

# Melancholegalism: Black Letter Theory and the Temporality of Law

Peter Goodrich

I won't go about to argue the point with you, — 'tis so, — and I am persuaded of it, madam, as much as can be, "That both man and woman bear pain or sorrow, (and, for aught I know, pleasure too) best in a horizontal position."<sup>1</sup>

For the sake of authenticity, as a matter of jurisprudential tone, in the interests of style, there should unquestionably be a certain exhibition of melancholy in the exposure and analysis of this dark humour as an effect of law. As that greatest of authorities, Democritus Junior, *fons et origo*, as lawyers say, of any discussion of the saturnine humor, puts it early in his treatise, "I writ of melancholy, by being busy to avoid melancholy."<sup>2</sup> He adds, shortly after this touching *confessio infirmitatis*, an elaboration of the point by way of a cautionary reference to Lucian: "To this end I writ, like them that recite to trees, and declaim to pillars, for want of auditors." Knowledge is nothing if not proclaimed and, while the baroque Burton acknowledges his "Mistress Melancholy, my Egeria, or my Evil Genius," he persists in his relentless outpouring precisely so that being schooled in woe he can offer succour to the woeful.<sup>3</sup> Needless to say, high on the list of those whom Junior deems in need of treatment for their melancholic affects and effects, are those atrabilious agalasts, those cavillers and casuists, the devious and diffuse rabble of early modern common lawyers.

It is not clear, of course, that a profession that travels under the sign of Saturn can be cured of its principal *insignum* and symptom, its melancholegalism, without ceasing to belong to the guild, without leaving the very discipline that has caused the commonwealth to suffer. Yet a starting point is necessary and an historical awareness of issues of reception and transmission, a location of the question in its aesthetic, medicinal and legal aspects requires a certain acknowledgement of the classical character of the question of humors and the turning point, the reorientation that occurs in the long seventeenth century.

Burton is the preferred point of embarkation, as representing the zenith of the late Renaissance reception of theological treatises on the necessity of downcast eyes, of reverence and solemnity, quietness and somber dress within the political theology of everyday life.<sup>4</sup> The Christian tradition, that of the two Romes, those of the Papacy and legal imperium, carried with it a set of irenic practices reflective both of sobriety and

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1 Sterne 2003, p. 194.

2 Burton 1927, p. 16.

3 Burton 1927, p. 17.

4 The most pointed example of juridical *enchiridion* to this effect is Fulbeck 1599. There is also a significant tradition of works both theological and medical on curing melancholy, long preceding the eminent Burton. Thus, for example, Bright 1586; or Rowlands 1607. In a more literary and theatrical vein, there is also, plucked from amongst numerous works and plays on erotic melancholy, Greene, 1584.

antipathy to spectacle and play.<sup>5</sup> As the Psalm has it, *qui seminant in lacrimis in exultatione metent* — they that sow in tears shall reap in joy.<sup>6</sup> The dawn of modernity, and reason's attacks on emotion, came in the form of a suppression of the discourse of moods, of levity, hilarity and dance, as the practices that dissipated the vapors of melancholy and the irrational and emotive singularities that it promoted. Melancholia was thrust into a domain prior to thought, alternately a religious state and an anomic excess, an enthusiasm and wit that exceeded both reason and law. As befits the worm of knowing, the tenebrous and umbrageous instance of invention, the more than thought, the melancholic logic and dark garb of the new juridico-political realm inhabits a domain of the repressed, of the said of the unsaid that marks the opaque continent of the unconscious.<sup>7</sup> It is there, in what legal culture ignores, in what reason eschews, that the force of melancholy lives on.

Common law, the *mos britannicus*, was born of the reception of Roman law and Christian faith and so it is hardly surprising that it shares the themes of the unhappy consciousness of sin and the melancholic demeanor and environment of the profession. Common law will be my example, but, as its Latin nomination implies, it belongs to the *mores* and patterns of a humanistic tradition and European erudition that time and illiteracy cannot wholly erase. Melancolegalism refers initially, but things of course change, to a certain *déformation professionnelle*, an inexorable condition of practitioners, a degree of institutional capture that cannot be escaped but may on occasion be adapted to more or less well. The reverend Burton, *musarum sacerdos*, to stay with our example, appears to have learned from Democritus and come to enjoy his symptoms. He never stopped expanding and revising the treatise. He continued 'to writ' presumably because he had not entirely escaped his dark woe, his evil shadow, his tenebrous condition, and yet he can also laugh at times in the company of satirists:

I rub on in a strictly private life; as I have still lived, so I now continue, as I was from the first, left to a solitary life, and mine own domestic discontents: saving that sometimes, not to tell a lie, as Diogenes went into the city, and Democritus to the haven, to see fashions, I did for my recreation now and then walk abroad, look into the world, and could not choose but make some little observation... I did sometimes laugh and scoff... and satirically tax... lament...

<sup>5</sup> Stillingfleet 1660 devotes much energy and numerous cautions — cautels — to *gravitas*, seriousness of intention and deportment, the avoidance of play and excess within the restored polity. For elaboration of this theme, see Goodrich 2006.

<sup>6</sup> *Psalm* 125:5.

<sup>7</sup> This theme underpins the historical epistemology of law that is put forward in Edelman 2007.

sometimes again I was bitterly mirthful, and then again burning with rage.<sup>8</sup>

When it comes to jurists, to melancolegalism, the hint of rubbing along in private, of solitude, of declamations to empty auditoria, captures a pertinent sense of isolation, of disciplinary confinement, of institutional segregation and linguistic idiosyncrasy that mark much of the saturnine humour of law. The iconologist Cesar Ripa, whose work was very much contemporary with the learned Burton's, offers an intriguing and significantly schizoid emblem of melancholia. It bears description (Figure 1).



