

Rhetoric and Somatics: Training the Body to do the Work of Law

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In a passage of the *Lawiers Logike* that is ostensibly concerned with the rhetorical figures of description, Abraham Fraunce surprisingly defines "chronographia," the description of time, by reference to its antithesis. Citing "Master Lambard", Fraunce gives the following example: "an arrest is a certain restraint of a man's person, depriving it of his own will and liberty, and binding it to become obedient to the will of the law; and it may be called the beginning of imprisonment."¹ (1588a: 64r) Stasis or arrestation of the body is here used ironically to exemplify interruption of the essentially incorporeal passage of time. Spatial confinement is used to signify a certain displacement or self-consciousness of temporality. Similarly inverting the usual order of disciplines, Fraunce uses law to exemplify rhetoric: a legal definition is used to illustrate what Renaissance rhetoricians variously term a "sensible figure" (Puttenham 1589: 136, 148) or "figure of amplification." (Peacham 1593: R iv b) In Fraunce's own Ramist lexicon, the figure of description is termed "an imperfect definition" and, again using a legal example of the general category of figure or scheme, he cites the maxim "the common law is common use." (Fraunce 1588a: 64)

While there is a certain critical radicalism to Fraunce's Renaissance inversion of the disciplines, his subjection of law to rhetoric, I wish here to elaborate a more unusual and contemporary reading of the figure of corporeal imprisonment that is used to illustrate the indefinable quality of temporality. In Lambard's definition, imprisonment implicitly renders the body docile and so amenable to instruction (*docere*) or inscription of law. The body is both the site and the conduit of submission of the soul to the "will of the law": arrest deprives the person of will so as to replace it, to bind it, to the meaning and form of law. While in one sense the superimposition of a collective intentionality upon the itinerant form of the person is unexceptional, there is also a more complex play of person and will, body and soul that deserves expansion. The law is staged through the body, and it is through corporeality, through the characteristics and qualities of the body and its movements, that the most profound substrates of law are to be read: "the body of the Law is a human body; the substance to be counted, that which signifies, is not some eternal principle but rather the embodied subject, a physical presence. . . [for] everyone comes to dance with the Law." (Legendre 1997: 37)

There is, of course, an obvious sense in which forensic rhetoric played a part in the juridical inscription and fixation of the body. Under the rubric of elocution the rhetorical handbooks stipulated norms of gesture, dress and deportment, as well as of the appropriate degrees of physical expression of passion, from blushing to tears, from murmurs to the vocal modulations of rage. In the same vein, the rhetoric of memory required training of the body to receive the imprint of texts and events. The figures of discourse themselves can also, in this regard, be understood as signs of emotions (Goodrich 1995: 181), of the excitations of the body, which compose what Elias coined as the "invisible wall of affects" that constitute the psyche. (Elias, 1978: xii) It is in this sense that the body is prisoner of the soul (Foucault 1977: 30) and that through the long term training of the body, psyche and person come to take on their social form. To submit the person to the "will of the law" is thus a double arrestation, it confines the body so as to constrain the symbolic subject, that real yet non-corporeal body which is variously named psyche, consciousness, subjectivity or soul.

Training the body to do the work of law is thus a much broader problematic than that of simple interpretation and observance of the positive norms of legislation and judicial decree. Just as the body as the object of law is an intermediary surface, the site of an economy of knowledges, investments, and powers, so too "the law" must be understood recursively as the site of a complex of disciplines and strategies. Law is in this sense itself an effect of knowledges and practices that are strictly speaking extrinsic to it. Legal dogmatics, in this respect, is an unconscious discipline: not only is law bound explicitly to the repetition of prior determinations, to the invocation of an indefinite past--inveterate usage, custom, habit, mores--as the structuring principle of present applications, but in a stronger sense the "micro-physics" or infinite particularity of law applying acts both give effect to and endeavour in turn to effectuate an institution of life, a constitution and manners, civility and justice that far exceed the bounds or knowledges of law.²

The specific disciplinary transgression of strict legality to be addressed in this essay through the work of Abraham Fraunce and selected contemporaries, is that of rhetoric and the decorum, the affections and

relationships, eloquence and intimacies it implies. Read in the context of the ascendancy of Ramist dialectics and the submission of all the disciplines to the rule of method, there is a subtle and as yet unremarked subversion at work in Fraunce's critique of law from the perspective of what is in effect a rhetorical reason. Fraunce in his turn arrests law and submits it to the will of the exterior norms of rhetoric as well as the scholastic rule of methodical reason. More than that, however, the rhetorical critique of law subjects the discipline or doctrinal discourse of legality to the reassertion of the form of life, the fantasmatic structure or imagination, that rhetoric ideally implies. It is in this respect that Fraunce is most radical and it is here that Fraunce's critique starts, with the economy of the disciplinary body, and with its corporeal manifestations.

It is no accident that it is the pretended isolation of lawyers, and particularly the legal hostility to scholarship, that is blamed for the failings of law: "you would love the law, but *sine rivali*: you would reign, but alone: *hinc illae lachrymae*." (Fraunce 1588a: 3v) That the jealousy or insularity of law should be made manifest by tears, by physical insignia, should also be understood epistemically. Law marks the body and effects its strategies of governance through the inscription of emotions: through boredom, fear, embarrassment, love and the historical signs of attachment or denial. The lawyer cannot do other than inhabit the domain of the senses, that of the bodies that are subject to law in the manner of subjects, and in recognising this substrate of the logic of law, Fraunce enters immediately a tradition of rhetoric in which eloquence is the arbiter of both justice and love, in which the poem is the essential practice of amorous relationship, and law is at best a figure of poetic expression and of the rhetorical judgement that it inspires. (Goodrich 2001)

