

Introduction

Tothill Fields (1571): Law versus Theatre in “the Last Trial by Battel”

On June 18, 1571, over four thousand spectators gathered in Tothill Fields, Westminster for an extraordinary event: a trial by battle.¹ All around the field (or “lists”) were scaffolds “for people to stande and beholde” (1152). Trial by battle was long obsolete: the last in England had been in 1456 (a nasty fight involving penis and nose biting). Perhaps this one would be equally riveting. Following tradition, the litigants would not themselves take the field. Instead, “champions” would represent them. After a public ceremony of casting down the “Gauntlet[s]” (1151), the champions were “sworn . . . to perform the battle” (fol. 301b), and the fight was on. The contrast between the two champions added further spice to the spectacle. The defendant’s champion, George Thorne, was “a bigge, broade, strong set fellowe.” The plaintiffs’ champion, fencing master Henry Nayler, was, on the contrary, very “slender” and certainly “not . . . tall.” But he was handsome: altogether “a proper . . . man” (1151). It would be lithe skill plus sex appeal against brute force, David against Goliath. Moreover, Nayler had something even more important than skill and sex appeal: exceptional theatrical flair. This he had gained in part from performing regularly as a “prize player” in public fencing matches in the London theatres.² As “servant to the . . . Earle of Leicester” (1151) he was also

¹ For “the last trial by battel,” see Blackstone, *Commentaries* (2016 ed.), 3:223. All in-text citations to this event refer to John Stow’s *Chronicles of England* (1580 ed.), 1151–2; or the first English translation of Sir James Dyer’s reports: *Reports of Cases* (1794), fol. 301a–302a. These are the two principal accounts. Stow’s first appeared in his *Summarye of the Chronicles* (1573). Dyer’s first appeared in *Cy ensuont ascuns novel cases* (1585). Holinshead repeats Stow’s account with a few minor embellishments (*Firste [Laste] Volume of the Chronicles* [1577 ed.], 1858–60). Before arriving on appeal in the Court of Common Pleas, the case had already been adjudicated in at least three courts. The two plaintiffs were technically “demandant[s]” (petitioners) here, but to simplify, I refer to them as the “plaintiffs” and to the respondent as the “defendant.” For later accounts, see Filmer, *Chronicle of Kent*, 69–70; Furley, *History of the Weald of Kent*, 173; and Berry, *Noble Science*, 6.

The Church had opposed “trial by battle” (also called “trial by combat” or “wager of battle”) since the ninth century, and it had been largely discarded as a mode of proof by the fourteenth. The 1571 event, however, was not in fact the last attempt to try a case by battle: litigants continued to occasionally invoke their right to battle—for instance in 1631, 1638, and (astonishingly) 1817—but courts managed to forestall actual combat.

² The manuscript recording the activities of the Masters of Defence identifies thirty prizes that were played in public playhouses and fifteen more in places that were to become public playhouses (Berry, *Noble Science*, 2, noting that “these prize playings were a form of drama, competing with plays for audiences in some of the same ways and places”).

probably an actor in Leicester's troupe, performing alongside the master of the bawdy jig Richard Tarlton, who studied fencing with Nayler and was to become the most famous comic actor of his era.³

Nayler's dramatic march to Tothill Fields on June 18th and his costume change in the field suggest how much he had learned from his experience as a showman. At 7 a.m., dressed in flamboyant crimson satin, with a fashionably slashed doublet and a black velvet hat sporting a colossal red feather, he had begun his parade through the streets of London. As he marched—preceded by a fife-and-drum orchestra and followed by a Yeoman of the Queen's Guard bearing a horn-tipped staff and leather shield (1152)—he held aloft a sword with Thorne's glove dangling from its tip. Proceeding through the Palace of Westminster, pausing before the great doors of Westminster Hall (the hall of law), he then paraded along King Street, through "the Sanctuary," onto Tothill Street. Taking his time (to increase anticipation and keep Thorne waiting), he arrived at Tothill Fields and then disappeared into his tent. When a herald at last called upon the plaintiffs to produce their champion, Nayler emerged in full glory. Having stripped off his fancy doublet and plumed *chapeau*, he now appeared in a sort of medieval-Roman-gadiator costume, "in red sandals over armour of leather, bare-legged from the knee downward, and bare-headed, and bare arms to the elbow." A knight carrying "a red b[a]ton of an ell long, tipped with horn" and the Yeoman "carrying a target made of double leather" led him into the field, where he proceeded to march around its perimeter and finally into the center "of the lists," to the admiration of the thousands of spectators (fol. 301b–302a).

This was clearly theatre: a cross between Roman circus, medieval joust, and carnival; entertainments of the kind Tothill Fields regularly hosted.⁴ But it was also law. For there was a real case to be decided: one so dull that no one could possibly mistake it for entertainment (a dispute over title to a property somewhere in Kent, involving "a writ of entry *sur disseisin*, in the nature of assise . . ." [yawn]) (fol. 301a). Not only was it a real case: it was a real court. For the entire Court of Common Pleas had decamped to Tothill Fields, furniture and all. There the court was to "sitte" just as it sat in Westminster Hall. A "stage . . . representing the court" contained an exact replica (1152): a "place or seat for the Judges of the Bench was made without and above the lists, and covered with the furniture of the same Bench [as] in *Westminster Hall*." There was even "a bar made there" for the lawyers (the "Serjeants at law"). To begin proceedings, three "Justices of the Bench," including Sir James Dyer, Chief Justice of the Common Pleas, wearing

³ Tarlton started his theatrical career in the Earl of Leicester's troupe. Probably around the same time, he became Nayler's fencing student and eventually became a fencing master under Nayler's sponsorship. See Berry, *Noble Science*, 5–6 and 12–13.

⁴ Tothill Fields was a traditional site of jousts and duels. It had hosted a weekly market and annual fair since at least the thirteenth century (extended to a month-long fair in the fourteenth century), and had a pleasure ground with a maze and bearbaiting spectacles.

“their robes of scarlet, with the appurtenances and coifs,” took their places on the bench. The two serjeants-at-law took their places at the bar. And three “Oyes” (“Hear-ye”s) proclaimed that the trial had begun (fol. 301b). Thorne “approach[ed] the bar before the Justices with three solemn congies [bows]” and was instructed to stand to the right of the court. Nayler “approach[ed] the bar before the Justices with three solemn congies” and was instructed to stand to the left of the court (fol. 301b–302a).

All was proceeding just as it did in Westminster Hall. Except that they were sitting in the middle of Tothill Fields surrounded by four thousand spectators about to watch two champions in a prize fight, with coifed, scarlet-robed judges presiding as umpires. What happened next was a surprise: a woefully anticlimactic one. After the champions had paid their respects to the court and stood awaiting instructions, Dyer “solemnly called” the plaintiffs to appear by the side of their showy champion (Nayler) (fol. 302a). Everyone waited expectantly . . . , but no one appeared. Twice. Default judgment for the defendant. There was, after all, to be no combat. The Judge ordered Nayler to give Thorne back his glove. However, Nayler was not ready to concede defeat. Standing before the crowd in his Roman gladiator’s costume, with undiminished bravado, he looked up at the judge and said “no!” Even for those who could not hear, the scene must have appeared as a showdown between the scarlet-robed, becoifed judge (standing for law) and the costumed showman (standing for theatre). His Lordship might command anything else, said Nayler, but he would *not* give the glove back. Thorne would have to win it! *En garde!* Thorne must at least “playe wyth hym halfe a score blowes.” Did he not realize that they had to “shew some pastime to the Lorde chiefe Justice and the [spectators] there assembled”? Thorne sullenly declared that he “came to fighte, and woulde not playe” (1154). Dyer “commend[ed] *Nayler* for his valiaunt courage,”—perhaps noting the difference in size between the combatants. But he was sorry, there was indeed to be neither fighting nor playing: the show was over. The champions were “bothe quietly t[o] departe the fielde” (1154). And the spectators were to go home (fol. 302a).

Dyer’s (or his clerk’s) account of the event left out one small detail: the parties had settled the day before. In exchange for a payoff of five hundred pounds, the plaintiffs would give up their claim to the property.⁵ However, the Queen—who had somehow gotten in on the action—had declared that everyone must nevertheless appear in Tothill Fields and *make believe* that the combat would go forward: the spectators would gather; the champions would appear; the plaintiffs would then forfeit by not showing up. The spectacle would dramatize the

⁵ Stow explains: “the matter was stayed, and the parties agreed, that [the defendant] being in possession, shoulde have the lande, and was bound in five hundred pounde, to consider the Plaintiffs, [which] upon hearing the matter, the Judges should award” (1151–2). This was *de facto* a settlement, even if technically the case was merely stayed and there was to be another hearing that would make the settlement official.

defendant's rightful ownership without actually requiring the judges to preside over a bloody spectacle.⁶ This charade raised a question: what was the nature of the event that had taken place? Was it a trial? Or was it merely a piece of theatre? Had the court really "removed" to Tothill Fields? Or was it merely acting on a "stage . . . *representing* the court of the common pleas"?

