Languages of Law*, London 1990, ch. 3.

19 *authore* Edw. Coke milite, *The First Part of the Institutes of the Lawes of England. Or, a Commentarie upon Littleton, not the name of a Lawyer onely, but of the Law it selfe*, London: Soc. of Stationers 1628.

20 JOHN SELDEN, *Titles of Honour*, London: Stansby 1614 at b 4 a: »one not like his parents is, in some sort monstrous, that is, not like him that got him, nor any

other of the ascending or transverse line.«

and authorizes a certain kind of speech or more precisely a speaking through.

A second hypothesis: where law is in crisis or facing the exigencies of novel technologies and the epistemic threat of public exposure of its archaic forms, it resorts to its earlier theological principles, and specifically to the Trinitarian scheme outlined above. The hostility to history that was most explicit in Coke and other founders of the modern tradition finds new expression in a disciplinary mysticism or a renewed theatre of justice and law. It is necessary to be clear upon the point: it is not the past that is hated, the past is the greatest of law's resources, it is rather the constraint of the discipline of history and its potential threat to fictions of the past that lawyers need to circulate. As the Catholic theologian John Favour puts it, in a work titled *Antiquitie Triumphant over Novelty*, there is a past that exceeds temporality and history alike: »antiquity has no bounds, no limits, it signifies the age of indefinite time«, to which he adds that antiquity is not that which is old »but that which is oldest, that is first and primitive without any mixture or derivation, or mingling, or meddling with following ages ... Truth must be searched in the original, before it hath been strained through the multitude of men's wits«. ²¹ In the words of another theologian, an earlier defender of the Anglican faith, the authority of religion depends not upon time or history »but rather upon Gods and clouds« (*sed numine*). ²²

A final hypothesis in relation to law's hostility to history is a commonplace psychological observation: law's enmity is predicated upon desire for the terrain that history occupies. We hate most what is closest to us and in that spirit it is the similarity of law and history, the fact that they share the same territory, that generates their

competition or sibling rivalry. A more expansive elaboration of such a point would take us back to the humanist lawyers and to the common territory of philology and law. Law and history were friends up until the early modern period. Then they fell out because law needed a history of its own, an internal history, a history of juristic fictions that exceeded the bounds of the past and the disciplinary methods of those who actually studied the past. Precedent, in other words, was not history but rather it was legal history, a way of presenting or more accurately of passing off and so passing on a past of the jurist's own invention.

Retrolution

The specific form of the lawyer's hostility to history is not that of either contesting or debating the shared terrain of legal and historical knowledge. That would be much too open and dangerous a species of litigation. Lawyers are trained differently: where historians are by discipline motivated to disinter, to unravel, to evidence, prove or demonstrate, the lawyer is trained to advocate, to persuade and especially to win. Whatever Aristotle may have said about forensic rhetorician's making the best case in the available circumstances, the early modern curricular rhetorical manuals were very clear that the function of the legal orator was to fight, to persuade, to conquer. The orator was an advocate, a Christian soldier trained to fight and to win at trial. ²³ Precedent rather than history was their principal tool of persuasion: it was easiest to win by showing that this had been done before. Thus the past is dressed up to win arguments and to annoy or displace historians in the process. There is a marketing term that ironically describes the procedure and can be

21 JOHN FAVOUR, *Antiquitie Triumphant Over Novelty: Whereby it is proved that Antiquitie is a true and Certain Note of the Christian Catholicke Church*, London: Field 1619 at 33 and 35.

22 JOHN JEWEL, *A Defence of the Apologie of the Church of England*, London: Fleetstreet 1567 at 491.

23 ARISTOTLE, *Rhetoric*, London: Macmillan 1886 ed.; BERNARD

LAMY, *The Art of Speaking*, London: M. Pitt 1676.

brought into play in assessing the antinomy of history and law.

In discussing the priority of the formal attributes of the photo portrait of Nussbaum over the apparent parodic intent, it was described as retrolutionary. The contemporary market developed the concept of the »retrolutionary« to depict the paradox of the new in the form of the old. The word is a neologism from the mid-1990s and was used first by Jaguar's designers when they introduced their latest creation at the Paris Motor Show in 1994.²⁴ The retrolutionary product in question was the new XJ series luxury car. Recognizably modeled after the 1960s Mark 10, this apparently classical car boasted not only the rounded shape but also the leather upholstery and wooden trim of the original. Behind the classical façade, however, lurked the most modern computerized technology, a state of the art engine, and the gamut of postmodern auto trimmings. The new was packaged as old so as to sell it: the surface was comfortingly familiar and enticing but underneath it lay the very latest or most modern of devices and desires.