Of the causes of the corruption of eloquence

To read the *Lawiers Logike* as a critique of law based in rhetoric and poetics as much as in logic itself is to read the work somewhat against the grain. Two observations can perhaps facilitate such a reading. The first is that the *Lawiers Logike* is to be understood within the corpus of Fraunce's work and indeed is only formally comprehensible if understood as, amongst other things, the sibling of his poetry and as the other face of the *Arcadian Rhetorike*. (1588b) For Fraunce, as for the ancient orators, "it is the poets, writers of imagination, who still maintain the stock of natural logic that scholasticism's falsehoods have perverted." (Dzialo, 1998: 9) Rhetoric, in consequence, must necessarily and explicitly suffuse the method of law because it is the discipline that most directly reads the imagination and so offers access to the proper learning of law, the knowledge of things divine and human, the combination of spiritual and temporal, of body and soul.³

The second and more expansive consideration is that of the tradition of rhetorical critique of law to which the *Lawiers Logike* belongs. There is, of course, a certain common ground that associates Fraunce most closely with the reforming impetus of Ramism and specifically with the English reception of that neo-scholastic movement. (Howells 1956: 249-255, Ong 1958, Vickers 1988) As is well known, Fraunce studied under the English Ramist Gabriel Harvey and while at Cambridge attended the lectures that were published as *Ciceronianus*. (1577, 1945) Amongst the many virtues of Harvey's treatise is a critical distance from authority, worship of the ancients or any of the erstwhile "Gods of latinity." (1945: 69) In the spirit of cisalpine humanism counterposed to classicist antiquarianism, Harvey counselled a scholarship that transcended disciplinary boundaries, and a rhetoric that looked beyond the surface of discourse, the words or body of the text, to the varied knowledges that it entailed: "in studying Cicero the imitators ought to study not only his latinity but his resources of wisdom and factual knowledge." (1945: 73)

Fraunce's sweeping critique of legal method clearly draws upon Harvey's urbane interpretations of Cicero and Ramism, but he also draws upon a more specifically juridical post-Ciceronian tradition of *controversiae* and of resistance to the peculiarly legal forms of the corruption of eloquence. In reconstructing this tradition as running from Cicero's *Pro Archia poeta oratio* (1923 ed), through Quintilian's lost work *De causis corruptae eloquentiae* (Brink 1989), to Tacitus' *Dialogus de oratoribus*, (1914 ed) I wish to make explicit both the interdependence of poetics and law, and the epistemic distinction of poetry as the form through which it is possible to know and judge law by criteria that both exist in and address a beyond of law. The court that judges the legitimacy of legality was not historically the Kantian court of reason but rather the court of rhetoric and its laws of love.

The theme is implicit in *Pro Archia* and deserves a brief initial interrogation. Cicero's defence of the poet

and of poetry begins with an assertion of the "common bond of a mutual relationship" that binds together all the arts and addresses the shared theme of how best to live. (Cicero 1923: i. 2) Already, in other words, the orator addresses law in terms of a poetically accessible beyond of law, a domain which is later depicted in terms of friendship, of the spirit and the senses. It is through literature and poetry that the forensic orator finds inspiration, purpose and the pleasure that accompanies "having never failed my friends." (vi. 13-14) In the face of the clamour and wrangling of law, "the name of the poet is holy." (viii. 18) It is through poetry that law gains its meaning, its inviolability: "if the soul (*animus*) were haunted by no presage of futurity, if the scope of her imaginings were circumscribed by the spatial limitations--the measures--of human existence" then neither law nor lawyer would have any reason to labour, suffer, lose sleep, or otherwise struggle for life itself. (xi. 29) Poetry was thus the vehicle of loyalty and the primary medium of friendship. Law was but an instrument through which the poetic designs of love could find an impermanent protection or expression.

The rhetorical submission of law to the designs of friendship and the dictates of imagination or more properly fate, are themes that frequently return in the Ciceronian tradition. In jurisprudential argot these are the figures of the natural law tradition which, in good Platonic form, bind the shadowy domain of positive law to the role of reflecting a prior law, that of nature, of the first Venus or love. (Goodrich 1997; 2001) For the Ciceronian orator, legality is bound to obey an imagination or vision embedded in a theistically given nature and encoded in laws of amity and love that gain their proper expression in poetry, in lyric and literature, rather than in the dead prose--Bacon's *litera mortua*--of law. (Bacon 1630: A 2 a) Law itself, in this tradition, was but *mutus magistratus* and could only come to life through rhetoric, through speech. It is this concept of law, this hermeneutic structure which addresses law as being the reflection or image of another poetry or cause, that finds expression in Quintilian and in Tacitus in the specific form of an attack upon the ineloquence or corruption of the forensic schools of rhetoric, and so also of the letters of the law.

In that the text of the *De causis* has been lost, our only access to the work is through the *Institutio oratoria*. (Quintilian 1996 edn) That is perhaps reason enough to divagate briefly into the definition of rhetoric that the latter work provides. The definition of rhetoric as *bene dicendi scientia*, comes in the course of a lengthy discussion in book two of the *Institutes*. (II.xv. 34, 38) Reviewing that definition, in the course of an excavation of the meanings of casuistry, Legendre comments insightfully on the philology of the phrase and concludes that "the work (*opus*) of interpretation is accomplished through the labour of the actor (*artifex*)," the artist who devotes her time to the cause of speaking well, to *bona oratio* or just speech. "Casuistry is thus to be understood as the art of speaking justly. Whether oral or written, discourse must be just." (Legendre 1992: 384) It is the legal orator whom Quintilian addresses in this definition, and that the advocate speaks well means that he speaks justly, that is according to the definitions, norms and doctrines that constitute the justice (*iustitia*) from which law derives its name (*ius*).

Following in the Ciceronian tradition, Quintilian's desire to equate eloquence with justice also implies a rhetorical judgement of law: insofar as human law is just, it is so because it has found a language that approximates more or less accurately and so more or less eloquently to the unwritten reason or ghostly inscriptions of nature herself. Positive law should in these terms endeavour ideally to reflect the inchoate language, the images or primary words of the spirit that was their origin or cause. The best language, to borrow from Sir John Fortescue, was a pristine language, one that had been spared being "altered and depraved by common use" (Fortescue 1460, 1737 edn: 108), and hence was a language that was just to the extent that it rendered the justice it transcribed in the language of its original expression. Whatever the precise conception of nature or god that motivated the hierarchy of laws, the hermeneutic significance of the definition is resident in the formulation of a rhetoric that is bound to read law in terms of a justice that exceeds it. For Quintilian and for Tacitus, rhetoric addressed and judged law by reference to a domain of spirit, *animus* and *ethos*, that transgressed strict legality and so also the habitual bounds or *litera mortua* of juristic expression.