Dyer's account, included in his official collection of law reports, treated the case as if it were just like any other case. The account devotes pages to the legal facts and issues, the case's progress through various courts, and the decisions of each of those courts. But then the report suddenly switches genre to describe in rich detail the throwing down of the gauntlet and the spectacle at Tothill Fields: the stage carpentry, the *mise-en-scène*, Nayler's costume. Attempting to provide a legal justification for the spectacle, the report explains: it was "for [the defendant's] assurance [that] the order should be kept touching ye combate" (1152). The plaintiffs' failure to appear was to clinch the settlement. In this sense, the drama in Tothill Fields was to have real and binding legal force. In fact, the public spectacle would do what apparently the Chief Justice of the Court of Common Pleas and the Queen herself could not do: ensure the validity of the legal decision. At the same time, the spectacle decided nothing. In fact, it represented a lie: there had been no actual verdict. The plaintiffs had *not* lost but had in fact pocketed a rather tidy sum. Moreover, the event's theatricality far exceeded its potential legal utility. Surely there were simpler and less costly ways of securing the settlement than constructing scaffolding for four thousand spectators, erecting a large stage, and mounting on it a replica of the Court of Common Pleas, furniture and all.

Whatever the Queen's or Dyer's intentions, that costly, elaborate theatricality—a theatrical supplement exceeding any legal necessity—helped to articulate the contradictory meanings of the event. It implicitly drew a set of parallels: between the prize fight that was to take place in the field and the verbal fights that took place in court; between the costumed champions and the costumed judges, in their ceremonial robes and coifs; and between the real Common Pleas in Westminster Hall and the one on the "stage . . . *representing* the court of the common pleas." In replicating the seating arrangements of the Common Pleas and many of its forms, the event made it hard for spectators to miss the analogy. The event seemed, initially at least, to collapse the difference between these. Perhaps there was really no difference between a court and a "stage . . . *representing* [a] court"? Perhaps there was no difference between a trial and a prize fight, a spectacular diversion, a bit of theatre? However, at the same time, the arc of the event also seemed to act out precisely the opposite message. It taught a lesson to the four thousand

⁶ Given that the parties had pursued the suit fervently for at least a decade, through multiple courts and before multiple juries, it seems surprising that they would simply settle unless the Queen forced them to do so. She appears to have been heavily involved in the case, both weighing in on the decision and lending her Yeoman of the Guard to Nayler. But she was almost certainly not present at the combat, since no one mentions her presence there.

spectators who went to Tothill Fields expecting the show-of-a-lifetime. It seduced the crowd with the promise of law-as-sport, inflaming its desire for spectacle only to chasten it. The lesson was: do not expect trials to be like prize fights. Law is not entertainment. The verdict was thus a victory not only for the defendant against the plaintiffs and their all-too-showy champion but for law against theatre. Law, not spectacle, had decided the case.

Law as Performance: Legal Theatricality and Antitheatricality as Idea and Practice

The thwarted Tothill Fields trial by battle stands for several principles that are at the heart of this book. In their shortest (most schematic form) they are as follows. *First* and most obviously, while legislators, judges, texts, institutions, ideas, and social practices produce and enact law, so does performance—a word whose multiple meanings I discuss below. *Second*, law’s aesthetic power is essential to its force. Scholars of law and literature have often stressed that “there are fundamental differences between law and literature” or law and aesthetic forms generally; “most obviously, law coerces people”; it produces “command[s] backed by state power.”⁷ And yet, the show in Tothill Fields (like modern-day judicial reality TV) produced a coercive “command backed by state power.” Law and its aesthetic representation are not always radically distinct kinds of things, their differences often more a matter of degree than of kind. *Third*, stagers often deploy performance to enact law, articulate doctrine, or enforce a decision. But performance has a tendency to take on a life of its own—its contradictory political trajectories and layered performance poetics defying attempts to harness it to legal orthodoxy. *Fourth*, whatever else legal performance may figure or express, it also (perhaps always) confronts its own status as performance, understood as power or problem, figured as inherently antithetical to law or inherently inseparable from it, embraced or reviled. Theatricality is itself one of the subjects of legal performance.

Behind such legal theatricality lies a long and rich tradition of jurisprudential thought about law as a performance practice. This is the “legal idea” to which I refer above and whose history this book seeks to recover: an idea explicitly articulated in countless texts and, at the same time, communicated through actions, staging, events. My study traces the history of this idea through the early modern period while at the same time exploring some of its manifestations in practice. As an idea, it was once overwhelmingly influential,

⁷ Gewirtz, “Narrative and Rhetoric in the Law,” 4 (“fundamental differences”); West, “Adjudication Is Not Interpretation” (unlike “other things we do with words” such as literature, adjudication “is imperative, [a] command backed by state power” [207]); and see Petch, “Borderline Judgments” (“law has direct and material social consequences that literature does not” [7]).

engendering an elaborate poetics of legal performance—a set of performance rules and norms—and a highly developed critical vocabulary for thinking about the ethics and politics of legal performance. Performance is at the center of a tradition of thought that ancient, medieval, and early modern theorists and practitioners transmitted across centuries, continually elaborating it and altering it to suit changing conditions. It appears in explicit discussions of how to perform in the courtroom (in rhetorical manuals and judges’ and lawyers’ guides to practice). But it also appears in more fragmented form in codes and collections of customary law, statutes, law reports, legal opinions, procedural treatises, proposals for judicial reform, chronicles, trial reports, execution narratives, memoirs, letters, visual images.

Such texts helped to articulate what became truisms about the value of legal spectacle and spectatorship. Punishment was to be visible to terrify evildoers. Judicial proceedings were to be transparent and accessible to the people (at least some were). Proverbially, law was not merely to be done but “seen to be done.” At the same time, they pointed to the dangers of legal spectacle and spectatorship. The lure of beauty or riches could seduce the judge. Spectacle could blind one with its splendor. The best performers used theatre to deceive. The attribute of Justice’s blindfold—which began to appear in visual representations in the late fifteenth century—could exalt Justice or act as an accusation: sometimes idealizing her impartiality (neither courtroom histrionics, false pity, nor the splendor of riches could sway her); sometimes satirizing her blindness. In a portrayal of “Worldly Justice” in the Dutch jurist Joost de Damhouder’s popular civil practice manual (1562) (fig. 0.1), she is “Janus-faced”: one side wears a blindfold; the other’s eyes are open.⁸ The image registers the blindfold’s ambiguities. On the one hand, as Damhouder explains, the blindfold may represent blindness to justice: Worldly Justice is often blind to just causes; her eyes bound by a blindfold, she cannot see her way to clemency. On the other hand, as the image and its captions suggest, the blindfold may represent true Justice’s immunity to the seductions of the eye. Sighted (on the left), she is swayed by “Favor, Kin, Silver, Lawyer[s], [Greedy] Guardians” who try to bribe her as the flames of “Hell” lick at their feet.

⁸ *Praxis rerum civilium* (1567), sig. ****1v (and for Damhouder’s extended explanation of the image, sig. ****2r-****8v). The image originally appeared in the 1562 edition of his *Praxis rerum criminalium*, and appears in different versions in the many editions in various languages that follow this one. I am indebted here to the discussions in Resnik and Curtis, *Representing Justice*, 72–4 (and 62–75, 91–105 generally on Justice’s blindfold); Huygebaert et al., ed., *Art of Law*, 116–19 specifically on the Damhouder image and 147–50 on Justice’s blindfold generally; and see Prosperi, *Justice Blindfolded*; and Hayaert, “Paradoxes of Lady Justice’s Blindfold.” For similar negative representations of Justice’s blindfold, see, for instance, the 1494 image of the Fool blindfolding Justice (sometimes attributed to Albrecht Dürer) in Sebastian Brant’s *Ship of Fools*, or the image of the Tribunal of Fools in Schwarzenberg, *Bambergische Peinliche Halsgerichtsordnung* (1508); and see the discussion (and reproduction of both images) in Resnik and Curtis, 67–9. The negative blindfold also draws on the traditional iconographic contrast between Jewish Synagoga (blindfolded) and Christian Ecclesia (clear-sighted).