Fig. 1

A robed and swarthy, dark-skinned male stands with his left foot slightly raised and resting on a square stone. In his right hand he holds an open book, in his left a purse tied shut. The very emblem of *melancholicus de melancholia adusta calida*, which is to say of the dark and scorched figure of a generalized humour. A bandage or gag is looped around his head and covers his mouth, while atop his pate sits a solitary bird — *un passereau solitaire* — one which eschews the company of the flock, and like the poet Horace prefers loneliness to the hubbub of the court.<sup>9</sup> The figure of the melancholic is that of an escaping or at least an ambivalently split lawyer. Melancolegalism, a first hypothesis, expresses the desire and the impossibility of escaping law, the simultaneous dash for the exit and the locked door. Take each element of this Riparian emblem, this littoral lawyer in its serial turn.

The stone represents the seat and sedimentation of legality, the immovable character of law as architectonic and structure, as monumental, permanent and immovable. It is equally a pedestal, the stand on which *Justitia* would usually be portrayed, but here the figure is distinctly in a quandary, half on the stone, half off, neither climbing up nor stepping down. The scholar, the learned lawyer, the *iuris peritus* or jurist, is pulled in two directions at once, is neither on nor off but between and astride, condemned in this depiction to being neither entirely a scholar nor wholly

<sup>8</sup> Burton 1927, p. 15.

<sup>9</sup> Ripa 1677, II.54. This edition, one of many editions and translations of the 1593 Italian publication, first published with woodcuts in 1603, is translated and edited by the lawyer and emblematic Jean Baudoïn.

a practitioner. The open book is code, *lex legum*, law of laws and signals at the very least the textual tradition, *ratio scripta*, the many years of arduous and sedentary study — *multorum annus opus* — the deeply embedded humanism that leads in the words of the sages of common law to the requisite appreciation of our most valuable inheritance, the tradition, the priority and antiquity of our indigenous and best of all laws, *commune ley*. This is the mark of the jurist, the scholar of law, the disciplinary figure in a profession without discipline, lacking then and now any distinctive method, “an auncient palace” that, however substantial, “is yet but darke and melancholy” in the words of one of Ripa’s and Burton’s contemporaries.<sup>10</sup> And thus what the right hand proffers in terms of knowledge and learning, the left hand takes in the form of the closed purse, the trove of fees and costs that lawyers accrue during their lengthy litigations. Next, penultimate symbol, the best for second to last, is the blindfold (*bandelette*) that has rather humorously slipped from the eyes to the mouth. It is a sign of taciturnity, the mark of an orator who will only speak for money, whose mouth is closed until gold has changed hands. It is a satirical symbol shared with other legal emblematisists, but note also that it is a sign of subjection, of being bound and silenced, and in one etymology which derives *fascia* from *fascinum*, it is a mark of enslavement, of being in thrall to a species of sorcery and bewitchment, generated not least by the dark art of law.

The Riparian icon shares with Burton’s textual depiction a somewhat covert or archaeological reference to the melancholy generated by law. For the author of the *Anatomie*, the textual connection resides both in the attribution of most civic and social melancholia to the proliferation of lawyers, and also in the expression of malaise to be found in the references to disputes, quarrelling, the factious and fractious behavior that legalism prompts and promotes. In Ripa’s woodcut the archaeology is symbolically heavier but nonetheless requires a degree of decryption because of the subtle and subversive rearrangement of the elements, of the pedestal, the robe, the blindfold, the book and the purse to indicate an unhappy because disordered figure of *prudens*, of the scholar lawyer, the jurisconsult, the legal casuist who, in Nietzsche’s terms, is already a dusty and shadowy figure, the son of a filing clerk, *melancholicus de melancholia adusta calida*, to use the proper phrase.<sup>11</sup> Also concealed in this solitary and swarthy figure is the hint of a reference to dark arts, to the Druidic rites of the early common lawyers, the robes and sacrifices of an esoteric governance which has its earliest roots, its imagined origins, *illud tempus*, in the mythical time of divinity and nature, symbolized by the bird that sits atop the head and crowns the totality. The image of the

10 Cowell 1607, p. 3.

11 I am borrowing here from the wonderful Klibansky, Panofsky and Saxl 1979, p. 71, meaning a warm and affected melancholic.

solitary avian thus also has a critical edge, as the representation of an idea of solitude, of disciplinary isolation, of lonely imbrication in the dark and atemporal space, the tenebrous and timeless nocturne of an archaic past, an antiquity that the sages were wont to term ‘out of mind’ or ‘beyond memory’.

With the immediate roots and incidents of melancolegalism adumbrated and shared, I will follow the indications of Ripa’s emblem and trace a double reading, a dualist apprehension of this split persona. It is in part a question of unhappy consciousness, of the awareness of an outside while being locked inside the institution. Melancholia is a mild psychosis, although perhaps not so innocent amongst bellowing lawyers, but the question to be addressed is that of the specifically juridical in melancolegalism. The melancholic cannot give up the object of their love, he or she clings to the affective, to the sources of their jurisdiction, the symbols of a legitimacy that she cannot quite believe. That said, the study of melancolegalism has to begin paradoxically with the external elements of desire forgone but never entirely abandoned, the legitimacy and authority of a jurisdiction which the scholar jurists (*prudentes*) remain in equal measure bound to and dissatisfied with. This leads to a disciplinary listlessness, to the *tristesse* of an unrealized or literally courtly love, a thwarted liturgical desire. It is here, in the second, textualist imaginary of law, in the plethora and plenitude of the unread and unseen that a disagreeable solitude manifests itself in the melancholia of the jurist who cannot let go of the unrealized ideal of an outside of the discipline, a beyond of the institution. Here, and we can borrow momentarily from Benjamin’s notion of the melancholy leftist, the humanist, the critical legal scholar must face, must come to terms with the experience of their privilege at the same time as they admit their lack of power.<sup>12</sup>