The interrelation of justice and eloquence can be given further illustration by looking in detail at the discursive context and the specific form in which the definition of rhetoric is given. Book two of the *Institutio* is concerned most broadly with the education of the young orator, with the exercises, instructions and narratives through which the "young boy" can be brought to appreciate the dependence of rhetoric upon truth (*veritas*) or, in Ciceronian terms, the real. To appreciate the proper forms of legal argument thus not only requires that youth be inculcated with a sense of the real, but also that the corporeal reality of puerility--the exuberance, ardour, imaginative excess, poetic licence and luxuriance

of the young--be acknowledged. Thus the teacher of rhetoric is a nurse to the student, feeding milk to the mind and attending to the plump body (*plenus corpus*) of the juvenile orator. The virtues of rhetoric are inculcated early and the soul is trained not least by corporeal routines and the other finely grained interventions into attitude, expression and emotion. What is noteworthy for a contemporary analysis of the epistemology of legal rhetoric is the persistence of the corporeal referent of knowledge and speech.

Even in the work of a conservative such as Quintilian, poetry is placed in advance of law and the licence, imaginings, and other excitations and drives generated by the poetic sustain the early training of the legal mind. (1996 edn: Bk. II. iv. 2-8) The virtues as well as the motives for speech are alike grounded in the poetic, in the fire or the passion that is aroused most strongly in the youthful orator. When it comes to the specific depictions of just speech, the same corporeal object domain of action, of the real as truth, is again intrinsic to the proper demarcation of just and unjust speech. If justice in practice means speaking justly, the definition of justice also necessarily implies a practice or domain of oratorical acts. It is for this reason that Quintilian foreshadows his exegesis of the meanings of rhetoric by examining the institutions and practices of legal oratory. How, he asks, did the ancients exercise their "powers of speaking" (*facultatem dicendi exercuerunt*), what were the objects, directions, qualities and tones of their rhetorical acts? (Bk II. iv. 33-41) The answer to that question again lies in the subtle education of the juristic soul.

Before arriving at the ideals of eloquence and justice it is necessary to observe the salutary images of ineloquence and injustice. The insertion of training in legal rhetoric in the domain of practice lodges the legal firmly in history, in the temporal, corporeal and failing world of events. The truth of that world is that injustice and the *cacozelia* or pernicious words through which it is known are more common than acts of genuine felicity or just measure. To understand the eloquence of justice, it is necessary first to appreciate the theory of declamation and attend to the corruptions of speech to which, historically, it has given rise. Declamation, the dialectical method of scholastic argument for and against a particular point of fact or law, was the principal means of training in the *controversiae* of legal rhetoric. The educational virtue of declamation lay in its imitation of the real, in the fidelity of its representation of the practice of lawyers and courts. In the present day, however, Quintilian observes, declamation has "degenerated to such an extent... that it has become one of the chief causes of the corruption of modern oratory." The rhetorical roots of this corruption lie in "the extravagance and ignorance" (*licentia atque inscita*) of our declaimers who, abandoning all semblance of the real--*simillimae veritatis*--or any actual declamation, debate the doings of magicians, plagues and oracles, the fantastical cruelty of stepmothers and other unreal things. (Bk. II. ix. 5-6)

The detachment of speech from the real is not only an epistemic failing, a rant or lunacy, but is also depicted as a physical defect. The ignorant and engorged declaimer is like a cow that has blown itself out with a surfeit of green food and just as the cow has to be cured by blood-letting, so the declaimer "should be rid of his superfluous fat and his corrupt humours must be discharged." (Bk II. x. 6-8) In a later passage from Book V, the theme of the "swollen emptiness" of the declaimer is revisited in sexualised corporeal terms: "declaimers are guilty of exactly the same offence as slave-dealers who castrate boys in order to increase the attractions of their beauty," to which is added the thesis that "[a] false resemblance to the female sex may in itself delight lust, if it will, but depravity of morals will never... succeed in giving real value to that which it has succeeded in giving a high price." (Bk V. xiii. 18, 19-20) Desexualisation through mutilation is here made the equivalent of injustice in the realm of speech: empty oratory is an injustice that equiparates with the most extreme violence against the order of nature and specifically against the sexuality that defines corporeality.

Just as the soul is inscribed through the training of the body, through the institutional and everyday routines that give the body affect and speech, so too the body--its attitudes, tones, deportment and dress--is in turn the expression of the qualities of the soul. Justice in these terms refers to far more than law, and the justice of speech to which legal oratory is gauged or directed has correspondingly to be understood according to a much finer series of juridical nuances than is usually acknowledged either in rhetoric or law. In Pauline terms, speech is the spirit, it is the soul in the body, it is breath and it is life. While the soul may in Christian terms have priority over the body, it is only known through, or accessible by means of the body. In the same vein, the body is in classical terms an image, a mode of transport between words and things, a site of passage that exists according to the various chimerical temporalities of memory and hope.⁴

For Quintilian, the corruption of speech is the sign of injustice, of the degeneration of body and soul, of

violence and anti-nature. Put differently or simply in a positive formulation, one aspect of legal rhetoric is that of maintaining, both at the level of education and of practice, the criteria and values, the attitudes and relations upon which just speech depends. It is these political and aesthetic questions that Tacitus picks up and elaborates in the *Dialogus* and to which some brief further consideration is appropriate. Although it has been persuasively argued that the *Dialogus* draws heavily upon Quintilian's lost *De Causis* (Brink 1989), it is also a work that is amenable to a more radical and political interpretation than is the earlier work. At the very least, Tacitus is more explicit as to the centrality of poetics to judgement, and so of politics--of relationships, loves and the other affects of the intimate public sphere--to the justice or injustice of laws and of their application.