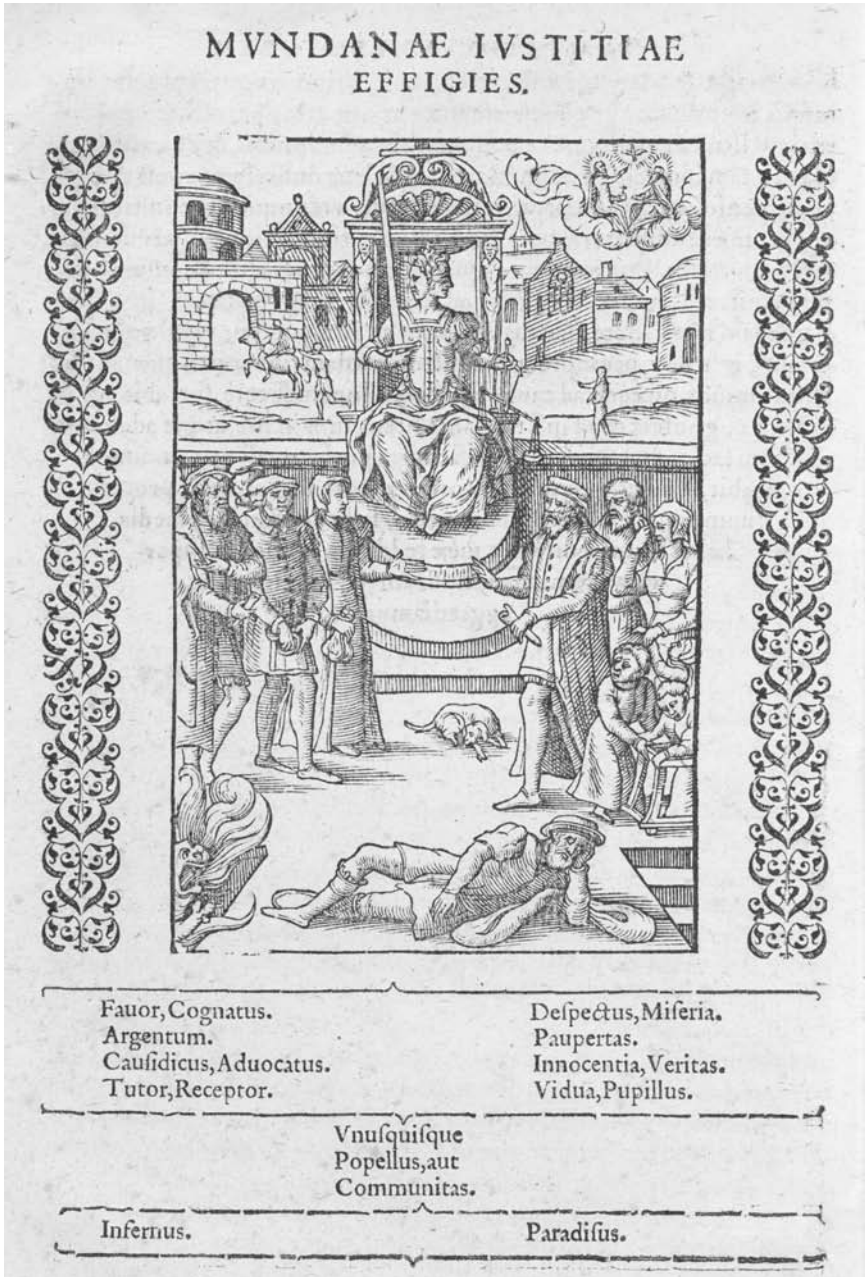


Fig. 0.1 Janus-faced, half-blindfolded “Worldly Justice” in Dutch jurist Joost de Damhouder’s *Practice in Civil Cases* (1567): “Favor, Kin, Silver, Lawyer[s] . . .” against “Misery, Poverty, Innocence, Truth, [the] Widow, [the] Orphan.”

Damhouder, *Praxis rerum civilium* (1567), sig. ****1v. Rare Book Collection, Lillian Goldman Law Library, Yale Law School.

Blindfolded (on the right), she metes out justice to “the Despised, Misery, Poverty, Innocence, Truth, the Widow, the Orphan” without regard for worldly goods, blessed by the heavenly Trinity that hovers above.

One can find a similar ambivalence about legal visibility in a trope with a much longer history than blindfolded Justice, a trope that appears insistently in legal thought, from ancient to modern times, in everything from learned commentaries to rude quips: the trope of law as theatre. Ancient Athenians identified trials as tragedies, and likened legal speakers to actors: both actors and legal orators needed the art of *hypokrisis* (delivery), which outlined the proper use of voice, body, and movement. Ancient Romans elaborated on the likeness in their transformation of *hypokrisis* into the arts of *actio* (bodily action) and *pronuntiatio* (vocal expression). For them and their heirs, the theatre of law was where justice and truth might be revealed and enacted. In this sense, law itself was a “Theatre of Justice and Truth,” as the title of Giovanni Battista de Luca’s magisterial treatise declared.⁹ But law as theatre could, alternatively, be a place of lies, perverting the course of justice. For in teaching legal speakers the art of *hypokrisis*, actors taught them the art of falsehood. In a famous anecdote, Solon-the-lawgiver attacked Thespis-the-actor for telling lies. If theatre was allowed, he said, it would soon spread its lies to the most solemn of legal acts.¹⁰ For Plato, the theatre of law was not merely a place of lies but the site of mob rule. There the “theatrocracy” (*theatrokratia*)—run by a rabble that ruled the lawcourts through applause—augured the end of law, the beginning of nihilism, and the inevitable return to a brutish state of nature.¹¹

In this view, theatre and law were opposites. Theatre was the realm of artifice, ostentation, vulgar entertainment, melodrama, narcissistic self-display, hysteria, perfidy. Law was the realm of dispassionate reason, objectivity, discipline, and the sovereignty of truth. Legal speakers were not to attempt to hoodwink Justice, blinding her with histrionic arts. One was not to do anything “fitter for the stage than the court” (as the lawyer Abraham Fraunce wrote in 1588) or let one’s theatrical tricks show.¹² Those who charged their opponents with theatricality were saying: “I stand for law.” But law, one had to admit, could not do altogether without theatre. It had to showcase justice, visibly represent its own force and dignity, induce deterrent awe in the populace, produce docile legal subjects through example, deploy the passions of the crowd, provide a theatre for

⁹ De Luca, *Theatrum veritatis, et iustitiae* (1669–81).

¹⁰ Plutarch, *Lives* [Loeb], 1:489 [Solon, 29]. The story is the inspiration for Kezar, ed., *Solon and Thespis*, a collection of essays on early modern law and drama.

¹¹ Plato, *Collected Dialogues* (ed. Hamilton and Cairns), 1294 [Laws, 700c–701c]. The term theatocracy appears surprisingly rarely in later discussions, but see Nietzsche’s *Case of Wagner*, where it denotes the dominion of theatre over the other arts (“a faith in the precedence of the theater, in the right of the theater to lord it over the arts, over art”) (*Birth of Tragedy and the Case of Wagner*, 182); Rancière, *Philosopher and His Poor*, especially 45–7; and Weber, *Theatricality as Medium*, 31–53.

¹² Fraunce, *Arcadian Rhetorike*, sig. K3v.

vengeance, promise catharsis as closure. The legal actor had to employ just enough theatre, but not too much. The trope thus registered two opposing attitudes: legal theatricality (law needs theatre); and legal antitheatricality (law must avoid theatre at all costs). It marked these out as antinomies, but also revealed them as, often, perilously proximate. Recognizing law as a performance practice, it identified theatre as both a source of law's power and an embarrassment.

As I suggest throughout this book, such debates about legal theatricality are not just jurisprudential footnotes but lie at the heart of legal theory, defining what counts as law and what does not. "What is law?" (legal philosophers have asked since the beginning of time). "Not theatre!" Except when it is. My study is thus not only a history of law as a performance practice; it is also a history of legal performance as a constitutive idea in western jurisprudence. Modern legal historians and philosophers have largely ignored performance, whether as legal practice or legal problem. This is understandable. Most legal transactions were (and are) spectacularly unspectacular, involving paper-pushing (or the equivalent), forms and formulae, deals in back rooms with no spectators to applaud or hiss. Trials were not single spectacular events but made up of a series of actions—formal accusation, investigation, interrogation, compilation of evidence, decisions on proper procedures and methods of proof—most of which took place in private chambers. Even public proceedings could be decidedly dull, lasting for weeks or (sometimes) years. In the penal sphere, fines, imprisonment, and exile were far more common than the kinds of spectacular public punishments we associate with ancient Rome or medieval and early modern Europe.¹³ Legal events that took theatrical form, as the Tothill Fields trial by battle did, were rare happenings. And yet such events played an outsized role in people's perceptions of what law stood for (as sensational trials do today). Such events, along with accounts of what they meant and how to do them, served—and serve—as the narrative and conceptual backdrop to the day-to-day life of law.

If legal historians and philosophers of law have largely ignored this tradition, scholars in a number of other fields have nevertheless recognized its potential importance and explored some of its many facets. Law and literature has long looked to early play texts and theatrical representation for what they may tell us of historical legal performance practices and ideas. Cultural history has vividly conveyed both the drama and the meaning of the medieval and early modern spectacle of punishment. Historians of rhetoric have shown us the importance of judicial oratory in rhetorical theory and practice. In recent decades, classicists have devoted their attention to performance in a number of domains, among them the ancient lawcourts. And scholars in law and humanities generally have

¹³ See Caviness, "Giving 'The Middle Ages' a Bad Name," 194 (and generally); Dean, *Crime in Medieval Europe*, 180 and "Criminal Justice in Mid-Fifteenth-Century Bologna," 26–7; Jordan, *From England to France*, 24–7; and Tedeschi, *Prosecution of Heresy*, 151.

turned increasingly to the exploration of law as a visual, embodied, spatial, sensory, and affective practice.¹⁴ I am heavily indebted to such studies, on which I draw liberally throughout this book. I hope that our work will, collectively, contribute to reimagining legal history as the history not only of doctrines and institutions but of felt and lived experience. This book attempts to give an account of a set of discourses and practices that were (I argue) central to that history for millennia, and continue to be so today.