### The obscure object of the lawyer’s desire

What does the lawyer love? What lies at the root of their sorrow, in the tendrils of their *nostos*? It is a question first of the aftermath of a certain lust, a devouring of law, of the indigestion occasioned by the over rapid consumption of an ill-prepared amalgam of norms. Consider in this regard a passage I am fond of from the Renaissance antiquary and lawyer of both laws, William Fulbeck, in his conference of diverse laws:

And I have had a verie great desire to have some understanding of Lawe, because I would not swim against the stremme, nor be unlike unto my neighbours, who are so full of Law-points, that when they sweat, it is nothing but Law; when they neese [sneeze] it is perfite law. The booke of Littletons tenures is there breakfast, their dinner, their boier, their supper, and there rere-banquet ... the booke of

12 Benjamin 1999, p. 423.

the Groundes of the Law is his portesse, and readie at his girdle to confute you.<sup>13</sup>

Here the brave *magnifico* of the local law is stuffed with rules and from his girdle hangs their little cognized and barely understood, paradoxically uncodified proof in breviary as a substitute for writing as *ratio scripta*, as codex and pandect, as commandment, tablet and law.

William Fulbeck is unhappy because of the lack of learning exhibited by undisciplined common lawyers. He shares or indeed predicts John Cowell's lament as to the 'auncient palace', the collection of particulars that is lacking all "comfortable lights" of knowledge. The conference that he suggests with the other laws, canon and civil, is precisely to introduce method, and along with it continental humanism, the scholarship that accompanies the universal law, into the Inns of Court. He craves black letters, here meaning *lex scripta*, the great *Corpus iuris civilis* and its sibling *canonici*, and their greater tradition of the glossators, commentators and humanists. Specifically, he accuses his unlearned contemporaries of lacking both the protocols of a discipline and the normative structure of rules. The common lawyers are gluttons, they are endlessly consuming law, tirelessly eating cases, singularities, particular instances and occasions of dispute and judgment, but never rising to the level of *universalia*: "which default is for want of rules".<sup>14</sup> Method requires a trajectory from the universal to the singular, from norm to instance — *progrediendum ab universalibus ad singularia*.<sup>15</sup> If the cure is evident, the ailment is somewhat less obvious. The lawyers are stuffed with law, they are eating it all day, four meals *per diem*, a gluttony of ill masticated words and phrases. It is necessary to turn to the matter of digestion.

For all their talk of the great inheritance of common law, an expression, incidentally, taken from Cicero, the Anglican sages had no Code, *Corpus*, or complete collection of laws. They lacked a Justinian, and had no *Pandectae* nor could they claim that all their laws were wholly digested — *totius omnium digestorum... iuris*, as the great work of Tribonian announces before it even starts. There is a lack, an absence of order, a paucity of learning that leaves the common lawyer in an apologetic and uncertain frame. For all their eating of cases, maxims and rules, the common lawyers have acquired no Justinian, no *corpus iuris* of all their laws, no pandect or encyclopedia and every time their eyes pass over the Latin maxims and law French *termes de la ley* they are reminded of what they do not have, namely the continental law, the classical tradition, the Trinitarian structure of legality that derives ultimately from *Gaius noster* and the

first of the great Latin institutes. There is a deficit of legitimacy, a questionable disciplinary authority, an aura of inauthenticity most often manifest in the exaggeration of the qualities and distinctiveness of common law, its greater antiquity, its peculiar excellence, its indigenous perfections.

Common lawyers, though they are hardly alone in this, have their costumes and rites, rods of office, benches, thrones and portraiture to show their regal authority. Less remarked, and in the case of common lawyers less visible, and this is the issue, there are also their collections, their libraries, their books. The metaphor of eating the law, of a body of norms, a *corpus iuris* internal to the subject, transmitted from exterior to interior, like food, and *Digested* for all to see, lies at the root of the legal tradition and is well expounded by Legendre in a short essay on collections and collectors. The purpose of the *Digest*, of this massive effort of collecting the laws, of compiling all of the rules, is precisely to forge an identity, to fashion a unity out of the dispersal and decay, the decomposition and desuetude that affects all human endeavor and all administration. The root of *digestus* is the verb *digero*, signifying not simply to take in, but more strongly to force apart, to separate, to divide and hence the strange elective affinity between collecting and identity, between plurality and singularity. To collect is a facet and function of power and whatever its disparate forms, the different modes of collecting all share a theme: "that of *authentically* being in the service of a ritual, a celebration which harbours, as the antiquated catholic vocabulary puts it, a 'collect', which is to say a prayer."<sup>16</sup> The identity of the collector is taken over by that of the collection, he is possessed. The drama of the fetishized tomes and texts takes the form of the *collecta* and *rogationes*, the prayer and the biddings that it transmits *ad collectam*, to the community.

