

Epilogue

The history I have traced did not, of course, end abruptly in or around the year 1678. In fact—as theatres proliferated and the modern entertainment industry began to emerge, proffering a set of new tropes for performance—one could argue that it had only just begun. When the novelist Frances Burney was asked how she had “been entertained” at the trial of Warren Hastings in 1788, she cried: “Entertained[!] . . . you ask after my amusement as if I were at an opera or a comedy” but “it is quite too serious and too horrible for entertainment.”¹ Law was not entertainment, opera, comedy, theatre. And yet, for legal philosopher Jeremy Bentham (writing just a few years later), that was precisely what it was. The courtroom, he writes, “[is a] theatre of justice,” where “the sports of the imagination” shown in the theatre “give place to the more interesting exhibitions of real life.” In the courtroom, spectators “imbibe, without intending it, and without being aware of it, a disposition to be influenced [by] the love of justice.”² There, the

bystanders at large [receive] instruction, not the less impressive and beneficial from its [appearance as] simple entertainment. Here [is] a theatre: the suit at law, the drama; parties, advocates, . . . judge, and jury, the *dramatis personae* and actors; the bye-standers, the audience.³

The great Sir Francis Bacon, Bentham notes, had once declared that law should take “*Nihil ex scenâ*”: “nothing from the theatre.” But he is wrong, insists Bentham. In law there must be “*Multum ex scenâ*”: “*much from the theatre.*” For Bacon (writes Bentham), “*Scena*”—theatre—means “*lying.*” But legal theatre is not lying but in fact lying’s opposite. Legal theatre offers transparency, demonstrative visibility. “To say, *Multum ex scenâ*,” he writes, “is to say, lose no occasion of speaking to the eye. In a well-composed committee of penal law, I know not a more essential personage than the manager of a theatre.”⁴

¹ Burney, *Diary* (1910 ed.), 1:446–7.

² Bentham, *Works* (1962 ed.), 5:21, col. 2, 5:577, col. 1. (“Letters on Scotch Reform,” first published in 1808, but reiterating the similar arguments Bentham made in his 1791 *Panopticon*, postscript).

³ Bentham, *Works*, 2:137, col. 2 (*Principles of Judicial Procedure*, [c.1820–27]), where Bentham is actually envisioning this scene as the result of one of his proposals for judicial reform.

⁴ Bentham, *Works*, 4:80, col. 1 (*Panopticon*, postscript, arguing specifically for penal theatre but also reversing Bacon’s claim about trial procedure). In the passage Bentham quotes, Bacon is arguing that courts must deal only with real cases, not cases by “fained parties” (essentially, fictional test cases): “*Nil habeat Forum ex scenâ*”; the court should have nothing to do with fictional matters (matters brought

One can track the idea that theatre is essential to the courtroom in its classic form well into the twentieth century (and beyond). Texts like Michel Le Faucheur's *Essay upon the Action of an Orator: as to His Pronunciation & Gesture, Useful [for] Lawyers* (1680) continued to draw on ancient precepts for *hypokrisis, actio, pronuntiatio*, appearing in ever-updated versions: in Jean-Sifrein Maury's *Principles of Eloquence for [the] Bar* (with a chapter "On Oratorical Delivery") (1782); William C. Robinson's *Forensic Oratory: A Manual for Advocates* (with sections titled "Of voice," "Of gesture") (1893); or *The Professional Voice: Practical Lessons [for] the Bar [and] Theatre* by Dr. Pierre Bonnier (consultant at the Comédie-Française and Opéra-Comique) (c.1908).⁵ The four-page list of "do's" and "don't's" in Peter Joseph Cooke's *Forensic Eloquence; or, The Eloquence of the Bar* (1897) offers specifics: "Do not place your thumbs in the armholes of your waistcoat; do not clutch your coat or gown with your hands"; "Do not twist your moustache"; "Do not jerk your body or bend your knees spasmodically when pressing home . . . your narrative"; "Be natural, decisive, spontaneous, and sincere." Modern, but—waistcoat and moustache aside—suspiciously like Quintilian. The "most eminent actors and actresses of the day [know]" that it "all amount[s] to this —Be natural!" declares one theorist.⁶ Do not "ris[k] becoming a declaimer or an actor" or speak with "theatrical pomp," declares another. And yet—insists the first—"you must be at once an actor and a comedian."⁷

Lest you think such advice belongs to a bygone era, read manuals for the aspiring courtroom lawyer, or better yet, go online: "remember that the courtroom is a theater" (as one website on cross-examination advises). "Do not disappoint your jury. [M]ake sure [your performance] has maximum dramatic effect—without being overly dramatic."⁸ An article titled "Acting Effectively in Court: Using Dramatic Techniques" urges: transfer techniques "from theater to the courtroom"; train your voice; block your movements; learn to express emotion; and employ "character voices," as in the following script, in which counsel for the defense addresses the jury.