That said, I did not actually set out to write a book that would cover more or less two thousand years. It was to be a collection of historical forays: studies of specific legal events that I hoped would, together, demonstrate a set of diverse methodologies for interpreting legal performance. Having completed most of the studies that would make up that book, I thought I should perhaps add a chapter of prehistory that could serve as historical scaffolding, explaining the long tradition of thought about legal performance that undergirded the specific events I was examining. A paragraph on Plato became a chapter; my chapter of prehistory became two, then three (and so on). The material seemed to demand that I follow it. As my chapters alarmingly split and multiplied, I found myself plunging recklessly into unfamiliar periods and places, moving far farther into the past than I had ever dreamed of going. That “chapter” of prehistory is this book: the prequel (in a sense) to the book I had originally envisioned.

Although I did not set out to write such a book, in the course of doing so I did come to feel that studying the *longue durée* offered valuable perspectives that my initial shorter time span would not have provided. Among other things, only by looking at widely different periods can one see past period exceptionalism and recognize that what may appear unique to one period is in fact part of a longer tradition. Only a longer trajectory can show how formative ideas and practices travel and mutate, continually generating new ones. Only such a trajectory can show tradition to be a thing that is not static or unidirectional: a thing that does not change in a from-to fashion or form a seamless totality, but waxes and wanes, crosses borders, disappears and re-emerges in utterly new guises; a thing that is messy, multifarious, and often very untraditional.¹⁵ More specifically, it was only

¹⁴ I cite much of this scholarship throughout. See especially Chapter 1, note 8 and Chapter 2, note 7 (on studies of ancient legal performance); Chapter 3, notes 4 and 44 (on judicial oratory in the history of rhetoric); Chapter 4, note 164 (on studies of the spectacle of punishment); and Chapter 5, note 6 (on studies of early modern theatre and law). Several important studies of law, theatre, and performance in later periods are nevertheless in dialogue with this project. See e.g. the discussions of law in Joseph R. Roach's extraordinary *Cities of the Dead* (especially 55–62, 239–82); Leiboff, *Towards a Theatrical Jurisprudence*; Read, *Theatre & Law*; and the essays in Umphrey, Douglas, and Sarat, eds., *Law and Performance*; Bove, ed., *Théâtre & justice*; Leiboff and Nield, eds., *Law's Theatrical Presence*; and Biet and Schifano, eds., *Représentations du procès*. For further discussion of law and performance as a proto-field, see my “Mapping Law and Performance.”

¹⁵ For a classic account of “tradition” in this sense, see Hobsbawm and Ranger, ed., *Invention of Tradition*; and for an inspiring parallel discussion, see Greenblatt, ed., *Cultural Mobility: A Manifesto* (especially 1–23 and 250–3).

after traversing large swathes of legal history that I began to see fully what before I had seen only in fragments: just how enduringly important performance—and spectatorship—have always been for law.

Law as Spectatorship: Public Trials, Open Courts, and the “Audience”

Even at trials “behind closed doors” there was always at least one spectator: a judge “holding audience.” But trials were also often held in “open Court,” at the “open barre” before “publique Audience[s].”¹⁶ I use historical phrases here in part as a reminder that terms such as “open” or “public” can mean very different things in different contexts. As Subha Mukherji has stressed, phrases describing courts as closed or open register perceptions as much as realities.¹⁷ Nevertheless, such terms—however imprecise—can offer clues about trial audiences, whose nature is often elusive. We do know a good deal about the audiences that gathered in the Athenian Agora or Roman Forum. But, while historians of medieval and early modern law have given us detailed accounts of the practices, procedures, personnel, doctrines, and jurisdictional powers of a dizzying multitude of early courts, they rarely mention trial audiences. In the course of writing this book, I often found myself searching in vain in the vast literature on medieval and early modern law for answers to specific questions: who, precisely, was allowed into a particular courtroom? Who was actually there? Where did they sit? How did they behave? What was the space like?¹⁸ I have striven to answer such questions where I can, particularly where they illuminate scenes I analyze closely. In doing so, I have repeatedly stumbled upon basic facts and suggestive details that are at odds with

¹⁶ See Lambarde, *Just Lawyer*, 10 (“open Court”); Prest, “William Lambarde,” 472 (quoting Lambarde on the “open barre”); and Tuvill, *Essaies Politicke, and Morall*, fol. 1r (“publique Audience”); and for “huys clos” (behind closed doors), see La Roche-Flavin, *Treze livres des parlemens de France* (1617 ed.), 296 [Bk 4, 67].

¹⁷ See Mukherji’s excellent discussion of the idea of the open court in *Law and Representation*, 174–205 (“[o]penness is at once a spatial perception and a function of the ‘public’” [194]). In law, the word “public” often means “state-sponsored” (rather than individual or “private”). A history of the “open” or “public” trial (as concept and reality) is still to be written. For brief, general accounts, see Herman, *Right to a Speedy and Public Trial*, 1–30; and Radin, “Right to a Public Trial.”

¹⁸ Attention to physical space, action, and atmosphere is rare in traditional legal history. There have been, however, a number of studies of early courthouses, courtrooms, their spatial arrangements, and their iconography. Those to which I am most indebted include: Resnik and Curtis, *Representing Justice*, (see especially 1–87, 134–6, on medieval and early modern civic space, the rise of town halls, and their images and architecture); Graham, *Ordering Law* (especially 1–71 on medieval and early modern English courtrooms); Deimling, “Courtroom: From Church Portal to Town Hall” (a brief but very helpful account of ecclesiastical court locations); and the brief description of typical late medieval courtroom arrangements in Brundage, “My Learned Friend,” 186. For an anthropological approach to medieval and early modern legal ritual that pays considerable attention to space, see Garapon, *L’âne portant des reliques*. The chapter on trials in Dillon, *Language of Space*, 155–77 (closely analyzing space in, primarily, the trial of Mary Queen of Scots) offers a useful model for both legal and performance historians; and see my “Staging the Last Judgment in the Trial of Charles I.”

certain textbook narratives. Most notable among these is the classic account of the disappearance of public trials on the Continent some time in the twelfth century.¹⁹ These facts and details appear throughout my book, but a very short summary may be helpful to those who might say (as one learned colleague did), “but there were no trial audiences outside of England!”

Few would dispute the fact that judgment in early medieval Europe often took place “in an atmosphere of public witness” before “a communal audience” (as Wendy Davis and Paul Fouracre put it).²⁰ And few would dispute the fact that many courts in late medieval *England* remained relatively open public venues. But most would insist that things were quite different on the Continent after the twelfth-century “legal revolution.”²¹ According to the now standard account, around the time that the Church founded the Inquisition, Roman and canon law began spreading their tentacles across the Continent, transforming the old customary accusatorial legal systems into inquisitorial systems. Trials moved behind closed doors almost everywhere but England. Gone were the old traditions: proof through witnesses and community testimony; public, collective judgment; protections against false accusation. The judge-as-Inquisitor became the sole accuser, interrogating witnesses in secret and extorting confessions through torture. The only forms of public justice that remained came too late, after torture and confession had confirmed guilt: in vast public sentencing proceedings; and in the spectacular displays of brutality that exhibited so-called justice to the people, treating staggering savagery as sacred ritual.

This account has a good deal of truth to it (even in this grossly schematic form): many trials were closed to all but a few officials; judges usually interrogated witnesses (at least initially) in chambers. However, in the chapters that follow I question various elements of it: showing the ongoing importance of oral argument before various kinds of audiences; qualifying standard representations of inquisitorial trials and late medieval punishment rituals as controlled expressions of absolute power; and examining public or semi-public trials and trial spectators. What is indisputable is that there were “trial audiences outside of England,” in later periods as in earlier ones.

A few notes and images must stand here as placeholders for my more extended discussion of public trials in Chapters 3, 4, and 5.²² In the later Middle Ages and well into the early modern period, many courts continued to hold trials in church porticos, public squares, marketplaces, on city walls, or in other open public spaces. In a lengthy discourse on why trials must

¹⁹ See e.g. Peters, *Torture*, 41–4; Evans, *Rituals of Retribution*, 37; Deane, *History of Medieval Heresy and Inquisition*, 100–1; Dülmen, *Theatre of Horror* (throughout, but especially 34–9); Cohen, *Crossroads of Justice*, 54, 75; Merback, *Thief, the Cross, and the Wheel*, 132–3 (132 for “behind closed doors”); and my more extended discussion in Chapter 4, 146.

²⁰ Davis and Fouracre, ed., *Settlement of Disputes*, 216.

²¹ For discussion of the twelfth-century “legal revolution,” see Chapter 3 and 4, 93–4, 146–8.