In the *Dialogus* the theme is explicitly that of the character and value of the practice of law. Rhetoric is here expressly the court that will judge the practice of law and specifically address the charge laid against the schools of legal rhetoric, namely that they were in his day degenerate, ignorant and immoral "schools of shamelessness" (*ludum impudentiae*). (Tacitus 1914 edn: 108) In other words, if the legal institution is to be judged and professional practice appraised, it cannot be by the profession itself but must be from some point outside of the legal institution. It is for that reason that the court is that of rhetoric--in modern terms one would say scholarship--and judgement is given by the lawyer's peers, the practitioners of the other branches of rhetoric, namely the epideictic and deliberative genres, the practices of poetics and politics.

The question of who is to judge is intimately linked to the quality of judgement. Here it is not insignificant that the principal judge, Maternus, a loosely masked representation of Tacitus himself, is presented as a poet, an epideictic rhetorician, and that his criteria of judgment are drawn in the main from his reasons for no longer practising law. (Tacitus 1914 edn: 37) For Maternus, the yoke of the practice of law, the acrimony, racket, hazard, greedy mania and tears of the legal market-place held little charm when compared to the tranquillity and recursive care of poetry: "Here is the cradle of eloquence, here is its holy of holies; this was the form and fashion in which the faculty of utterance first won its way with mortal men, steaming into hearts that were as yet pure and free of the stain of guilt; poetry was the language of the oracles." (47) It is the function of poetry, in this definition, to care for the soul and to cultivate the spirit. Poetics, and by association literature, are the non-instrumental arts that ordain the purpose of institutional existence and the criteria for valuing individual lives.⁵ Devolving from these poetic criteria, the rhetoricians determine that there are two structural causes of the decline of legal oratory. First, there is the separation of legal rhetoric from its basis in literature and poetics. This is deemed to be both a failing of historical understanding and an aesthetic lapse. In historical terms, following Cicero, poetry is the original basis of community and institution, it is the first law and poets are the first lawgivers. Poetry, in short, precedes and underpins both the value and the practice of law and it is to the peril of lawyers that they forget that genealogy or genesis. (49-51) The poetic contract thus precedes the legal contract: to the extent that law is the expression of social stability, it depends upon the images of identity, the sentiments of community and the practices of virtue that poetry instil.

The separation of law from literature is accompanied by a correlative disjunction of theory and practice in the schools of forensic rhetoric or what would now be termed the legal academy. Granted the juridical view, both ancient and modern, that poetry and literature are distinct from law precisely by virtue of the non-instrumental character of the aesthetic, its lack of direct impact upon the polity or the real, it is ironic that Tacitus views the separation of law and literature as a dimension of the estrangement of the theory of legal rhetoric from practice or the public sphere. To the extent, however, that poetry precedes both politics and law it follows that the separation of legal rhetoric from poetics is a separation of law from the practice, the life-style and values, in short the embodiment that poetry represents. It was a practice concerned, according to Maternus, with the inculcation of virtue and with care of the soul and was in consequence intrinsic to the polity or to the real in a much more tangible sense than the agonistic and superfluous activities of legal orators who sought either venal advantage or self-aggrandisement.

Drawing upon the criticisms of the corruption of speech, and particularly the bond between ineloquence and injustice, Tacitus places just speech in the domain of action: "For the real basis of eloquence is not theoretical knowledge (*cognoscant*) only, but in a far greater degree natural capacity and practical exercise." Slightly later, and in a curiously contemporary tone, Tacitus affirms that "theory (*artibus*) involves practice, and it is impossible for any one to grasp... diverse and abstruse subjects, unless their theoretical knowledge is re-enforced by practice..." (103) In the political reading that Tacitus gives to the causes of the corruption of eloquence, the truth of law lies in its practice: the actors in the drama of law are eloquent and so just only to the extent that their speech embodies the ethos, the knowledges and

the virtues, which ideally allow law to contribute to the civility of the public sphere. To the extent that the lawyer as actor intervenes in the polity, their speech is the form of their practice, and that speech, to borrow this time from Cicero, "enacts the real." (1982 edn: 3. 214)

Turning, finally, to the causes of the corruption of legal eloquence, which is the explicit theme of the *Dialogus*, Tacitus elaborates three complex sets of signs of juristic estrangement or disaffection, three marks of injustice. The first sign is the increasing separation of the lawyer from the real, which here means not simply alienation from the public sphere of legal action, but equally a disembodiment or emptying of the legal subject, an estrangement from the poetic sources, the truths or fates which law expresses. Adopting a version of Quintilian's analysis, the schools are berated for debating themes such "the reward of the king-killer," "a remedy for the plague," or the "incestuous mother," in that such themes are remote from political reality and irrelevant to the causes that are pleaded in court. (Tacitus 1914 edn: 111) The estrangement of the school from the real is also expressed in the self-estrangement of the lawyer, in the collapse of the identity or personality of the jurist to which later critics of law have so often returned. If education in the rhetoric of law inculcates an abstruse and politically irrelevant casuistry, an unreal and so unjust oratory, then the estrangement of the legal institution from the life of the polity will inevitably also be reflected in the narcissistic isolation of the individual lawyer whose public persona is predicated upon having nothing to say.

The decline of the law schools is not an autonomous event, but is linked explicitly to the deterioration in the ethos and episteme of legal practice. The second sign of the corruption of legal eloquence lies in a species of stylistic and argumentative decay. Legal language becomes divorced from the vernacular and increasingly alien to the realities of everyday discourse. The "bombastic style" (109) and "magniloquent phraseology" (111) of the schools is a symptom of the divorce of legal language from any significant or ethical role within the public sphere. Law becomes a matter of hierophantic dictate or pontifical pronouncement rather than being related in any direct manner to the lives, the languages, or the values of those governed. In an argument that has been revived repeatedly, Tacitus suggests that the ethics of law can be measured by the language used by lawyers. More specifically, judged by the traditional criteria of appropriateness of language to subject-matter and to audience, the language of law was deemed obscure, empty and largely self-referential. The language, in other words, reflected the separation of law from its sources, and of legal practice from the public sphere. By contrast, to borrow one of the more famous formulations of the *Dialogus*: "Great oratory is like a flame: it needs fuel to feed it, movement to fan it, and it brightens as it burns." (111)