The market uses the retro in the same way as law uses precedent. It is a mechanism for smuggling in novelties that would otherwise be rejected. It is a way of selling products or in law it is a night under cover of which to pretend that the authority to determine or regulate novel forms already exists. The retrolutionary allows the car manufacturer to disguise or dissimulate the novelty of the newest product: its plastics are made to look like wood; its radar contact with other cars (it warns the driver of proximity to other vehicles) is signaled by a warning bell; its monitoring of the environment and road conditions is mostly silent; its automatic transmission is made to look like a stick shift; the self-referential computer monitoring of the car's functions is

invisible. In adopting a retrolutionary stance towards history, the contemporary antinomy of law and history gains expression in the manipulation of history for the purposes of law. The smooth operations of marketing allow novelty to take on a comfortingly familiar or retro form. When hard pressed, common law reasoning tends towards similar marketing devices. The most obvious and contemporary of illustrations can be taken from the current attempt by common lawyers to develop a framework for regulating cyberspace or web contracting.

In a recent case involving a Korean computer company and a Delaware corporation the California Court of Appeals was forced to venture into the difficult issue of cyberspace auctioning of Internet domain names.²⁵ The question to be resolved was that of the legal effect of posting the name »Golf.tv« on the defendant's website for auction to the highest bidder. Despite the novel technological form of this cyber dispute, the decision revolved around a fiction as old as common law itself. The judgment handed down was predicated upon an analogy drawn from an illustration to Restatement (Second) of Contracts 28 in the following words: »A advertises that he offers his farm Blackacre for sale to the highest cash bidder and undertakes to convey the property to the person submitting the highest bid ... This is an offer ...«²⁶ The example of the sale of the fictitious pre-modern property Blackacre was held to be »closest to the pleaded arrangement in this case«, and this despite the acknowledgement that the instant facts »did not involve a live auction with an auctioneer«.²⁷

In another recent case that on appeal has rapidly acquired significance as a precedent on the contractual status of clickwrap license agreements, the issue was whether the simple act of downloading free software from a Netscape

24 For discussion of the retrolutionary, see ANDREW BLAKE, *The Irresistible Rise of Harry Potter*, London 2002, 16–17 (arguing that the Harry Potter stories are a striking example of the retrolutionary, of an old story being used as the form in which to address new issues).

25 JE HO LIM v The .TV Corporation International, 99 Cal. App. 4th

684; 121 Cal.Rptr 2d. 333; Lexis 4315 (2002).

26 JE HO LIM at 338. Restatement 2d. Contracts, s. 28, illus. 1 & 2, pp. 80–81; resting on *Zuhak v Rose*, 264 Wisc. 286, 58 n.W. 2d 693 (1953).

27 JE HO LIM at 338.

website created a binding obligation.²⁸ Faced with the necessity of adumbrating the legal differences between »shrink-wrap«, »click-wrap«, and »browser-wrap« agreements, the judgment begins with a resounding retrospective: »Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today ... across the invisible ether of the internet.«²⁹ Making a seemingly paradoxical analogy between the click of a computer mouse and a signature or a handshake, the judgment proceeded to invoke the antique concept of the offeror being »master of the offer« to determine that as in face to face contracts for sale of goods, so too in the digital download of software codes off the web, *caveat emptor* or buyer must beware.³⁰

The fiction of »Blacke-acre« dates back at least to Coke’s *Institutes* of 1628. Those were in their turn a commentary on Littleton and reported a customary law within which the fiction of Blackacre was well enough established to require no explanation in Coke’s discussion of rents or more precisely of conditions placed upon enfeoffment.³¹ The concept of *animus obligandi* and later of *aggregatio mentum* is equally antique and involves reference at least to medieval conceptions of inner intent combined with the duty to tell the truth and keep one’s word.³² The point is that this history, or more accurately these archaisms do not occur in the normal run of judgments. They are used in moments of aberrance or of divagation where existing law clearly does not address let alone cover the topic to be judged. History, and specifically the retrospect, the recourse to medieval fictions or Lati-