²² See especially Chapter 3, 92–3, 110–11, 119, Chapter 4, 150–76, and Chapter 5, 200–4, 228–32, 238–50.

be open to the public in his 1617 treatise on the French parlements, judge Bernard de La Roche-Flavin notes that there are “tribunals of justice [in] many places in public squares in the towns of France,” some “uncovered, exposed to the Sun, winds, & rain,” holding trials in “open session” [*à huys ouvert*].²³ Even courts that met indoors were often open to the street. One c.1497 image (fig. 0.2) shows a lively scene in a Hamburg municipal courtroom: judges, parties, bailiffs, prisoners, and onlookers crowd around the judges’ bench or mill around inside the courtroom; many more gathered outside peer through the giant window at the scene within.²⁴ An image in Damhouder’s criminal law manual shows a more dramatic scene: a supplicant begs the judge for mercy on bended knee, while spectators watch through the windows at the back (fig. 0.3).²⁵ Even heresy and witch trials—which were supposed to be among the most secret—were not always so secret. At the heresy trial of Jan Hus in 1415, there were hundreds of people in the audience.²⁶ At Françoise Fontaine’s witch trial in Louviers, France in 1591, “a great number of people” watched the spectacle through windows.²⁷

In many of the royal palaces converted to “palaces of justice” between the fourteenth and sixteenth centuries, large crowds gathered to watch trials: for instance, in the Quarantia courts in the Ducal Palace in Venice; or in the judicial parlements (appeals courts) in Paris, Rouen, Toulouse, Aix-en-Provence, Dijon, and elsewhere in France.²⁸ As La Roche-Flavin writes, justice is “rendered publicly in the great halls of the Palaces, which one calls ‘halls for Audiences’” because, “if [justice] . . . is not seen by all, that is not justice.”²⁹ We can see such audiences in an image of the Toulouse Parlement, in which dozens of attendees crowd around the gated bar, jockeying for elbow room (fig. 0.4).³⁰ Writing in the mid-fifteenth

²³ “Les places publiques des villes” are “sans aucune couverture, & à decouvert, exposée[s] au Soleil, vents, & pluies,” though occasionally, “au tour de ces places, ou tribunaux de la justice, il y avoit des couverts, co[m]me nous voyons es environs de plusieurs places des villes de France.” “[E]n ces Basiliques, ou places publiques, [on] donnoit Audiance [aux Advocats] à huys ouverts.” La Roche-Flavin, *Treze livres des parlemens de France* (1617 ed.), 296 [Bk 4, Ch 66–7]). La Roche-Flavin was presiding judge in the Chambre des Requêtes in the Toulouse Parlement.

²⁴ Hamburg Staatsarchiv, Cl. VII. Lit. LaNr. 2 Vol. 1 c, reproduced in Reincke and Bolland, ed., *Die Bilderhandschrift des Hamburgischen Stadtrechts von 1497* (unpaginated, image B; and see, similarly, image C). With thanks to Wolfgang Schild for helping me locate this image.

²⁵ Damhouder, *Praxis rerum criminalium* (1562), sig. ***4v.

²⁶ See my extended discussion in Chapter 4, 165–76.

²⁷ A “grand nombre de peuple . . . estoit aux fenestres de lad. cohue” (noisy courtroom). Bénéat, ed. *Procès verbal fait pour délivrer une fille possédée*, 68.

²⁸ Both the Quarantia courts in Venice and the French parlements had political functions as well, but from the late Middle Ages, their main order of business was judicial. On these courts generally and for the fact that their doors were open to the public, see Viggiano, “Giustizia, disciplina e ordine pubblico,” especially 833–4; and Shennan, *Parlement of Paris* [1998 ed.], especially 18, 68, 100–1, 105–6; and below.

²⁹ “[L]a justice se rend publiquement es grandes sales des Palais, qu’on appelle les sales des Audiances de la grand Chambre” (*Treze livres des parlemens de France*, 299 [Bk 4, sec. 75]). “[L]a justice si elle . . . n’est veüe de tous, ce n’est pas justice” (298 [Bk 4, Ch 74]).

³⁰ Bertrand, *Opus De Tholosanorum Gestis* (1515) (title page). The image shows François I confirming offices in the Toulouse Parlement, but represents the Parlement more generally. The Toulouse Parlement was the first of the provincial parlements, established c.1420–37.



Fig. 0.2 A busy Hamburg municipal courtroom (c.1497), with a group of petitioners and onlookers clustered beside the judges' table (far right), and a large crowd at the window.

Staatsarchiv Hamburg, 111-1 Senat, Nr. 92693: Stadtrecht, 1497 [Altsignatur: Cl. VII Lit. I a Nr. 2 Vol. 1 c].



Fig. 0.3 A supplicant begs the judge for mercy on bended knee, as spectators watch the scene through the windows in Joost de Damhouder's *Practice in Criminal Cases* (1562).

Damhouder, *Praxis rerum criminalium* (1562). The Bodleian Libraries, University of Oxford, Douce D 230, sig. ***4v.

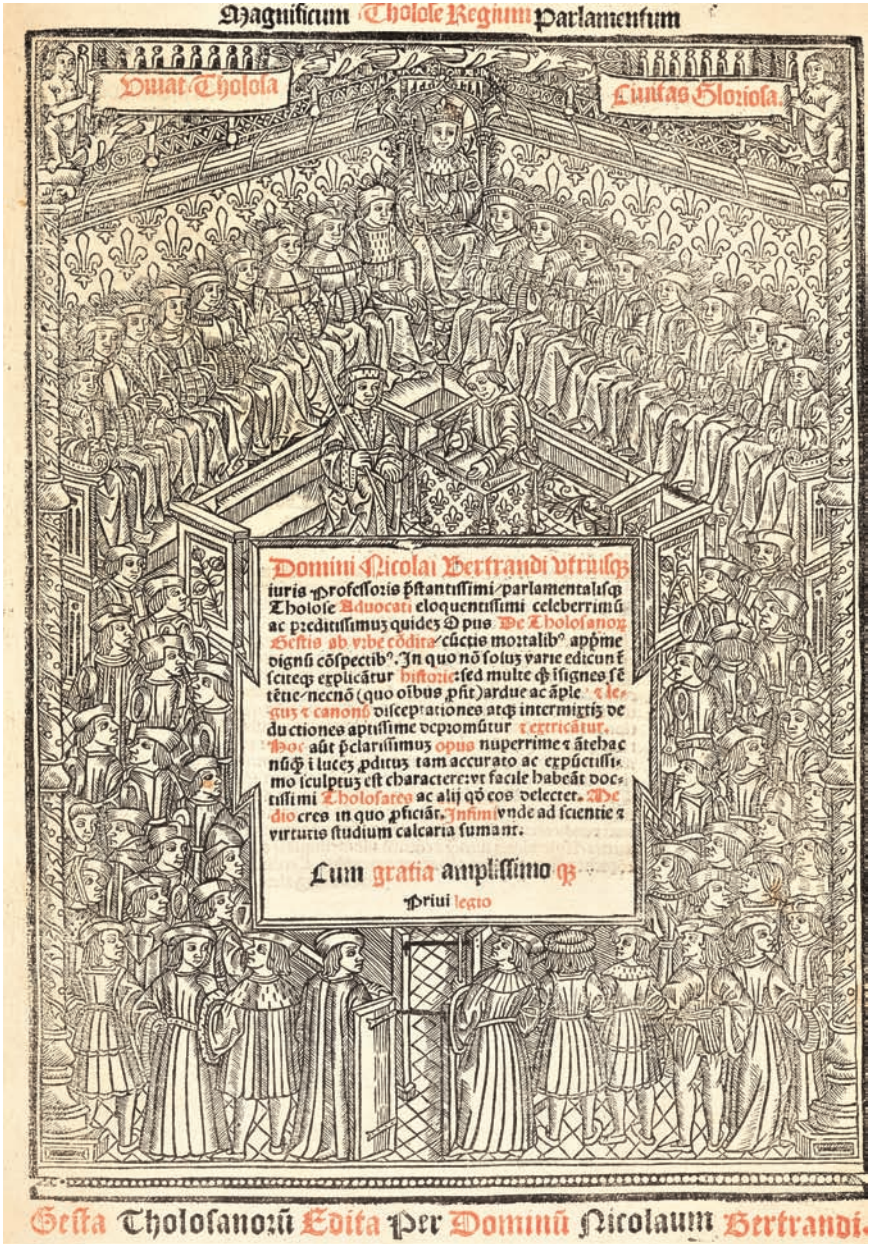


Fig. 0.4 A crowd of attendees in the Toulouse Parliament's courtroom in jurist Nicolas Bertrand's *Acts of the Tulousians* (1515).