The failings of legal language reflect a degeneracy that is both ethical and aesthetic. The final sign or criterion of the corruption of legal eloquence is aesthetic. In a surprising yet resonant argument, Tacitus suggests that the decline of forensic oratory is expressed in a style of dress that has become ridiculous, and in an architecture that belittles the space and significance of legality. Of dress, Tacitus remarks: "take those gowns into which we squeeze ourselves when addressing the court, the costume prevents all movement, and well reflects the orator's loss of dignity and credibility." (119-21) Allowing for a reading that acknowledges the vital role of the aleatory and sumptuary in the governance of the body, and so too in the inscription of the soul, the reference to the corporeal constraint and absurdity of the legal toga is complex. (Goodrich 1998) What is lost initially is the corporeal freedom necessary to the expression of ideas, to gesture and elocution, tone and style. Already it is hard to imagine eloquence where the speaking subject lacks the sartorial room to expand and expatiate. More than that, however, the issue is explicitly also one of credence and dignity, of *justum* and *decorum*. The loss of decorum is a loss of the poetry or sensibility that attaches the persona of the lawyer to the ethos of law. This collapse of the symbolic order, even where expressed in signs as seemingly peripheral as dress, marks again the classical sense in which the enactment of the real, the corporeal practice of law, is the proper measure of both its eloquence and its justice. Where law plays out the drama of public life upon a bare stage and before an empty auditorium; where the agon of the courtroom proceeds in "a scene of desolation" (121), without witness, purpose or style, then the material impoverishment of law likely reflects a much deeper corruption of speech.

The law of tears

In Christian doctrine, the discourse on tears was addressed primarily to the proper forms of expression of mourning at the death of a loved one.⁶ The tears expended at funerals were to be restrained, weeping was to be ordered and the various physiological signs of penitence or loss were alike to be

governed by doctrines of retention. The body, in other words, does not belong to the subject, and cannot be given over to spontaneous lachrymose subversions. The body and its desires were subjugated to law, and in Christian doctrine that meant a law which perceived life as a wound and death as metamorphosis rather than destruction of the body. Spontaneous weeping thus signified a feminine dissolution of reason in emotion, and in consequence it had a negative meaning, tears were signs of meanness and of evil. To call out or supplicate with tears was permissible only according to the specified forms of the liturgy and in this instance the tears would be silent and internal or 'mystical'. Ceremonial tears marked a joyous waiting (*langor mirabilis*) or even a purification of the body as part of the rite of prayer, of *pro petitione lacrymarum*.

That Abraham Fraunce alludes to the dogmatics of tears early on in his criticism of the common law can be interpreted according to the differing levels of meaning attributed to weeping. Most immediately, and Tacitus too had made this observation, tears and tear-stained faces were part of the reality of petition and cause. Tears may here have marked the distance between poetry and law but they also signified the hazards, dangers and corruptions of legal practice. Tears in this sense had no part to play in the discourse of law and indeed weeping was an illicit gesture or argument, an affect and not a reason. While there can be no doubt that Fraunce's reference to tears shed both amongst and in response to the activities of the *voces venales* of the legal market-place is a criticism of unnecessary or illogical weeping, it is also a criticism directed most expressly at lawyers, at the "upstart *rabulae forenses*" (Fraunce 1588a: 4r) themselves. If we read Fraunce's discourse through the rhetorical tradition that impugns the causes of the corruption of eloquence, then the reference to tears and to the *hilaritas* or "dunsicality" (5v) of lawyers are literal and explicit signs of estrangement from the real. The tears here mark an epistemic loss with a corporeal trace. Each term of that loss, both the jealousy and the pain of law, can be sketched by way of the earlier discourse on the corruption of legal eloquence.

The specific context of Fraunce's critique of legal ineloquence needs to be sketched in terms of the material contexts and physical effects of the corruption of speech. Abraham Fraunce had moved from Cambridge University to the Inns of Court, and Lincoln's Inn specifically. He had moved from one place to another and from one school to another. His critique of law is school based. It is directed at the habits and practices, the methods and performances, of the Inns of Court: "Men reason in schools as philosophers, in Westminster as lawyers, in Court as lords, in country as worldly husbands." (3v) As Walter Ong has observed, the school--whether philosophical or legal--is defined by an architecture of place, by the materiality and location of a practice. (Ong 1958) Derived etymologically from *schola*, meaning among other things classroom or place of learned conversation, the school is first of all a site of interaction, the material location or geography of a practice. Fraunce acknowledges this most explicitly through his metonymies of place: schoolroom for philosopher, Westminster for lawyer, Court for nobility and Inn of Court for the training of the body to do the work of law.

The location of method and critique within an architecture and the other materialities of a practice, is also a mechanism for locating thought in the context of the embodiment of practice. Place connotes materiality and corporeality and hence provides the precondition for what Cicero and following him Fraunce termed *veritas*, the practice of law as the enactment of the real. Fraunce makes this connotation or connection explicit in going on to discuss the virtue of schools, and in particular that of the Inns of Court, in terms of their teaching of the "force" and the "consequence" of arguments. (7v-8r) Logic, and specifically the logic of law, was taught in schools and taught so as to train the student in the *pragmata*, in the effects of rhetoric, in the force of argument, in the performance of justice as enactment of the real.

Training in law was a training in logic and rhetoric, a training in the emotional force and so also the physical effects of words. The practice of rhetoric was not only defined by place--by the ambient location of the body--it was also defined by its relation to its auditory subjects, by the effect of the word upon its recipients. Consider again Fraunce's discussion of arrest, and here arrest in the context of the common law of treason: "If... a man calls another traitor, and he says nothing to this, he is by due process of law arrested for suspicion, and for this must answer to the accusation." (45r) Words can order, uplift and entreat, but they can also wound, arrest, or condemn. In each case, words inhabit a place and a relationship, a theatre of enactment or performance that leads Fraunce to opine significantly that "I will never think him worthy of the title and name logician, that never puts his general contemplation into particular practice..." (115r) The meaning of words, and the meaning of laws, lay in speech acts that incorporated both word and gesture, speech and context. The lawyer was necessarily engaged in a rhetorical performance, in the theatre of the real.