When it comes to law, the collection belongs primarily to the eras of legislation, to the code and the sovereign. It is accompanied by a degree of animism in that the purpose of collecting is to unify the entirety of knowledge and then to animate it, to make a *corpus* or body out of it. The collect, the prayer of the collector, is to be monarch, to become sovereign through being possessed by, and the incarnation of the laws that they have digested. That is the path of the law within the Western tradition, of the *mos italicus* and its tributaries. The common lawyers are not simply not immune to this fetish, they suffer more by having less. Their *corpus* envy is well expressed by Francis Bacon, himself a great collector throughout his checkered career, who announces that "[Justinian] for a monument and honour of his government [revised] the Romane lawes from infinite volumes ... into one competent and uniforme corps of law, of which matter himselfe doth speake gloriously, and yet aptly calling of it

13 Fulbeck 1602, fol. B2

14 Fulbeck 1829, pp. 223-24.

15 Fulbeck 1829, p. 223.

16 Legendre 2006, p. 75.

*proprium et sanctissimum templum iustitiae consecratum.*"<sup>17</sup> The greater the collection, the greater the power. The principle is one that Legendre expatiates upon in the dual terms of theatre and phantasm. The collection conceals and shelters the abstract objects of fetishization to the end of transmitting two key invocations. The first dogma transmitted by the collection is a visible manifestation of the phantasm of totality, and through this representation of all of the law, *omnia in corpore iuris invenientur*, the theatrical presence of this total text projects the figure of the sovereign — the Master, the lawgiver — into play. *Lex animata*, as Bacon puts it in the preface to his collection of legal maxims, is *lex loquens*, a walking, talking, figure of absolute law, the collector as an ambulant *corpus iuris*.<sup>18</sup>

Once the collection is established, the sovereign present and spectacular, the game of law, the play of interpretations, of gloss and commentary, *brocardica* and biting, can begin. *Prudentes sicut serpentes* — wise as snakes. The social hermeneutic of interpretation, of relaying the text, the task of the exegete, that of crawling along, of travelling without legs, has begun. The key point is that the exegete is possessed by the textual collection, by an anterior interiority, a reference back to an invisible source. The second function of the collection is thus that of instituting a logic of authority, the trail of ink, the black letters that mark the path from darkness to text, from sovereign to delegate, from interior to exterior. It is authority that is signaled, the incontestable because prior and greater source of the totality that exegetes, [*iuris*] *prudentes*, have simply to render, or indeed to excrete. The fiction of the source and totality of law is to be introduced into the social through the dogmatic application of its parts and more obscurely through love of the collection, desire for the text and all that it represents, all that it can do for the serpent, the creeping being, the exegete.

It is tempting to conclude that the subjection of the legal servant to sovereign ruler, of the exegete to the text, such being the form that the juristic fetish takes, is the source of *melancholia juridica*. Melancolegalism would here simply be the expression of possession or more precisely of being possessed by what you cannot have. Sir Edward Coke, the exegete of Littleton, "our English Justinian", says as much in remarking *non verba sed veritas est amanda* — it is not the words but the truth that is to be loved. The black letters, the emanations from darkness, the expostulates of the shadow realm, of the invisible and dead sources of legality are but the vehicle of the *animus* that Coke seeks, through staring long and hard enough at Littleton's tomb and tome, to embody and to incorporate, to take it on as law. It is the territory of the night watch, or in the words of another great English institutist, who incidentally correctly calls Coke a

commentator rather than an institutional author, *vix Viginti Annorum Lucubrationis Acquiratur* — it is acquired through twenty hard years of lucubration.<sup>19</sup> The path to legal knowledge, the self-same Wood remarks "is dark and rugged".<sup>20</sup> The position of *Magister ars iuris* is not easily acquired nor necessarily happily exercised, if the practice, as Legendre elaborates it, is that of relaying the phantasm of an absolute power, that of implementing a mystical theology, the fetish object of the collection, in the quotidian rites of juristic practice. The artist or artisan of law inhabits "the vertigo of a floating world" and, more to the point, experiences "the inexplicable sorrow of existing to bring the work to life, while inhabiting its secret".<sup>21</sup> The jurist is in that sense a hidden figure, a dweller in the shadows, an epigone, and, once aware of that subordination, must come to feel a certain loss of freedom.

The common lawyers, however, were not such good collectors. They did not have, nor did they inherit either the *corpus iuris civilis* or the *corpus iuris canonici*, they lacked a Justinian, a Gratian, even if those were indubitably their models and *exempla*. Their melancholia is thus a sorrow for what they never had, for what they did not lose but could not make, for collections that belong to others. Theirs is in that sense an inauthentic love, an unreciprocated desire, a lust for a lost object that was never theirs. One says it again: *Corpus envy*. A brief example, contemporary with Wood's *Institutes*, can be taken from the other law, from a complicated jurisdiction internal to common law, that of English canon law as codified in Edmund Gibson's *Codex juris ecclesiastici Anglicani* of 1713. The title is *Codex*, after that part of Justinian's *Corpus iuris* that named the Imperial Edicts "since the greater part of the Written Laws which compose this Body (tho' framed and assented to by the other Branches of the Civil and Ecclesiastical legislatures) did yet receive their sanction and final authority from the Prince."<sup>22</sup> To this, the learned Bishop Gibson adds that he has supplemented the black letters of the Prince's dictate with the rules of Common and Canon law decisions, and had these required a separate title, "*they might properly enough, and by a like parity of Reason, have been called a Digest of Ecclesiastical Laws.*" His collection too is thus also full of gloss and commentary, and while he notes that "they are to be reduced into one Body without Addition or Diminution", he also notes that "*we must be content to digest them into the best Form they will bend to.*"<sup>23</sup>