nate concepts are rhetorical devices gauged to obscure, to comfort or mislead.³³ Of the cases briefly excised above one can note that both involve liberal use of the figure of *syncretis*: Blackacre, a fictive parcel of medieval property distinguished from Whiteacre, has not got any significant connection to domain names, nor has the inner intent of a computer program any obvious link to the notion of agreement between co-present legal subjects or what is termed in common law, a meeting of minds. In both cases the antique terms are manipulated – and without any further discussion – to close down reasoning as to the novelty or logic of the new form. In theological rather than any more deliberative manner, antiquity triumphs over novelty and the foreign or historic term acts as a talismanic mode of occluding discussion of the source – the invention – that motivates the judgment.

The use of the retrolutionary in law constitutes a novel departure and a radical misuse of history in the sense that the motive of recollection or linguistic archaism is more panegyric than legal. It aims to persuade through manipulation rather than argument, it intersperses the medieval or foreign terms less to reveal a cause than to conceal confusion. Legal fictions have a venerable role in law but the fiction was predicated at its best upon an understanding of history and its measured extension. That has become less evident in contemporary law. History is increasingly a threat to law because of its potential to expose the bowdlerized character of legal retrolutions, because it reminds us of the distance between lawyers and scholarship, and because the *catachresis* or misuse that the contemporary fiction employs is less intentional than the expression of an arbitrary default.

And of Nussbaum’s portrait, might it not be argued that it offers a highly visible expres-

28 Christopher Specht, John Gibson, Michael Fagan, and Sean Kelly v Netscape Communications Corp. and America Online Inc., 150 F. Supp. 2d 585; 2001 U.S. Dist. Lexis 90731 45 U.C.C. Rep. Serv. 2d 1 (2001); appealed in Specht et al. v Netscape Communications Corporation, 306 F.2d. 761 (2002).

29 Specht v Netscape at 587.

30 Specht v Netscape at 592. The legal connotations of mastery of

the offer are indelibly antique – they derive from master and slave, master and servant, and latterly master and mistress – but gained their contemporary currency from case law dating back to the end of the 18th century.

31 COKE, *The First Part of the Institutes of the Lawes of England*, supra n. 19, Lib. 2 Cap. 12. Sect. 222, 148b.

32 CHRISTOPHER ST GERMAIN, *Doctor and Student*, London: Selden Society 1528/1974 ch. 23.

33 On the misuse of Latin, see PETER GOODRICH, *Distrust Quotations in Latin*, in: *Critical Inquiry* 29 (2003) 193.

sion of the retrolutionary principle?³⁴ Derived etymologically from *lucescit*, the break of day, and mediately from *lugeo*, to mourn, the portrait can be interpreted as a failure to break a mournful pattern toward the retro or past. More specifically it re-inscribes a genealogical and so highly legalistic relation to a past or more precisely a form of lineage that is European rather than American and masculine rather than feminine. The reassertion of this formal genealogical representation of the subject hides the potential novelty of Nussbaum's role in the strict confines of the past form. She may appear to be staring out, but inwardly her gaze is fixated on the past, upon traditional structures and their reassertion. Rather than challenging the hierarchy of law's lineage, we see here the pleasure and ease of a twenty first century female lawyer joining that tradition. Her portrait emblemizes a new law

of transmission from *imago* to *mater*, from ancestor to daughter in a modified version of a classical figure of law. The daughter will take her place dutifully in the genealogy of law. She will fit fine in the serried array of gloomy legal portraits. Nussbaum accommodates herself to the form, and in doing so she hides the novelty of her success behind the dark colors and confining form of a structure. The paradox that the portrait portrays is legally one of accession. What was seized politically by struggle, through pain and sacrifice, appears as an inheritance. History is here quietly rendered invisible, the past is erased, and if Nussbaum stares with equanimity toward the future it is seemingly only proper, her birthright, her entitlement as a newly accommodated fiction of law.

Peter Goodrich*

34 Portraits of women in Law Schools are still frighteningly rare. The first women deans are now coming to the walls and I might proffer the suggestion that their images are highly conformist, they have been absorbed with remarkable ease.

* Cardozo School of Law, New York. Thanks to Anton Schütz, Pierre Schlag, Mariana Valverde, David Walliker and Piyel Haldar for valuable comments on this divagation.