"from the stage"). Bacon, "A Proposition to His Majesty . . . Touching the Compiling and Amendment of the Laws of England" (c.1616) in Bacon, *Resuscitatio*, 278. I am grateful to Alan Stewart for helping me locate this passage.

⁵ Le Faucheur, *Traitté de l'action de l'orateur, ou de la Prononciation et du geste* (1657) (trans. *Essay upon the Action of an Orator* in 1680); Maury, *Principes d'éloquence, pour . . . le barreau* (section "De l'action oratoire"); Robinson, *Forensic Oratory*; Bonnier, *La voix professionnelle: Leçons pratiques de physiologie appliquée aux . . . Barreau, Théâtre*.

⁶ Cooke, *Forensic Eloquence*, 19–23.

⁷ "[O]n risque facilement de devenir un déclamateur et un comédien"; "une pompe factice et théâtrale." Mareille, *La plaidoirie sentimentale*, 21, 290 (both a history and a practical guide); Cooke, *Forensic Eloquence*, 116.

⁸ Gerald A. Klein, "The Art of Cross-Examination," Klein & Wilson, <https://www.kleinandwilson.com/publications/the-art-of-cross-examination/> (accessed July 13, 2021).

If you had been in Billy Bob's shoes that night at the Commodore Club you would have seen that Joe Willie had fire in his eyes and smelled the alcohol on his breath. If you had been in Billy Bob's shoes that night at the Commodore Club, you would have thought:

(Now with a slight drawl)

Joe Willie doesn't understand that I'm in love with Beth. Beth told me how violent he gets when he's drinkin.' How he's capable of just about anything.

But "BE NATURAL." Do not be overly dramatic. For "[t]he courtroom is *not* a stage.... Theater is make believe, while the world that revolves around our practice of law is harsh reality."⁹ In other words, be theatrical. But not too theatrical. For (as the judge and bailiff repeatedly admonished during the Michael Jackson trial in 2005): "the courtroom is not a theatre."¹⁰

In each such declaration one can find not only a poetics of legal performance but also a distinctive theory of law. In "The Path of Law" (1897), Oliver Wendell Holmes writes that the lawyer's task is to "eliminat[e]... all the dramatic elements with which his client's story has clothed [the case]." For Holmes, insisting that law is not drama means that it is a cool machine that operates without moral judgment, emotion, or extraneous detail. Law is merely a neutral set of "prophesies... that if a man does or omits certain things he will be made to suffer in this or that way by judgment." The "lawyer does not mention that his client wore a white hat, ... while Mrs. Quickly would be sure to dwell upon it," since the lawyer "foresees that the public force will act in the same way whatever his client had upon his head."¹¹ (Holmes is of course wrong—and "Mrs. Quickly" right—about whether you might "suffer... by judgment" or by the violence of "public force" because of what you wear or how you look.) In 1962, defending the rule that banned television cameras from the courtroom, one-time Dean of Harvard Law School Erwin Griswold wrote: "[a] courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players, [and a] trial is not a drama." For Griswold, insisting that law is not drama means that its central function is the search for truth. "[A] courtroom is a place for ascertaining the truth in controversies among men, and has no other legitimate function" (no other?)¹² If each such declaration harbors a poetics and a theory of law, each also

⁹ Fiedler, "Acting Effectively in Court: Using Dramatic Techniques," 23 (emphasis added). See similarly Ball, *Theater Tips and Strategies for Jury Trials*.

¹⁰ "Reporter's Log: Michael Jackson Trial," BBC News, 1 June, 2005, <http://news.bbc.co.uk/2/hi/entertainment/4511991.stm> (accessed June 20, 2021).

¹¹ Holmes, *Collected Legal Papers*, 168–9 ("The Path of Law").

¹² Griswold, "Standards of the Legal Profession," 616, col. 1, col. 3. See similarly Dershowitz, "Life is Not a Dramatic Narrative": "When we import the [dramatic] narrative form of storytelling into our legal system, we confuse fiction with fact and endanger the truth-finding function of the adjudicative process" (101).

harbors a politics, a praxis, an applied ethics. In her 1963 report on the Eichmann trial, Hannah Arendt described the auditorium where the trial took place as “a theater . . . complete with orchestra and gallery, with proscenium and stage, and with side doors for the actors’ entrance”: an ideal setting for the prosecutor’s “theatrics.” But “Justice does not permit” theatrics, she proclaims: “it demands seclusion, it permits sorrow rather than anger.”¹³ For Arendt, insisting that law is not drama means that it is not to be a stage for aggrandizing the banality of evil, but instead to be a place of mourning. As Arendt knew, in legal performance, there can be a very great deal at stake.