The collector, Gibson, is the amanuensis of the *Codex*, the living

19 Wood 1724, v.

20 Wood 1724, iv.

21 Legendre 2006, p. 81.

22 Gibson 1713, p. viii.

23 Gibson 1713, vii.

17 Bacon 1630, n.p. 'Epistle Dedicatory'.

18 Bacon 1630, n.p. 'Epistle Dedicatory'. For more on that theme, see my Goodrich 2013, p. 498.

emblem and relay of the author of the laws, the Prince, and through him, *Pater omnipotens*, the mythic figure of the father who writes all. The black letters, the laws, are precious because it is he who sent them. It is for that reason that they must be collected, preserved, archived, commented and, as Foucault observed, commented again, and yet remain to be commented. They belong to a space of repetition, to the permanence of the black letter, the perdurance of law from which Gibson gains his identity and cause. The Codex is the “Body” of all the laws and their pertinent digestive tracts. Gibson is quite emphatic: everything must be included. Love of law requires going to the “Foundation in all Cases” which alone “enables us to come to a Full and Final determination of our selves”.<sup>24</sup> It is we who are in the end inscribed, and we who bear the law in our interior — variously termed the heart, the chest, the digestion, the body. But consider that what is loved is “the Foundation in all cases”. It is the “Originals” that must be returned to and relayed, because these precisely transcend and are “too great a Priviledge for any private Person whatever”.<sup>25</sup> Thus by proximity to and transmission of the ‘originals’, through love and relay of foundations, the collector ascends, exceeds, and escapes the limitations of that merely private person and through association becomes a part of that superillustrious and blindingly powerful fetish figure, *pater legum*. The compiler of the *Code* becomes through this body, through these black letters, himself a minor monarch, a sovereign of sorts, *in imitatio imperii*.

The sacred and laws have historically always been such. Whether the jurisdiction is spiritual or temporal makes no difference, for it is precisely that which escapes the private, which is no more one but rather belongs to, and exists with the totality, be it conceived as community or divinity. In Gibson’s case this conjunction effectuated by the collection is dramatized legally in the insistence upon originals and foundations. Here the Codex adopts an unusual and strikingly indicative strategy of reproducing all the laws quite literally: “Not only, such Laws as are now in force, but such also as are Repealed or Obsolete”.<sup>26</sup> This admirably impractical undertaking is in fact no more than the expression of belief in the lineage of law, in its force and power — *vis et potestatem* — to which we must hold, the classical authors tell us, much more closely than to the *ipsissima verba*, the black letters themselves. They are the bearers of a truth that exceeds mere signs. That the lawyers cannot let go of any laws would seem to be the implication and Gibson indeed follows this to its logical conclusion in determining that knowledge of law is never complete until the *iuris peritus* is in command of the originals and foundations, “till he is

<sup>24</sup> Gibson 1713, vi.

<sup>25</sup> Gibson 1713, vii.

<sup>26</sup> Gibson 1713, v.

sure he has before him all the Light that the Constitution affords.”<sup>27</sup>

The heliotropic metaphor and the reference to the Constitution is significant. The Codex is being propelled into a jurisdiction that has no written constitution and in which much of the purpose of the Collection, of the ‘collect’, is to contravert and challenge the common lawyer’s refusal to acknowledge the rules of canon law and the priority and antiquity of ecclesiastical well-being. The old law has a certain priority and it always threatens to return, to reform the subsequent errors of common lawyers and to revert to a past that is closer to the infancy and indeed the birth of law and so closer to the original and foundation, *nuda veritas*, the untempered truth. Thus “it may be no improper Remedy, to resume and revive those, which are Repealed or Obsolete”, and to this can be added the benefit of simplifying and reducing the number of laws and hence limiting the “Evil” of multiplying new laws which add impudent novelty as well as complexity and secular intention to the pristine and better forms. The “former Foundations” may well most effectually “answer the Ends of Religion”. The black letter never dies for the simple reason that it is but a glimpse of the shadow, the darkness from which it emerged, or to borrow from Agamben on Bartleby: “The ink, the glimpse of shadow with which the pen writes, is thought itself”.<sup>28</sup>

The paradox of collecting, as Gibson evidenced, is that it is an impossible task. It is a desire precisely for what cannot be recovered, for the unlimited fetish object, the phantasm of monarchy and mastery, paternity and law, which depends upon nothing so much as tenebrous indefiniteness, upon escaping enclosure and collection alike. Law has to institute an enigma as its source, a fetish, an image that will propel the enthusiasm of the collector and whose dramas can play out upon the social stage as a moralizing distraction from the desire for power and the draught of shadows, the ‘wormsign’ that marks the grimoire of the juridical collector.<sup>29</sup> Here then is the paradox of melancolegalism, that of desiring to be a lawgiver, to make laws, to be a master, in a discipline whose black letters confine the jurist to the role of the scribe, the chirographer and copyist of what has been handed down. Law then is the experience of limits in the face of the unlimited, the incorporation of time in the face of the timeless. This means, for the humanist lawyer, for the genuine melancolegalist, not a cry against the dark, which is the collector’s futile gamble, but rather an embracing of the decomposition of time and the ennui of knowing too much.

27 Gibson 1713, vi.

28 Agamben 1999, p. 243. The Italian is *la goccia di tenebra*. I have irresponsibly altered the translation.

29 Masciandro, 2014, p. 81. A grimoire is a textbook on magic and this is perhaps the moment to salute the opus *Melancology* and confess the blatant translation and traducing of my title and theme.