Bertrand, *Opus de Tholosanorum Gestis* (1515). The Bodleian Libraries, University of Oxford, Vet. E1 d. 46, frontispiece.

century, jurist Thomas Basin claimed that trials in the parlements of Normandy and Paris often had as many as fifteen hundred spectators.³¹ A little over a century later, Etienne Pasquier claimed there were nine or ten *thousand* spectators at one of the trials he argued in the Paris Parlement.³² Throughout these pages, I offer testimony to the presence of audiences—sometimes large ones—at trials on the Continent, as in England: in (for instance) repeated references to “the Court, *and* the whole Audience”; in images of trial spectators; and in descriptions of trials as vast “spectacles” in which (as in Tothill Fields) participants were expected to “perform” for the “crowd.”³³

Performance, Theatricality, Gender, Law, and the Question of Anachronism

Although early cultures did not have a single word for what we call “performance,” they did have many words that served a similar function. Throughout, I look closely at these words, viewing them as crucial clues to the ideas and attitudes that lay behind discussions of legal performance. Most notable among them were terms specifically focused on bodily expression: “*hypokrisis*,” “*actio*,” “*pronuntiatio*,” “delivery” (and variants). For the Spanish humanist Juan Luis Vives, “*actio*” denoted not only bodily action but—like the modern word “performance”—the full range of display skills and “active” aesthetic practices whose end (he said) was “action,” including oratory, theatre, dance, and music.³⁴ Words that described audiences—“*spectatores*,” “*publica*,” “*auditorium*,” and cognates—similarly served to link different kinds of events, all of which had spectators.³⁵ The word *actus* could denote an action generally, but in certain contexts pointed specifically to actions displayed for an audience: the reason that public disputations in England were called “acts.” While the English word “performance” denoted the accomplishment of any kind of action (as it often does today), it could also specifically identify actions for spectators, including legal ones: Nayler and Thorne were (as we have seen) “sworn . . . to *perform* the battle at *Tothill*”; Inns of Court students regularly

³¹ “Libellus de optimo ordine forensis lites audiendi et deferendi,” 35 (in Basin, *Histoire des règnes de Charles VII et de Louis XI* [1859 ed.], vol. 4); with thanks to Jody Enders’ *Rhetoric and the Origins of Medieval Drama*, 40–3, 96, for introducing me to Basin, whom I discuss briefly in Chapter 3 and at greater length in Chapter 4, 153–7.

³² Pasquier, *Oeuvres d’Etienne Pasquier* (1723 ed.), 2:314, and see my extended discussion of this case in Chapter 5, 244–50.

³³ Charrier, *Memorable action judiciaire* (1559), 5 (“la Cour, & tout l’Auditoire”; emphasis added); and see similar examples and references to “performing,” “spectacle,” and the “crowd” throughout.

³⁴ Vives, *Vives On Education*, 23; *De [tradendis] disciplinis* (1612 ed.), 223 (arts whose essence is “*actio*, . . . quae activae dicantur”).

³⁵ The word “*auditorium*” at once denoted the people gathered to listen and the place where something was heard, and (more narrowly) a judicial hearing.

“performed” in moots.³⁶ Theatrical analogies similarly stressed the relationships among different kinds of performance events, most notably (for my purposes) legal and theatrical ones: the Roman Forum was a “theatre [*theatrum*] [of] eloquence” (as Cicero put it); for later commentators, a trial or punishment might be a “spectacle” or “pagean[t],” “a[n] enterlude upon a stage,” “a theatre for [staging] comedies or satires.”³⁷ Words such as *scaenicus*, like our “theatrical,” both identified representations that took place in theatres and described events or behavior that resembled those representations (usually to decry their histrionics or mendacity).

All of these words served to point to performance as a distinctive form of expression, palpably different from both textual expression and ordinary being and doing. At the same time, the trope of the *theatrum mundi*—expressed in such assertions as “all the world’s a stage” or “the make-believe [is] true”—identified performance as a universal ontological condition: all doing and being was, in fact, performance in the “great theatre of the world.”³⁸ In bearing this double meaning, the constellation of early terms designating performance and theatricality aligns surprisingly well with the double meaning of the words “performance” and “performativity” in contemporary critical usage. On the one hand, “performance” may describe a particular form of expression: what Richard Schechner famously called “showing doing”; those special actions that expressly or overtly display, signify, present, demonstrate, or enact something for a real or imagined audience.³⁹ On the other hand, “performance” (or its adjunct “performativity”) may diagnose a universal ontological condition: the fact that what appears as natural is in fact produced and reproduced through performance on the stage of life.

These two ideas about performance are different, yet they converge, particularly when overt performance seems to reveal the performativity of everyday life or display the world as theatre. Early legal performance often seems to do just this.

³⁶ Middle English borrowed the verb “to perform” from the French, using it to designate both “to carry out (an action)” and “to furnish” (often in legal contexts). For the later history of the word and its variants, see my discussion in “Law as Performance,” 200–1. And see Chapter 6 for many examples in which “perform” and “performance” specifically denote the display of action or skills (there, in legal contexts).

³⁷ Cicero, *Brutus, Orator* [Loeb], 23 [*Brutus*, 6] (describing the orator Hortensius). For “spectacle,” see e.g. Basin, *Histoire de Louis XI* (1963–72 ed. [orig. 1471–3]), 2:269; Pernoud, ed., *Retrial of Joan of Arc* (orig. 1450s), 240; and *Most Wonderfull and True Storie* (1597), 24. For “pageantes,” Phillips, *Examination and Confession of Certaine Wytches* (1566), sig. A3r. For “enterlude . . .” Buchanan, *Detectioun of the dvinges of Marie Quene of Scottes* (1571), sig. F1r. “Ne doit la court estre ung theatre pour y faire comedies ne satires” (chief royal prosecutor of France in 1495; quoted in Houlemare, *Politiques de la parole*, 457).

³⁸ Readers will of course recognize Shakespeare’s *As You Like It* [2.7]. “The make-believe [is] true” is a rough translation of the title of Lope de Vega’s play, *Lo fingido verdadero* (c.1608), in which, the actor Genesis (later Saint Genesis) becomes a Christian by performing the role of a Christian. And see Calderón’s *El gran teatro del mundo* (c.1634).

³⁹ “‘Showing doing’ is performing: pointing to, underlining, and displaying doing.” “The underlying notion is that any action that is framed, enacted, presented, highlighted, or displayed is a performance” (*Performance Studies* [2013 ed.], 28, 2). Schechner famously describes such actions as “twice-behaved”; “restored”; in the “subjunctive” mode, expressing an “as if . . .”. Schechner, *Between Theater and Anthropology* (e.g. 3, 6, 35, 37, 41, 52, 55, 104, 112, and throughout).

For instance, in his defense of Titus Annius Milo, on trial for murder, Cicero pointed to Milo as a vision of stoic masculinity and declared that Milo's manliness forbade that he weep publicly: Cicero himself would have to weep Milo's secret tears, which he proceeded to do, weeping copiously throughout the speech.⁴⁰ Cicero seems quite aware of the norms he is deploying (as a device for gaining sympathy for the not-altogether-sympathetic Milo). If a time-traveling twenty-first-century critic were to arrive in Rome in 52 BCE to reveal to Cicero that his speech had "exposed the norms of quotidian gender performance" (overcoming the not insignificant translation challenges), Cicero might say: "so I did!" But his display of gender performativity did not serve in any sense as critique. For acts of unmasking the *theatrum mundi* or of the performative constitution of things are political wild cards. Like performance generally, they rarely have a single political meaning but are instead many-vectored, ambiguous, ambivalent, politically polymorphous (and sometimes altogether perverse) things.⁴¹

Sadly but unsurprisingly, while early commentators might recognize gender as (in part) a thing that was made through performance, very few thought this meant that gender roles were malleable, least of all in law. Virtually all commentators (ancient to early modern) understood judges, lawyers, and other kinds of legal actors to be, necessarily, men. There were exceptions. Female rulers could preside as judges or intervene in cases.⁴² Valerius Maximus lists a few "women who pleaded before magistrates for themselves or others" in ancient Rome. Among these was the "infamous" Carfania, whose appearance in medieval law books I discuss in Chapter 4, Maesia of Sentium, who pleaded before "a great concourse of people, going through all the forms and stages of a defence not only thoroughly but boldly," and Hortensia, who "pleaded the cause of women before the Triumvirs resolutely and successfully, . . . [r]eviving her father's eloquence" and winning her case.⁴³ In the year 1500, Giustina Rocca served as judge (*arbiter*) in the Tribunal of Trani (Italy) in a highly public family inheritance dispute ("all the people rushed to see such a female wonder sit on the bench of the tribunal and proffer the sentence").⁴⁴ In one mid-fourteenth-century text, the Virgin Mary

⁴⁰ See *Pro Milone*; and my discussion in Chapter 2, 78–80.

⁴¹ For an extended discussion, see my "Legal Performance Good and Bad."

⁴² Pope Gregory's *Decretals* (one of the major sources of canon law) actually specifies that illustrious women with power and authority are an exception to the general rule, and may act as judges in cases between their subjects. See Mastroberti, "Sul caso della tranese Giustina Rocca" (quoting the *Decretals*, Bk 1, Title 43, Ch 4).

⁴³ Valerius, *Memorable Doings and Sayings* [Loeb], 2:211 [8.3].