Returning to the tears that mark the injustice of laws, their most immediate textual cause, for Fraunce, lies in the dispute between law and scholarship. It is here, drawing explicitly upon the classical antagonism between law and poetry, that Fraunce accounts the good scholar to be both a poet and orator. Scholarship here has both explicitly and tacitly a basis in poetics, and in terms reminiscent of Maternus' defence of poetry, Fraunce speaks of the "easy, elegant, conceited, nice and delicate learning" of the poet and of the skill that goes into the writing of verse. Poetry--the "new found verses of Amyntas death" (2r)--and more practically the lyric affinities or "likeness of signs" that allow Plowden to remark "semblable reason, semblable ley" (73r) are unquestionably for Fraunce the greater or first source of law. In Ciceronian terms the poetic is the domain of invention and it is joined to law in the most practical of forms, namely that of method which joins rhetoric to logic and allows thereby both for "a more easy and elegant kind of disputation" and also for philosophical elaboration. (120r)

The polemical object of the *Lawiers Logike* is proclaimed early on to be that of bringing scholarship to law, and law to scholarship. (7r) Logic and law, in the words of the dedicatory poem, should become "nearest and dearest friends." In this argument, friendship belongs within the intimate public domain of the poetic, and scholarship itself is a secondary expression of sources grounded in the lyric of nature or law of love and transmitted by means of the *universitas* of philosophical friendships and their kindred texts. ⁷ It is important to recognise that the scholar is much more than simply a logician, and that method is in essence a formal enterprise or mode of disposition and presentation. The "university man" to whom Fraunce refers at length is someone who will bring to law the fruit of ten years of study and the wisdom of the disciplines and modes of inscription that should in the argument of the *Lawiers Logike* precede and revitalise the law. The figure of friendship is thus juxtaposed polemically to that of the unlearned, "dunsical," silly, confused and asinine. Again following the trajectory of the causes of the corruption of legal eloquence, it is possible to sketch Fraunce's contemporary exposition of the licence and ignorance, the *licentia* and *inscita*, or even the *luxuria* and *ignorantia*, that mark the body of law.

At the risk of a certain reverse causality, the immediate context of Fraunce's criticism refers to "that hotchpotch French, stuffed up such with variety of borrowed words, wherein our law is written."8 (3r-v) It is the language of law that is in the first instance the cause of its "hard, harsh, unpleasant, unsavoury, rude and barbarous" (3r) character as an object-language of professional study. While the most profound reason given for the failings of language are the lawyer's resistance to university learning--to scholarship--and most particularly to the Ramistic concept of method, the corruption of legal eloquence and here the loss of *elegantia iuris* lies rather in the failings of forensic rhetoric. Rhetoric must be tied to truth, indeed if it is to be eloquent and so just it must enact the real. The real in its turn is the product of lengthy learning and subtle technique and it requires at a minimum a deep sense of the meaning and use of words. Here the poetic must be structured in a specific order or form: "fitly and according to cause, auditors, time, place and such like circumstances." (115r) Such is the charge of law, but it is one that requires first a sensibility towards words and their representation of the truth of things: "for words be notes of things, and of all words either derivative or compound, you may yield some reason set forth from the first arguments, if the notation be well made. [Etymology or notation] is called *originatio, quod originem verborum explicet: et Etymologia, id est, veroloquium.*" (51r)

The poetic truth of a word, as also the rhetorical force and significance of its use, depend upon a properly scholarly apprehension of its source or root in the domain of the originary. That the notion of the thing gains expression in the notation of the word is a common theme of humanist sensibility and one which Fraunce seeks tirelessly to propound "contrary to the prejudiced opinion of some silly penmen, and illogical lawyers, who think it a fruitless point of superfluous curiosity to understand the words of a man's own profession." (56v) If we follow the contrary or opposite set out in this argument, then the ignorance and the licence of the legal profession is marked more than anything else by a scholarly failure to understand words, and particularly the words of the law. The failing is both poetic and logical and so Fraunce is here again close to the classical topic or common place of the corruption of eloquence. The injustice of law is most expressly a failure to speak justly, a corruption of the relation of the lawyer to the real by virtue of their misapprehension of signs.

The argument made by Fraunce as to the corruption of eloquence gains its most vivid expression in his polemic against contemporary lawyers. Again using a figurative language that first marks injustice as stylistic or oratorical infelicity, Fraunce directs his criticisms against "babblers" (57r), "seditious cavillers" (7r), "grand little mootmen" (89v), "silly penmen" and other "singlesowld lawyers and golden asses" (62r) who practice an unlearned profession and "after some lewd bargain in the country, run

immediately to the Inns of Court, and having in seven years space met with six French words, home they ride like brave magnificoes, and dash their poor neighbours children quite out of countenance, with villen in gros, villen regardant, and Tenant per curtesie." (7v-8r) The legal orator "[does] obscure things purposely; amplify; digress; flatter; insinuate; alter; change; and turn all upside down" (114r), placing first things last, and last things first. In this manner, "the greedy desire of a superficial show in unnecessary trifles makes us want the true substance" (62r) of common law.

What is at stake in the corruption of legal eloquence is not simply a question of poor logic or of deficient style. In summing up his critique of common law, Fraunce explicitly links reform of legal method to ease of government, and felicity of expression or *elegantia iuris* to good order and felicity. (120r) He continues: "To conclude I could heartily wish the whole body of our law to be rather logically ordered, than by alphabetical breviarum torn and dismembered..." (119v) To grasp the significance of this conclusion it needs to be placed in its Renaissance context. The body of law was not an abstraction or estranged figure of speech, it was a metonymy, and specifically a *prosopopoeia* or face of both place and people, of the habits, customs, and other enactments of common law. The body of the law was conceived as a real body, a terrain or territory that Fraunce next speaks of in terms of English habit and national competence or jurisdiction. The body of law was very explicitly the body of the nation. It was what Fraunce's contemporary, the antiquarian scholar William Camden termed the *chorography*, the pattern or dance of a people living together over time. (Camden 1586) Lawyers and the common law were the emblems of this national body or habitually trained local realm. The body of the law was *corpus mysticum* or *pax regem*, but it was also and more interestingly a moveable body, the mark or geography of practice over time.