## Saturn was the lord of my geniture

The wounds of the jurist are somewhat unnumbered but the layers of their loss can be untethered. Following the author of the *Codex*, we can begin with the loss of the repealed and obsolete, the fading of the antique, the prior and better, in the face of the incursions of secular law and the depredations of man made jurisprudence. *Novum omne cave*, as the emblemists say.<sup>30</sup> We can find the same in others, before and contemporary with Gibson, in Fortescue, Fraunce, Coke, Selden, Spellman, Davies, all of whom viewed modern lawyers as an immoderate and unlearned crew — *rabulae forenses*.<sup>31</sup> Erasmus is happy to reiterate and expand on Burton's lengthy lucubrations on the misfortunes brought about by law, and in a discussion of friendship, the amicability of the educated, deplores the loss of the skills of the ancient jurists: "The purity and majesty of the Latin language is revealed by the very fragments that a boastful Justinian thrust upon us instead of complete works, though even they are full of the most unbelievable textual errors."<sup>32</sup> The collector, in other words, also introduces error and in their passion to possess they excise, traduce, mangle and mislay. The French humanist Hotman states it best in castigating the interpolations of the classical law that Justinian's compiler, Tribonian had introduced into his barbarous extracts from the earlier texts. The collector substituted his own "fables and reveries", the phantasms and false enthusiasms of the pseudo legislator for the black letters, or better the (to him) invisible truths of history, the prior and older law.

Human error, the fallibility of lawyers, the first and best-recognized woe of melancholegalism, is that of time and the sorrow-laden *chronographia* of juridism.<sup>33</sup> Saturn, in Greek *Chronos*, is the sign that in the history of legal myths watches over the jurist because time is the originary law. The figure of Saturn, the father of Jupiter, can form a starting point for the temporality of loss. Portrayed as an old male figure, he is shown in a ragged robe, a scythe in one hand, a serpent in the other and sometimes with his legs bound with yarn. The depictions vary although the elements are consistent if not currently so well known. The tattered robe indicates the blandishments of time: age wears out and consumes the cloth and it

<sup>30</sup> The motto, beware all novelty, comes from Johannes de Solorzano, *Emblematum regio politica incenturiam unam redacta* (1653), p. 416.

<sup>31</sup> The best lines come from Fraunce 1588, vii: "you would love the law but *sine rivali*; you would reign, but alone, *hinc illae lachrymae*". For discussion, see Goodrich 1990, Ch.2: 'A Short History of Failure: Law and Criticism 1580-1620'.

<sup>32</sup> 'Ne bos quidem pereat' — not even a bovine would be lost. I have used Baker 2001, p. 367. Hotman 1567 is the more extended discussion of this theme.

<sup>33</sup> Edelman 2007, p. 14: "How to change and remain the same? How to repose in the halcyon time of law, this time that culls the past to engender the future? This is the first aporia. And the jurists invented the fiction of continuity, namely a category of immortality, the moral person."

falls away. That Saturn also has part of his robe in his mouth, in Cartari's depiction, again ironically indicates how tattered time will devour us all.<sup>34</sup> (Figure 2).



Fig. 2

This has a further representation in the myth that Saturn ate his children. In some images, he holds a serpent that is eating its own tail, a marker of how time turns on itself, how it forces us to waste ourselves through the obscure affections by means of which we collect, identify, mark and witness our own passage and decay. More than that, the children figured in the shadow, to the left of Saturn's feet, harbour a similar threat of returning the favour and eating the father.

Angered by his father Coelus' cruelty to his children, Terra, Saturn's mother armed him with a scythe and he castrates Coelus with it. Jupiter, his son, later and out of a similar anger, castrates Saturn, leading the orator to say *Corpus effoetum tradit senectuti*.<sup>35</sup> The yarn that is sometimes said to bind the legs of Saturn also indicates the limitation that temporality places upon the body and movement. If law desires to be a *corpus* then a threefold calamity will affect it. The body will decay. Its attributes will fall away, its movements will grow constrained and it will wither. Second, time catches the law in a play of repetitions in which it will devour its children at the same time as its children will revenge themselves upon the parent. Law is caught up in this sense in a war with itself, in sacrificing and being sacrificed. Third, this latter and more specific feature of this symbolism of the scythe is that castration is the mark of law, that foreclosure that precludes the son taking up the place of the father, that makes the lawyer schizoid. Saturn's genitals are tossed into the sea as a mark of fecundity, from which Venus emerges. His genitals, torn off, become the

<sup>34</sup> Cartari 1610, p. 38.

<sup>35</sup> Ross 1672, p. 380. (The wasted body betrayed by age).

genitive of others. Saturn, however, is wrested free of desire, his lust cut away, to comply with the Aristotelian maxim of law being wisdom without desire.

Christian myth, Western political theology, inherits these neo-platonic figures and themes of saturnine influences and temporal woe. The black letters of law, the gothic typefaces, the *litera mortua* intend to preserve a text that time wrecks, that the illiterate betray and that the collector can never wholly compile or contain. It slips away. Writing itself, the black letter, the umbrageous quality of ink, the dark liquid of thought, can do nothing to prevent or stall the fact of loss. The body will pass into dust, our children will consume us, all our errors and enthusiasms, our collections of laws, will be defiled and interpolated. To borrow a phrase, the black letters that are intended to permanently mark, to stain indelibly, to act as literal custodians of the law, ironically reproduce the very darkness, the self-same loss that they seek to exclude.<sup>36</sup> The letter, to borrow from Lacan, is littoral. It borders what it seeks to escape, the *ex nihilo* of creation, at the same time as it is sent to the indefinite emptiness, the repetition and degradation of what is to come. The coastal metaphor also signals the graphological, the dark ocean of ink from whence the letter came, from which the drop was drawn and to which it must return. The wasted body is simply the text upon which the letter fails and withdraws.

