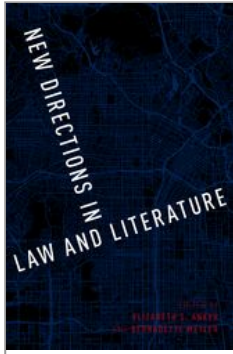


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## New Directions in Law and Literature

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## Law as Performance

Historical Interpretation, Objects, Lexicons, and Other Methodological Problems

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### Abstract and Keywords

This chapter starts from the view that legal performance matters to law: its outcomes, doctrines, and history. Here, rather than defending that view (a task undertaken elsewhere), it analyzes the methodological issues that arise from it. Distinguishing performances—expressive, embodied legal events, and practices—from both literary and legal texts (the traditional objects of law and literature), it assesses the vexed words “performance” and “performativity” as analytic tools, set against the rich historical lexicon. It then distinguishes “law in performance” and “law of performance” from “law as performance,” arguing that analysis of more familiar interpretive objects (aesthetic performances, legal texts) cannot substitute for sustained attention to legal events and practices. Finally, it briefly outlines some paradigms for understanding legal performance: legal conjuration, enactment, or mimesis; legal surrogation (metaphoric, metonymic, or indexical); and legal theatricality-antitheatricality.

*Keywords:* law, performance, theatricality, performativity, history, literature, methodology

In 1590–91, a series of witchcraft accusations swept the northern coast of Scotland. Under torture, the accused confessed to: disinterring corpses and making powders of the bodies, attempting to bewitch the king by roasting a wax image of him, baptizing a cat in order to raise a storm to prevent the king's new bride from reaching Scotland, and other "conjuring, witchcraft, enchantment, sorcery, and such like" (in the words of *News from Scotland*, a pamphlet published at the height of the trials).<sup>1</sup>

Agnes Sampson, a healer, diviner, and midwife, confessed to collecting the venom from a black toad in an oyster shell in order to do *maleficium* on the king by means of a piece of his foul linen. John Fian, a schoolmaster and town lothario, confessed to putting a hex on a love rival that caused him to "f[a]ll into a lunacy" (318) (after, rumor had it, a failed attempt to bribe a pupil to steal "three hairs of his sister's privities" [319] so that Fian could possess her by witchcraft). Most of the accused confessed to attending a massive witches' sabbat on All Hallows Eve at North Berwick Kirk, the church to which they traveled over the North Sea in a sieve and where, accompanied by a young maidservant named Geillis Duncan on a "trump" (or Jew's harp), led by Fian (in disguise), they "took hands" and "danced [a] reel," back-to-back and "widdershins" (counterclockwise) with hundreds of (p.194) other witches, at the end enacting a mock sacrament that concluded with a dramatic performance of the *osculum infame* ("shameful kiss"): as Agnes Sampson's confession put it, the devil got up on the pulpit, "lifted up his gown[,] and every one kissed his arse" (138).



Figure 11.1 Witches in the examination chamber in *Newes from Scotland* (1591).

The twenty-four-year-old king (James VI, soon to be James I of England)—personally implicated, perhaps alarmed, but still more titillated by the wondrous stories—took the unusual step of calling the accused to Holyroodhouse (the royal residence in Edinburgh) in order to conduct pretrial examinations in his own chamber (a woodcut in *News from Scotland* [Figure 11.1]<sup>2</sup> appears to show James presiding from his dais, the accused on their knees before him). Not satisfied with merely interrogating the witches, however, James commanded them to reenact the witchcraft of which they were accused in order to prove the “verity” of their confessions (318), as *News from Scotland* puts it. Geillis Duncan (the first to be brought to the king’s chamber) attempted to recreate the North Berwick sabbat, dancing the witches’ dance and playing on a Jew’s harp for the king (315). Agnes Sampson, the next, offered a clairvoyance demonstration, **(p. 195)** announcing to the assembly that she knew what the king and queen had said in their bedchamber on their wedding night, drawing close to him and whispering in his ear, causing him to cry out: “[A]ll the devils in hell could not have discovered the same[!]” (316). Following Sampson, John Fian brought his love rival (the man he had bewitched) before the king in order to display the “lunacy” that Fian’s witchcraft had wrought:

[B]eing in his Majesty’s chamber, suddenly he gave a great screech and fell into a madness, sometime bending himself, and sometime capering so directly up that his head did touch the ceiling of the chamber, to the great admiration of his Majesty and others then present; so that all the gentlemen in the chamber were not able to hold him, until they called in more help, who together bound him hand and foot, and suffering the said gentleman to lie still until his fury were past, he within an hour came again to himself. (318–19)

These scenes give rise to many questions. For instance, the accused had confessed to roasting the king's image and trying to drown him at sea: Why risk exposing him to envoys of the devil who had confessed to seeking his destruction? *News from Scotland* in fact worries about just this: some (it speculates) might "conjecture that the king's Majesty would not hazard himself in the presence of such notorious witches lest thereby might have ensued great danger to his person and the general state of the land" (324). Leaving aside the hazard, why demand the repetition of the crime of witchcraft, a crime no less criminal when performed for the king? And why, when the king saw these fiendish scenes, did he not experience horror or terror, but instead (we are told) "wondered greatly" (316) and, "in respect of the strangeness of these matters[,] took great delight to be present at their examinations" (315)? How might we understand the Jew's harp, the song the witches allegedly sang ("Cammer go ye before, commer go ye ..."), widdershins, and back-to-back dancing, Sampson's whispered aside to the king, the binding of Fian's love rival, and all the visceral details of these scenes? What were the legal effects of these demonstrations, and what did they mean for the law of witchcraft, treason, evidence, jurisdiction?