Championing legal positivism, Bentham was writing at the moment when the great traditions of legal oratory were allegedly fading under the rules and regulations of the modern administrative state. He was writing at the moment when (according to Foucault) “the great spectacle of physical punishment disappeared,” “the theatrical representation of pain” was no longer punishment’s central technology of power, and punishment was becoming “the most hidden part of the penal process.”¹⁴ But positivism did not in fact herald the end of legal oratory: the courtroom remained for Bentham (as for many of his contemporaries) a “Judicial Theatre.”¹⁵ And punishment did not go underground. Performance forms merely changed. The nineteenth century was the age of the scandalous trial, with mass attendance fueled by mass journalism. It was an age in which—alongside an ongoing culture of spectacular public punishment—an industry of prison tourism blossomed, funding the incipient prison-industrial complex.¹⁶ Newly organized and newly visible police forces appeared alongside new cultures of surveillance. Film and television cameras made their way into the courtroom, transforming legal spectacle into recorded light and sound shows, collapsing distance. The Internet multiplied these into an infinitude of fragments, fracturing time and space. As fast as old cultures of legal spectacle faded, new ones arose.

No one living in the age of late modern mass media—when moving images have taken over the public sphere and brought the courtroom into the palms of our hands—would now say that law takes “[n]ihil ex scenâ”: “nothing from the theatre.” Streaming across our ubiquitous screens, legal performances are with us whenever we care to look—the fictional sometimes inseparable from the real. Glancing at our devices, there is no escape from crime scene or trial footage, police dashcam videos, chokeholds caught on camera mingling promiscuously with prison reality shows, COPS, Law and Order reruns, Judge X (replicated in infinite

¹³ Arendt, *Eichmann in Jerusalem* (1994 ed.), 4, 6.

¹⁴ Foucault, *Discipline and Punish* (1995 ed.), 14, 9.

¹⁵ The figure appears throughout his work, most insistently in the constitutional code Bentham published in 1827, in which he repeatedly envisions “Actors on the Judicial Theatre” as “*Performers in the Judicial Drama*.” Bentham, *Works* (1962 ed.), 9:459, col. 1–2 (and see 9:157, 466, 474, 481, 486, 491, 493, 501, 538, 540, 561–3, 569, 571, 579, 581–2, 585).

¹⁶ For a discussion of nineteenth-century prison tourism, see Miron, *Prisons, Asylums, and the Public*; and my “Penitentiary Performances.”

knockoffs). Those of us who are privileged—probably most of my readers and I myself—live law mostly not face to face but as media theatre. We may be its subjects but we also consume it: as news; as entertainment. Legal philosophers and historians still sometimes tell us that law is a set of rules, doctrines, or concepts. They still sometimes tell us that we live under the “rule of law, not men.”¹⁷ But in an era in which showmanship, Twitter, and videobytes can determine the outcome of the most momentous legal events, it seems clear that we instead live under the rule of theatre, in a twenty-first-century version of Plato’s theatrocracy but on speed.

However different our own legal cultures may look from those of premodern and early modern Europe, we remain, in various ways, heirs to the tradition I have described in these pages. The questions that recur throughout this book are among the most important we ask ourselves: about the ethics of law-as-entertainment; about the relationships among aesthetics, emotion, and legal or political action; about the courtroom representation of atrocity. We echo early legal theorists when we ask, for instance, about the appropriate limits on video evidence (prejudicial or probative?); whether judges should instruct juries to ignore a defendant’s appearance and demeanor; whether police training should include video games and if so, how; whether executions should be televised; whether prison reality shows exploit prisoners; whether programs like “Scared Straight” actually scare anyone straight. Like early theorists, we mistrust courtroom theatrics and the manipulation of emotion. And yet we recognize that law is a performance art, and the communication of emotion central to the work it does. Like them, we fear that repeated exposure to stories of atrocity dulls our sense of outrage and makes us feel helpless; we worry that the spectacle of suffering, instead of acting as protest, may instead inadvertently offer perverse pleasures, if only the pleasure of indulging one’s own sympathy. And yet we know that atrocity must be visible if there is to be redress. Like them, we fear that teaching law students performance arts offers them training in specious persuasion and outright dissembling. But we also view such arts as the necessary weapons of justice. Like them, we protest the sway of “trial by media” and fear its affiliation with a demagoguery that stirs up popular fears and leads the people to trample the laws. And yet we view the secret trial as a tool of tyranny and the public trial as essential to democracy, which, despite all, still seems better than the alternative. Like them, we know that performance matters to how we make law and how it makes us. This book constitutes not an ending to that story, but its beginning.

¹⁷ See e.g. Kahn, “Freedom, Autonomy, and the Cultural Study of Law”: since Thomas Paine’s announcement that “law is king,” there has “been an unbroken, public commitment to the idea that we live under the rule of law, not men” (noting, however, the failure of this normative proposition as a descriptive claim) (165).