In the same vein, to tear or dismember the laws was to tear and dismember the patterns and interactions, the physical life and material practices of the Anglican dance, of the choreography that is English law. To tear the realm up was thus to tear people apart, to dismember subjects, to pull apart the members of the realm, the space and time and movement of England. And hence the tears, because ineloquence led to inelegant practices, and these in turn led to the inexorable decay, the slow dismemberment of the nation herself. All this, in other words, was for the want of words, for the lack of eloquence, for the loss of poetic and rhetorical skills.

The "ungentle legists" (Ferne 1586: 93) that Fraunce impugns are unjust because they are ineloquent, they fail to speak justly and so omit to do justice in practice. Without expanding further upon this already well-rehearsed Ciceronian theme it should be noted that the principal political thesis advanced by Fraunce is one which seeks to restore ease, elegance and civility to the polity in the most immediate and physical or embodied of senses. The cause is both stylistically and substantially poetic and seeks to introduce a different truth or bond between words and things, and so too between rhetoric and judgement, between law and justice. The corruption of eloquence is the means through which the critic reads the disorder, confusion, indigestion and dismemberment of the substantive discipline, of the school and its practice. The failing of the unlearned and ineloquent lawyer is that of incivility. It is a political and rhetorical failing that enacts unpleasantness, harshness and loss of wealth and countenance. The lawyer has come adrift from the real through estrangement from the disciplines: the neglect of rhetoric, of the discipline of speaking well, transpires thus to be both a failure to care for the soul and a source of tears and lamentation, pain and loss, in the polity. The tears shed by virtue of the jealousy or inappropriate autonomy of law are real tears and mark indelibly the quality of civil life as it is inhabited, as it is embodied and lived.

Legal Somatics

This essay has marked an historical and rhetorical trajectory around the figures of eloquence and the justice of the legal enactment of the real. The object of that trajectory has been the social body of law as expressed through the corporeal figure and the names of the lawyer. Its concern, to borrow a phrase, has been "the most delicate, the most fragile and the most representative element of the constitution of the social: the intimate relation which ties the phenomenon of the institution to the problematic of speech." (Legendre 1997: xiii) In the classical tradition of the causes of the corruption of eloquence that intimate relation was spelled out not only in terms of the necessary injustice of ineloquence, but also by way of a theory of the real as the site of an embodiment of justice in the practice of speech. If we turn finally to Fraunce's theory of the epistemic that the forensic orator would ideally inscribe, it is possible also to return to the theme of the body, both as metaphor and substance, in the work of law.

There is, of course, a common theme in the curricula rhetorical manuals used at the Inns of Court that stresses physical moderation of diet, exercise, routine and continence as important aspects of learning the law, of memory and comprehension, and Fraunce relays some of that knowledge.⁹ While there is a certain poetic logic to the alimentary regulation of lawyers and to the ascetic and even melancholy physical regime recommended for students of law, it is no more than symptomatic of a broader theme which I will term legal somatics. Here we return to the earlier problematic of the inscription of law through the arrest of the body and, as Lambard puts it, the subjection of the person to the will of the law. It is here that Fraunce can be used not simply as a latter day instance of the tradition inaugurated in the *De Causis*, but also as the harbinger of a more novel reading of the legal institution: where law does not arrest, constrain or stop the person of the subject it must act in a more symbolic and repeated form. If arrest is not the usual course of enacting the law, that is because the normal mode of legal inscription is directed to the unconscious or habitual body of the subject, to the somatics of repetition and the traces that it leaves.

The question of the incorporation of law in what Blackstone later coined as the silent or tacit consent of the subject, in custom and use, is played out by Fraunce in a more radical epistemic form. In an important discussion of "borrowed arguments," Fraunce addresses the role of arguments from the authority of precedent in the unravelling of common law. Citing Plato, he makes the subversive argument that those who use the authority of others instead of arguments of their own "are fools... [for] in these borrowed testimonies there is no reason or persuasion, but rather violence and compulsion." (1588a: 66v-67r) The borrowed argument is not a symbol of thought but rather the collapse of a symbol, and the most unjust of failures to enact the real. This form of repetition, this unthought by means of which the legal orator represents the will of the law, is not only a hermeneutic violence but equally a corporeal failing, a swollen emptiness that returns to haunt the body and scar the polity.

Somewhat later the borrowed argument is again taken up and discussed in explicitly somatic terms. Under the methodical rubric of the exclusion of false and lame precepts, authorities without dignity, Fraunce remarks that if such a goal--*prima regula*--could be achieved then "all repugnant dreams of serjeants and councellors that serve the time and speak for money should not run so current for good law: nay every judgment given either without reason, or with partiality, should not stand for justice: every sembl, should not pass for a sentence, nor every dictum fuit, for a dictators constitution." (89r) The unreflectively repeated dreams of the serjeants of coif and of law could not be paraded as having the dignity of reason or the force of law. Again it is noteworthy that injustice is correlated to verbal acts, to bad sentences--*dictum* and dictate--and that these failures to enact the real of law are depicted as the work of a sleeping body, of a lethargic and indifferent constitution.

The problematic to which this criticism belongs is one which lies on the border of corporal and spiritual, at the juncture of dignity and rationality, of image and rule. One further example can make the point more directly. In a discussion of argumentative digressions, Fraunce remarks that impertinent digression "or rather repugnant imaginations continually cast in, mar all." (119r) With the reversion to imagination, which is also termed bad memory and disordered argument, we return to the poetic as the source of reason and the ethos that underpins law. To train the body to do the work of law is an ethical undertaking that is inevitably thwarted by the violence of brute precedent or the compulsion of unreasoned authority. To enact and so embody the truth of law in Ciceronian terms meant to act in accordance with the ethos and dictates of a higher law, a *lex legum* that was inscribed not in texts or positive judgments, but invisibly and creatively in the heart. All of which is to say that enacting the phantasmatically known laws of nature, kind and love, requires the inscription first of the rhetorical techniques of embodiment, an ease and openness of attitude and tone. The work of law is thus a work of transmission that exists on the fragile border across which the corporeal accedes to the spiritual and

the imagination is formed.