⁴⁴ "[T]ota penitus civitas confluit, ut videret tale monstrum mulierem in bancho sedentem pro tribunali, et sententiam . . . proferentem." Lambertini, *Tractatus de iure patronatus* (1533); passage quoted in full in Mastroberti, "Sul caso della tranese Giustina Rocca," 108 (and see 107–10 on Giustina generally). I have translated "monstrum" as "wonder" because Lambertini's attitude is otherwise positive, but the word could, of course, have far more negative associations. Lambertini's short account is the only source for the story. Giustina's grandchildren were the parties and asked her to arbitrate, presumably because she had substantial legal knowledge and (as Lambertini puts it) had

declares that, while “women generally are not admitted to the office of advocate,” they may defend orphans, widows, and the miserable: perhaps pointing to additional instances in which women served as advocates.⁴⁵ It seems not merely possible but probable—given the still largely untold history of transgender life—that among the male judges and lawyers were some who had once been identified as female, and others who continued to live in the borderlands of gender.

However, Justinian’s sixth-century *Digest*—which served as the most important source of Roman law through the early modern period—declared:

[o]n the ground of sex, [the praetor] forbids women to [represent] others. There is a reason for this prohibition, to prevent them from involving themselves in the cases of other people contrary to the modesty in keeping with their sex and to prevent women from performing the functions of men.⁴⁶

Few men would have disagreed with the view that Leonardo Bruni expressed in a letter to the humanist Baptista di Montefeltro (c.1405), explaining that she might study piety and morality but must by no means study rhetoric, for studying rhetoric meant studying law:

[W]hy should . . . a thousand . . . rhetorical conundrums consume the powers of a woman, who will never see the forum? That art of delivery, which the Greeks call *hypocrisis* and we *pronunciatio*, . . . so far is that from being the concern of a woman that if she should gesture energetically with her arms as she spoke and shout with violent emphasis, she would probably be thought mad and put under restraint. The contests of the forum, like those of warfare and battle, are the sphere of men She will, in a word, leave the rough-and-tumble of the forum entirely to men.⁴⁷

As Bruni’s letter suggests, the masculine pronoun in such texts is not generic or falsely universal: it is often assertively, aggressively masculine, precisely because

accomplished many “admirable things.” Lambertini notes that she required the losing party to pay her for her services. Scholars have sometimes painted Giustina as a lawyer regularly working in the Trani Tribunal (“Avvocatessa del Foro di Trani”), and she may in fact have served as a diplomat between Trani and Venice, but this seems to have been the only case in which she appeared in court. For “Avvocatessa,” see “Giustina Rocca,” *Enciclopedia delle donne*, <http://www.enciclopediadelledonne.it/biografie/giustina-rocca/> (accessed March 28, 2021).

⁴⁵ See Shoemaker, “Devil at Law,” 582, quoting the c.1360 manuscript of the *Processus Sathanae* (Trial of Satan) in the Bibliothèque Nationale.

⁴⁶ Justinian, *Digest of Justinian* (trans. Watson, 1998 ed.), 1:79 [3.1.1.5]. For a twelfth-century update, see Bulgarus’ letter to papal chancellor Haimeric: “Women can neither be judges nor bring claims for others, but can only claim for themselves. They cannot intervene on another’s behalf save when they are conducting their own business” (quoted in Brasington, *Order in the Court*, 109). In some places (such as ancient Athens and some parts of medieval Europe), women could not in fact represent themselves but had to sue through a representative.

⁴⁷ Bruni, “Study of Literature” (in Kallendorf, ed., *Humanist Educational Treatises*), 105.

women refused (as we will see) to “leave the rough-and-tumble of the forum entirely to men.” In replicating the masculine pronoun (as I do with some frequency), I am attempting to mark this history, which is far from past.

If “performance,” “theatricality,” and gendered pronouns do a fairly good job of representing historical experience, other terms have proven less tractable, including some that commonly serve as broad historical rubrics. Among these are traditional terms of periodization (“ancient,” “medieval,” “early modern”), place names (“Europe,” “England”), as well as some of the most common keywords of legal history: “trial,” “judge,” “juror,” “forensic,” “litigant,” “lawyer,” “witness,” “public,” “courtroom,” and, not least, “law.” I use all of these (alongside their approximate historical equivalents) in the uncomfortable recognition that modes of categorizing legal phenomena change from one period to another—indeed, one jurisdiction to another—and that modern terms only partly express the conventions of the shifting legal histories I trace. I use “courtroom” as a general term, but, as I have noted, trials took place in many kinds of spaces, some of them “rooms” in only the loosest sense: piazzas, church porticos, marketplaces, city walls. I use the word “law” despite the fact that what counts as law may be murky at times. The double meaning of the word “court” (*curia*)—both royal court and lawcourt—reminds us how hard it may be to disentangle law from political power. The event in Tothill Fields reminds us how hard it may be to disentangle law from entertainment. That entanglement is, of course, one of the themes of this book.

Representations of Legal Performance versus Legal Performance as Representation

Although defining the parameters of both law and performance may sometimes be difficult, I have tried to keep my eye squarely on performance in legal arenas, often in the face of frustratingly limited evidence. We know a great deal about ancient, medieval, and early modern law, and quite a bit about certain legal rituals: compurgation or oath-taking ceremonies; gestures and actions that created legal status or contractual relationships.⁴⁸ We have countless tomes of doctrine and commentary, court records, and reports of words spoken in courtrooms: formal speeches; judges’ pronouncements; attacks and counterattacks by disputants or their lawyers, sometimes rendered in vivid direct speech. We have a vast body of depositions, often in the form of highly dramatic narratives. But although such sources may describe events in the world at large, they are frustratingly silent on precisely the things I have sought to identify: how events in specifically legal

⁴⁸ See e.g. Stacey, *Dark Speech*; Mostert and Barnwell, ed., *Medieval Legal Process*; Davies and Fouracre, *Settlement of Disputes*; and many scattered references in Hibbitts, “Coming to Our Senses” and “Making Motions.”

arenas looked, sounded, felt; the movement of legal actors in space and time; their use of body language and performance style; the mood and behavior of the audience; the visceral experience of being present there; in short, performance by and before the law. What Paul Brand writes of the medieval English courtroom might be said of early legal events generally: the “courtroom was [a] place of actions, gestures, and movement, [but] [t]hese are only very occasionally recorded.”⁴⁹

The absence of such evidence is the reason that scholars of early law so often turn to literary texts to understand what legal events felt and looked like, while recognizing that the interpreter must do a good deal of work to separate fact from fiction. What can we learn of real courtrooms from a text like Hermann von Sachsenheim’s *The Moorish Woman* (1453), where the judge is “Queen Venus,” the lead prosecutor is the “Moorish woman,” and the defendant a knight who has violated the laws of love?⁵⁰ Probably a great deal, as the study of “law in literature” has long held. But in the temptation to interpret the politics and poetics of such a complex, verbally intricate, and narratively wild text, it is very easy to lose sight of the things real people did in real legal arenas and the things they believed to be true. Legal performances have their own politics, their own performance poetics, their own forms of complexity, intricacy, and wildness.

For that reason, I have resisted using palpably fictional texts as sources and tried to focus where I can on legal events as, themselves, modes of representation. Nevertheless, I do spend a good deal of time on representations of law: images and texts that represent reality as their makers saw it. These reveal conceptions of and attitudes toward legal performance that are central to my account. Like others trained in literary, visual, and performance studies, I often attend to seemingly insignificant details that are, it turns out, not insignificant at all. Thus, while my range is broad, I sometimes dwell on smaller scale moments as emblems or microcosms of larger forces, particularly in the “close readings” of performance that appear at various points in this book.⁵¹ This practice of dwelling on small but significant moments is not just a critical habit but represents one important claim of this book: that it is not only sovereigns, legislatures, and judges who create law through grand edicts; so do law’s subjects, not only through words but through

⁴⁹ Brand, *Earliest English Law Reports*, 4:xxxviii (referring only to English law reports, but his comment applies to trial records generally). See, similarly, Musson, *Public Order and Law Enforcement* (medieval law clerks “were content to provide only the bare minimum of information necessary to keep a record of the trials” [188]); and Musson, “Visualising Legal History,” 203–5 (on the utility of images for filling in what trial records rarely record).

⁵⁰ *Die Mörin*: see the discussion of this text in Westphal, “Bad Girls in the Middle Ages,” 108–16.

⁵¹ For a more extended discussion of the (sometimes subtle) distinction between representations of legal events and legal events as, themselves, representations, see my “Law as Performance.” For examples of close reading in this book, see the analysis of two of Cicero’s speeches in Chapter 2, 75–80; of Jan Hus’s defrocking and the Innsbruck reappointment ceremony in Chapter 4, 169–76 and 182–3; and of Pasquier’s defense of Jean d’Arconville in Chapter 5, 244–50.

actions large and small. Law is by nature a living thing and the people who live under it change it: sometimes imperceptibly; sometimes dramatically. In this sense (to borrow Peter Goodrich's phrase), performance is a form of "minor jurisprudence."⁵² And sometimes not minor at all.