The common lawyers, in their enthusiasm and their muddle seek inevitably enough to place law outside time, and indeed invented the word *immemorialis* to depict an atemporal or at least forgotten origin commensurate semantically with a time without reason. The lawyer Thomas Blount in his *Glossographia* defines *immemorabilis* as that which is unworthy of remembrance, that is to be forgotten and that cannot be remembered.<sup>37</sup> As with all things saturnine, the common lawyer's concept of a time before memory, 'out of mind' in one expression, is of time that has somehow fallen away or returned to the *nihil* whence it came. It is, however, an English civil lawyer and divine, John Favour, the author of an expansive treatise on the layers of temporality, who provides the most cogent theory of the atemporal.<sup>38</sup> It requires, of course, that I misread him somewhat, but I would hardly be an apposite melancholic if I did not.

The starting point is the political theology of a time that escapes temporality, a mystic time incorporated for common lawyers in custom extended to the immemorial — *gravissimum est imperium consuetudinibus* — and by virtue of their antiquity enigmatically beyond recollection in the domain of reverence rather than research: *sunt haec arcana imperii* —

36 Juranville 1993, pp. 75-86 is a useful elaboration of this theme. Schiesari 1992 is also of interest.

37 Blount 1656, s.v. *immemorable*. Baxter and Johnson 1943 provides the details.

38 See Favour 1619.

these are the mysteries of majesty, to cite a Gallic, which is to say a non-English common lawyer.<sup>39</sup> John Favour adds definition to this claim and makes a version of the humanist argument in nominal and substantive promotion of the original sources. In a debate with Roman Catholicism and in advocacy of the English settlement, Favour argues against novelty and in defense of the scriptures. Start with latter. The Romanists inveighed against the scriptures as an Inkstand theology (*Theologiam atramentariam*), as a wax nose (*nasum cereum*), a dead judge, a black Gospel (*Evangelium nigrum*), goose quills (*pennas anserinas*), dead ink, riddles and enigmas.<sup>40</sup> The black letters, in their view, and plausibly enough granted their inscription in Hebrew, Greek and Latin, need interpretation, *traditio*, the benefit of the patristic tradition. These, however, for the lawyer Favour are simply novelties, opinions, "vanishing imaginations" and new learning. It is for him antiquity that must be garnered: "In apparel, in diet, in furniture, in sense, yea in your very speech you renounce your Ancestors; you ever praise antiquity, and every day live after the new fashion".<sup>41</sup> One theologian's antiquity, it transpires, is another theologian's novelty. What follows is six hundred pages of defence, *pro et contra*, of the value and antiquity of the scriptures and their justification through proximity to a pure age, a naked truth that precedes and has priority over even the age of the scriptures.

Echoing Gibson, Favour defines antiquity as the original, "not that which is old... but that which is oldest, that is first and primitive, without any mixture, or derivations, or mingling, or meddling with following ages, and after times..." and leads to the conclusion that "antiquity has no bounds, no limits, it signifies the age of indefinite time".<sup>42</sup> The model of antiquity is revelation, the first expression, the word whose antiquity "passes by all things created, and resteth only in that infinite majesty, beyond whom there is no time, without whom there is no being, from whom their lieth no appeal."<sup>43</sup> The temporal and the spiritual, the higher law and its shadow, the copyists black letters, have thus to be kept divided, the pure theory of time representing a centrifugal implosion of the temporal which, being unlimited and boundless, both includes all of history, past and future, and exceeds it in the singular instance of the divine. It is a duality that only appears to have transcended itself into a higher unity because the theological form of juridical institutions will in this frame constantly recur. The atemporal or pure instance of the divine is but the

39 Hotman 1616, pp. 270 and 268.

40 Favour 1619, p. 151

41 Favour 1619, pp. 11-12.

42 Favour 1619, p. 35.

43 Favour, *Antiquite*, at 35.

genitive point of a parallel progress, a dualism that separates a temporality that cannot exceed its limits and a spirituality that cannot engage with its human delegates and vicars.

The melancholy truth of juristic history is that of a political theology that justifies law by reference to vanishing points that cannot be tracked, a littoral abyss after which there are only the equivalents of blinding light or oceanic darkness. It is that endpoint that reveals the final layer of loss, the last instance of melancolegalism, which is that of having to divest the discipline of law of its intrinsic plurality of eruditions. Consider Favour dismissing *fabulosa antiquitas*, fabulous antiquity, and one could add the fictions and myths of religious history. Does indefiniteness really require the abandonment of creativity, the loss of the art of invention? Similarly, in dismissing the 'Ancient Father' who said that "the word of God and the Holy Scriptures were like a beautiful image, which indeed had only one true aspect known only to the artificer, the Holy Ghost", does limitlessness really exclude aesthetics or preclude the experience of sensual apprehension from the methodology of law? The vanishing point evaporates the will and stems desire at precisely that instant where desire is most pertinent, even if that desire be melancolegalistic ennui. Despite himself, almost because of the wounds that he perceives the Church to have suffered, the diversions that the law has traversed, Favour does offer a clue to which I will advert as a form of conclusion.

Favour begins his dedicatory epistle to the book by stating that it is in his own antiquity that he has come to write of antiquity and he dedicates the work to the oldest bishop that he knows. In other words, he recognizes that he is approaching his limit, that he is soon to become indefinite, an acknowledgment that obtains expression in the statement *Antiquitas mea Jesus Christus*, my antiquity is Christ. Yet Christ is hardly antiquity and is an unlikely figure for the indefiniteness of time. Christ is dead, the testament being in that sense the last will of the departed and serves only as the mediate figure of incorporation, of that impossible unity upon which political theology depends. *Antiquitas mea* suggests something more, an opening, an antiquity of his own, a recognized invention and with it the potential for collapsing the dualism that resides at the root of melancolegalism