The last word belongs in this instance not to Fraunce but to his contemporary, lawyer and poet, George Puttenham. In his famous defence of 'English poesie', Puttenham addresses the decline in respect for poetry and poets. His contemporaries, he complains, hold the poet in disdain and call him "a light headed or phantasticall man." (1589: 14) To this disregard of the poetic, Puttenham counterposes the properly epistemic view that "the phantasticall part of man represents the best, the most comely and beautiful images or appearances of things, to the soul."¹⁰ He continues in the following vein: "such persons as be illuminated by the brightest irradiations of knowledge and of the verity of due proportion of things, they are called by the learned not phantastics but euphantasiste, and of this sort of

phantasies are all good poets... all legislators, politicians and counsellors..." (1589: 15) Here, finally, in the antique concept of euphantasy we are returned or at least reminded not only of the stakes of eloquence but also of the conjunction of the somatic and the legal. The reference to euphantasy is a reference to the lyric, to rhythm and speech, song and law. The poetic in this sense is directly a training of the body or, in the words of the *Art de dictier*, it is a reference to music, to "the last science, which is to be understood as the medicine of the arts, because the courage and spirit of those engaged in the other arts are tired and bored from their labours." (Deschamps 1392: 269)

The lawyer, in Fraunce's account, is quintessentially tired and bored by the rigours of their labour. The ineloquence or corruption of legal speech thus reflects a melancholic langour, a weariness of spirit and lassitude in the performance of the tasks of law. The remedy is rhythm and a return to the dance of law. The rhetoric of law is thus taken to be the site of a reversal of conventional juridical expectations. That the poetic and lyric should be seen to take precedence over the somatic techniques of rote learning and its venal imaginings is but one meaning of the rhetorical figure of the euphantasis lawyer. The other and broader sense of euphantasy is in Fraunce's words an escape from the violence of legal textuality and the compulsion or somatics of interpretation. Here again the stake is the dignity and eloquence of law: to train the body to do the work of law is to seek through scholarship and pedagogy to align the text of law with the eloquence of the disciplines that address the care of the soul, or in classical terms with nature. The body is the site of such an alignment or euphantasy and it is only in the corporeal, in the embodiment of law in speech, that the memories and the friendships of which Fraunce wrote can come in turn to eloquent expression.

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Footnotes

1 In a mildly Kafkaesque twist, it transpires that Fraunce sees the temporality of arrest as deriving from the requirement that the person arrested be brought "before the law." The law Latin for arrest is either *capias* or *attachias*, to which Fraunce adds that "our precept notes it by the words *duci facias*, cause him to be conveyed . . . for that the officer hath after a sort, taken him before . . . some justice of the peace." (64r)

2 This point can also be made in etymological terms: dogma and decorum have common roots and can be interpreted to imply a dimension of dream in the unravelling of thought. See Legendre (1986) and the commentary in Goodrich (1990). The concept of dogma or in this instance of legal dogmatics, carries with it a sense of the imaginings and fantasies that constitute social identity and govern the relationships of the public domain. The later tradition distinguished *honestum*, *justum* and *decorum* as the three spheres of public action, with inevitably indistinct or labile boundaries.

3 The definition comes from the *Digest* but is to be found in Fraunce and in other contemporaries. See, for example, Sir John Doderidge, *The English Lawyer* (1631: 28): "knowledge of the law is affirmed to be *rerum divinarum humanarumque scientia*", by which he also affirms that it "comprises all other knowledges" and is "the science of sciences." To divagate slightly, Fraunce (1588c: Bk 1), in his work on symbols also follows the convention of *symbola heroica* in noting the relation between visual sign and that which is signified, between mark and dignity, as also between body and soul.

4 Cicero (1923 ed.: xii. 30) remarks: "Many great men have been studious to leave behind them statues and portraits (*imagines*), likenesses not of the soul, but of the body; and how much more anxious should we be to bequeath an effigy of our minds and characters, wrought and elaborated by supreme talents?"

5 For a recent and, in my view, at times complacent version of this argument, see Nussbaum (1995). James Boyd-White (1990) and Richard Weisberg (1992) offer versions of this argument in proposing rhetoric as the criterion for evaluating legal judgment.

6 I discuss the Renaissance discourse on mourning, in Goodrich. (1995: 16-22) The other crucial discussion is to be found in Legendre. (1997: 48-54)

7 Without embarking upon any extended analysis of philosophical friendship, it is clear that in Renaissance terms there was a considerable weight of affinity, even eros, to the citation and circulation of classic and contemporary texts. The disposition towards disputation allowed not only the antirrhetic affect of polemic against opponents but also the emotional exposition and naming of the desired texts and loved names. Fraunce is particularly prone to this discourse of textual friendship and to matching the laudation of friends--Plato, Aristotle, Cicero particularly amongst the ancients, and Valla, Hotman and Ramus amongst contemporaries. To take one example from Fraunce (1588a: 67r): "Amicus Socrates, amicus Plato, magis amica veritas."

8 My analysis will avoid repeating the general description of Fraunce's critique of lawyers which is rehearsed at length in "A Short History of Failure: Law and Criticism 1560-1620" in Goodrich (1990). There is also the excellent brief discussion in Dzialo (1998).

9 Fraunce (1588a: 117) for instance discusses memory in the standard terms of the "comfortable simples" and "orderly diet, exercise..." and the like. For discussion of this theme, see "Eating Law: Commons, Common Land, Common Law" in Goodrich (1996).

10 The ability to appreciate the epistemological value of phantasms is a matter both of method and of mood. The moderns are blind, in Puttenham's view, and he proceeds to talk of "these gross heads, not being brought up or acquainted with any excellent art, nor able to contrive, or in manner conceive any matter of subtlety in any business or science do deride and scorn it in all others... and whatever devise be of rare invention they term phantasticall." The relation between phantasm and rhetorical invention is

captured in the maxim *animam non intelligere absque phantasmate*--the soul could not understand without phantasms. (1589: 14)