Chapter Summaries

In retrospect, the fact that my paragraph on Plato swelled beyond all expectation should not have been a surprise. Medieval and early modern commentators return again and again to certain passages in ancient texts: Plato's discussions of lawcourt rhetoric, sophistry, and theatrocracy; Aristotle's of the "depravity" of audiences and "corruption" of the courts and the sad necessity of "warp[ing]" the jury. They repeatedly reference certain anecdotes, treating them as foundational stories: Demosthenes' response when asked to name the three most important elements of oratory ("Delivery, . . . delivery, . . . delivery"); Aeschines' performance of the speech that had sent him into exile, and his commentary on Demosthenes' delivery of it, "[if only] you had heard the beast himself[!]" the contest between Cicero and the actor Roscius to determine whether Cicero could express more in words or Roscius in gestures; the scene of Cicero in the theatre, mesmerized by "the actor-man's eyes . . . blazing behind his mask" and the "sobs of mourning in his voice."⁵³ Those who offered the tradition its founding ideas came from or studied in far-flung places in Europe, Africa, and Asia: Egypt, Stagira, Calahorra in Rioja Baja (Spain), Numidia (Algeria), Persia, Baghdad, Damascus, Córdoba (via "Greater Libya").⁵⁴ I begin in ancient Athens and Rome not because these are self-evidently the birthplaces of European culture (as historians used to say). I begin there because their distinctive legal practices—in which prominent trials took the form of mass spectacles, and an orator's star performance before a cheering audience could make the difference between life and death—gave rise to an extensive body of thought and a set of recurrent questions about the poetics, politics, and practice of legal performance.

Those questions are at the heart of Chapter 1, "Theatre, Theatrocracy, and the Politics of Pathos in the Athenian Law Court." Here, examining a variety of legal orators alongside such major figures as Plato and Aristotle, I look at ancient Greek debates about the value and meaning of legal performance. On the one hand, legal

⁵² Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (and see Goodrich and Zartaloudis, ed., *Cabinet of Imaginary Laws*, a collection of "jurisliterary inventions" that are themselves forms of minor jurisprudence).

⁵³ For the sources of these discussions and anecdotes and later elaborations, see Chapter 1, 32–3, Chapter 2, 65, 80, 86; Chapter 3, 104–6; Chapter 4, 156–7, note 39; Chapter 5, 207 and note 28, 210–11, 214–16, 220, 237, 243; and Chapter 6, 264.

⁵⁴ These are places where, respectively, Plato, Aristotle, Quintilian, Augustine, Al-Farabi, and Averroës (Ibn Rushd), were either born or spent significant time studying.

theatricality appears in these debates as potentially toxic: exciting evil passions, encouraging mob rule, riding roughshod on reason. On the other hand, it appears as a powerful instrument that, rightly used, may rouse virtuous anger, pity, and fear, channeling these not toward catharsis but toward righteous judgment.

Chapter 2, “The Roman Advocate as Actor: *Actio*, *Pronuntiatio*, *Prosopopoeia*, and Persuasive Empathy in Cicero and Quintilian,” takes up a different set of questions about the ethics of emotion in legal performance. For Cicero and Quintilian, the crucial question is not whether you should manipulate the theatre of the forum but how: how to display your clients as victims; how to play your audience; how to weep in court convincingly. They offer detailed accounts of the techniques advocates can employ to fully identify with their clients’ anguish and communicate its reality in court: “let us not plead the case as though it were someone else’s,” insists Quintilian, but “take the pain of it on ourselves.”⁵⁵ At the same time, they raise critical questions about the integrity of practiced empathy, the doubtful value of highlighting one’s own representational frame, and the ethics of instrumentalizing suffering in the name of justice.

If my first two chapters focus on a set of foundational texts in two specific urban legal cultures, the chapters that follow turn to “minor” texts and events in widely divergent legal cultures across western Europe. Chapter 3, “Courtroom Oratory, Forensic Delivery, and the Wayward Body in Medieval Rhetorical Theory” shows the ongoing importance of theories of forensic oratory and (specifically) delivery to medieval theorists. After looking at portrayals of judicial performance in rhetorical treatises, procedural manuals, guides to legal deportment, satiric portraits of the lawyer-as-robed-vulture (and more), I turn to the work of four rhetorical theorists who rewrite (and upend) ancient rhetorical theory. In their work, law appears not as a set of rules or the sovereign’s fiat but as visceral, intimate bodily experience: sometimes divine; sometimes indecorous, subject to accident, hopelessly leaky, sublimely obscene.

Chapter 4, “Irreverent Performances, Heterodox Subjects, and the Unscripted Crowd from the Medieval Courtroom to the Stocks and Scaffold,” explores the gap between normative visions of legal events and their often disorderly realities: heterogeneous crowds; participants who went off-script; those who mooned the judge, spit at the Inquisitor, killed the executioner, or jeered like the mockers of Jesus. I explore here the open spaces and public venues that made trials into arenas for challenging the discipline and order that law was supposed to represent. I then turn to a detailed analysis of two trials—Jan Hus’s heresy trial of 1415, and the Innsbruck witch trial of 1485—showing, in these, how defendants could use performance to recast the meaning of such events and sometimes their outcomes. In the chapter’s last section, I revisit classic accounts of the medieval spectacle of

⁵⁵ Quintilian, *Orator’s Education* [Loeb], 3:63 [6.2.34–5].

punishment: often characterized as “solemn religious ritual” and “theater of devotion,” but in fact toppling expectations, defying intentions, turning to irreverent sport, and sometimes verging on sacrilege.

The last two chapters turn to the early modern period, in which theatres had become fixtures of the urban landscape, and lawyers seemed to have bred like “caterpillars” (the “streets [were] paved with them!”)⁵⁶ Chapter 5, “Performing Law in the Age of Theatre (c.1500–1650),” explores both the renewed identification of law with theatre and the legal cultures that helped give rise to that identification. As humanists borrowed from antitheatrical discourses to denounce the use of “Histrionical-Rhetorical Gesticulation” for law, those who celebrated the courtroom as a “great & magnificent theatre” invested the trope with a variety of contradictory political meanings.⁵⁷ Manuals dedicated to delivery appeared alongside a newly encyclopedic-anatomical science of non-verbal communication, teaching their users how to scrutinize nuances of body parts, gesture, and intonation: techniques they applied to courtroom performance critique. In courts like the Paris Parlement, celebrity lawyers like Etienne Pasquier blurred the boundaries between law and entertainment, flipping hostile crowds with dazzling theatrical legerdemain.

Chapter 6, “Legal Performance Education in Early Modern England,” takes up the question of how one learned such performance skills. Looking at both the Inns of Court and the universities, it examines the tutoring, books, and above all the exercises that trained young men not just in how to be a lawyer but how to look like one. Often excruciatingly difficult but also sometimes uproariously funny, the exercises bore a distinct resemblance to the revels that satirized them, which themselves bore an uncanny resemblance to the real practice of law. If moots and disputations trained future lawyers in crucial skills, they also trained them in impersonation, dissimulation, and make-believe, training that shaped not only their identity as lawyers but their sense of the fundamental meaning of the profession of law.

Throughout this book, I often highlight the strangeness of history in a belief in the value of encounters with the unfamiliar, which train us to resist viewing everything in our own image, force us not to take anything for granted, and remind us: things were not always as they are; nor need they always be. At the same time, I trace a set of enduring tropes, concerns, and questions about law as performance. Changing kaleidoscopically as perspectives have changed, these have nevertheless persisted across centuries, outlasted the rise and fall of legal empires, and (as I suggest in a brief Epilogue) are still with us today. They appear

⁵⁶ *Att.-Gen v. Kinge* (21 May 1596) in Hawarde, *Les reportes del cases in Camera Stellata*, 45; *Recueil general des caquets de l'acouchee*, 140 (“les ruës de Paris en sont pavées”).

⁵⁷ Agrippa, *Vanity of Arts and Sciences* (1676 trans.), 65 (“Histrionical-Rhetorical Gesticulation”). Faye d’Espeisses, *Recueil des remonstrances* (1591 ed.), 25 (“ce grand & magnifique theatre”).

in the interstices of formal legal thought and practice: in discussions of the role of emotion, sensations, or the lure of charisma in legal persuasion; the means of producing law-abiding subjects and the justifications for legal violence; the virtues and evils of legal democracy; the meaning of “the rule of law”; and much more. Questions about the use and abuse of theatricality for law lurk behind some of our most important legal doctrines: show trials are bad (too much theatre), but secret trials are even worse (not enough theatre); trials must be public (they need spectators) but not too public (lest they become public spectacles); evidence may dramatize, but not too dramatically; performance must be probative but not prejudicial. Knowing the history of the ideas about performance that underlie these and many other doctrines may give us keys to understanding our own cultures of legal performance, and the more overt and less docile kinds of performance we call theatricality: seeing into their mechanisms; observing how they exert power over us; pondering their consequences. This book seeks to provide such a history.