### Last words: Embracing ennui

Lord Shaftesbury, an irrefragable source of inspiration on a miscellany of topics from enthusiasm to ennui, regards melancholy as a species of inebriation, a poetic state, a kind of ecstasy temporarily obstructed.<sup>44</sup> The fumes of melancholy are like the vapours of wine or the frenzy of love, an affective and expressive state that brings humour to religion and passion

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44 Shaftesbury 1732, p. 67. Citing More 1662.

to law — *ingeniosos omnes melancholicus esse*.<sup>45</sup> Melancolegalism is the somewhat inebriate state, the reverie of humanist lawyers who would love the law but find that such desire is thwarted. This *melancholia generosa* is a spiritual and intellective state, an exercise of wit and imagination in a domain where these are resisted and denied. We recognize that the collections cannot be completed, that the texts are unfinished, that the 'corps' will dissipate, the custodians die, as also that knowledge evaporates in a world and profession that resists theory and generally ignores scholarship in favour of collections and an atrabilious attachment to *litera mortua*.

Where Burton offered melancholy as a diagnosis of the adverse effects of lawyering upon the polity, Shaftesbury suggests a *melancholia mea*, a state of affection, a hobbyhorsical attachment to an uncollected and inchoate law, to a method and invention of a norm to come. It is not the lawyer as practitioner, the filing clerk, the collector and traducer of particulars, the caviling adherent of adversarial causes who suffers any awareness that their "auncient palace", their supposed science is "but dark and melancholy". It is rather the humanist, the scholar, the jurist open to the disciplines, the figure of the *nomikos* who apprehends the draught of shadows, the trauma and the thought from which a law that lacks seeks continuously to draw. These are the inheritors of the *studiosi* and the *literati*, the enthusiasts who offered law tough love though it must be admitted that this was rather too often in the mode of a courtly yet obscure *amour lointain*.

Melancolegalism refers in a primary sense to the melancholy of legalism, the parlous and obscure desire of souls lost in the law, adherents of a juristic *sola scriptura*, the exegetes and literalists, who are oblivious to the uncollectible and porous character of law's littoral letters. They are not consciously unhappy, or so I suppose, nor likely melancolics because they lack the enthusiasm, they have not realized that their lover is unfaithful, that their science is a piecemeal and unsystematic undertaking that will never be complete or collected. They are astride their hobbyhorse without realizing that they are riding it in ever diminishing circles. Melancolegalism in its secondary sense is the sweet ennui, the irrational *furore*, the capaciousness of deliberation and desire that underpins the humanistic diagnosis of this putative science and its accompany humour, mood or condition. Finally, however, it is the fate of the critic, the scholar outside any exclusive inhabitation of the discipline of law, who feels the pain, who inhales the vapours, who suffers the wound, and slowly becomes inebriated, drugged by a sense of desire and of loss. That is the underplot as Shaftesbury has it, the path of the miscellany, the divagation of *vis imagi-*

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45 The notion of the genius, the creativity of the melancholic goes back to Aristotle but is taken up with peculiar force by Kant. See Edelman 2007, pp. 36-61. On the Aristotelian sources, see Klibansky et al. 1979, p. 42 et seq.

*nativa*, in love with the transitive and mobile shadow of thought.

The legalists, the common law exegetes, as if such a project were remotely plausible, have lost their humour, have taken law too seriously and so not seriously enough at all. The fetish, as Legendre points out, is a theatricalicalization of foundations, and a dramatization of law. From the distance necessary for critical apprehension of the system, the rites and ceremonies, the paper and forms, appear to continue in their age-old patterns. From the perspective of the critic, however, these patterns and forms are marked most distinctly by being ‘not ours’, not *lex mea*, if we can borrow and adapt a last time from Favour. Ours is a courtly love, a distant longing, in an era when, to coin a phrase, love is an unloved feeling. It is not in the end time but rather Saturn’s scythe that generates the melancholegalistic frame, the dull and unenthusiastic repetitions of what is most questionably termed a wisdom without desire. Were I to wrap up, to shroud the ending of this essay, it would be to reiterate Favour’s call for a desire and expectancy that embraces the ennui of texts and inhabits the drama and dispossession, the miscellaneous and marginal aspects of legality. Here is how it goes, the wormsign, the grimoire, the melancholic inebriation of a legal enthusiast.

The dance of the jurist is that of recognizing that the law is constantly invented yet that creativity can never be acknowledged. The iron cage of *scientia iuris*, the rulebook of precedent in the case of common lawyers, prohibits open acknowledgement, the theatrical limelight or social stage of acclaimed performance. The jurist hides her talent, veils her art, and over time comes to forget the very act of fiction, the storytelling, the rendering or more precisely painting that their path and performance project. It is the task to the critic not to love himself, which would be an obscure and useless *amour propre*, but rather to offer tough love, a critical apprehension of the theatre of justice and law. That means embracing melancholegalism, black letter theatre, fiction and loss, enactment and ennui as the price, not of reading, but of radical appreciation — *non in verbis sed in sensu*. The patristic authors, with whom our Doctor of Civil Laws, dear divine Favour identified, manifested excitement, enthusiasm, embrace of the ink divinity, the dark hotchpot, and a degree of ecstasy, a properly melancholic enthusiasm, *adustus calida*, or inebriation which dictated flight to the mountains, escape to the snow clad peaks of the scriptures — *fugiendum ad montes, ad montes scripturarum*, to borrow from Saint Jerome. Favour keeps repeating that injunction, and I am in favour, save that such flight should not be conceived externally nor as a running away. It is something other, darker, and dare I say more thoughtful. A running into the law, an embrace of its tenebrous texts, an engagement with all of its inkings, their plethora and enigmas. So too the confession of the critic, that he desires to bruise the head of the serpent, and that she wants to take a scythe to the law.

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