Before we can even begin to address substantive questions of this kind, however, we must face a series of methodological questions. What is the implied object of understanding here? (The events themselves? The representations of the events? How they reflect or shape social or legal classifications?) What can we know of that object from available historical sources? (How credible are the sources? If they serve as evidence, of what?) What kind of "meaning" do they bear? (Legal? Ideological? Rhetorical? Phenomenological? Aesthetic? Symbolic? Cognitive? ...)

**(p.196)** My description of the scenes in James's chamber is a fragment of a larger study investigating the role of performance in the historical production and reception of law. In the larger study, I offer close readings of a series of historical legal events and practices—trials, public punishments, police actions, and more—whose meaning was articulated not primarily through texts, doctrine, or rules but through what we have come to call "performance." At the same time, understanding these performances is inseparable from understanding the doctrines and institutional structures from which they emerged, and the historical attitudes that both shaped them and registered their meaning. Central to these attitudes was the figure of theatre. On the one hand, in the classic trope, law was supposed to act as a kind of theatre (a "Theatre of Justice and Truth," in the often-quoted phrase of the seventeenth-century lawyer Giovanni Battista de Luca).<sup>3</sup> On the other hand, law was *not* supposed to act like theatre (we must, at all costs, prevent the courtroom from becoming a "theater and spectaculum," "circus," or "carnival").<sup>4</sup> If, unlike theatre, law was nasty, brutish, and long (and, oh yes, really boring), that's what it was supposed to be.

My claim (here and elsewhere) is not that all legal events and practices are theatrical, or even that they are performances or performative (critical truisms that I will address further below). But I hope to show how performance and theatricality (both as effect and idea) matter to law—to legal institutions, practices, and doctrines, to specific outcomes, to the broader meaning of law, to our understanding of how law achieves its effects, how it persuades people of the legitimacy of its use of force, and how it exerts (or fails to exert) power over us. My readings of events, practices, and historical views about legal performance are meant to suggest an alternative way of studying law: more attentive to the material, affective, and aesthetic textures of legal process, both complement and corrective to the doctrinal, institutional or intellectual history of law. While my initial description of the Scottish witch trials hints at the kind of reading I do in the larger project, this chapter does not offer an extended demonstration of that kind of reading. Instead, it attempts to explain the methodological choices, interpretive dilemmas, and implicit theoretical claims that undergird my work and that distinguish it from the study of law and literature, legal history, and previous studies of law and performance.

### 1. Law in Literature and Law as Literature versus Law as Expressive Event and Practice

Some years ago, I wrote a semisatirical essay about law and literature as a subdiscipline, an affectionate critique of the field's primal longings, which (p. 197) were, of course, my own.<sup>5</sup> Chastened but not fully reformed by my own critique, the project I outline here continues to embrace the aspirations of law and literature (though perhaps its more modest ones). It shares one of law and literature's central motivations: the desire to offer a corrective to traditional legal scholarship's historical focus on doctrines or institutions alone, as if these were hermetically sealed off from the broader culture. Like other work in law and literature, it strives to offer "thicker descriptions" of law (to use Clifford Geertz's overused term)<sup>6</sup>—to escape the realm of concepts or rules and get further inside the experience and visceral effects of law. Like other work in law and literature (and unlike most legal history), it is attentive to law's aesthetic, symbolic, rhetorical, narrative, semiotic, phenomenological, and cognitive dimensions: the power of narrative and genre to shape legal events; the force and meaning of rhetoric, form, style, and structure; the work that symbolic substitution or figural slippage does; and more. Like other work in law and literature, it resists traditional views of law as a thing produced only within institutionally defined boundaries and forms (legislation, judicial decisions, institutional practices), recognizing the force of culture and representation to shape not only the legal subject but law itself.

However, my objects are neither of law and literature's traditional objects, as identified in the classic distinction: literary texts (the object of "law in literature") and judicial opinions (the object of "law as literature").<sup>7</sup> Instead, my objects are historical events and practices. That is, unlike law *in* literature (and such offshoots as law in film or law in art), I avoid extended analysis of what I will call "aesthetic" representations—literary texts, theatrical productions, films, or images—however relevant such representations may be, however expressive of the ethos from which they emerge.<sup>8</sup> For instance, in discussing the Scottish witch trials, it is tempting to discuss *Macbeth* (a play that explicitly draws on James's encounter with the North Berwick witches) or James's *Daemonologie* (1597), a highly literary expository text in which the witch trials play a major role. I resist this temptation not because I am skeptical about the capacity of literary texts (or other aesthetic representations) to tell us important things about legal history, but because I am wary of two scholarly tendencies: first, the tendency to use literary texts as straightforward evidence for a set of otherwise ungrounded legal or historical or political claims; second, the tendency to allow literary analysis to sideline the legal history that may have been the project's initial justification. As the literary (so rich in detail, so temptingly *interpretable*) grows larger, legal history (harder to access, more resistant to interpretation) grows proportionally smaller. The literary text initially holds itself out as the entry point to the legal ideas or events that **(p.198)** are the chapter's main subject. But a kind of bait-and-switch occurs: legal ideas or events, briefly sketched, quickly give way to extended literary analysis, which becomes the sole foundation for historical claims. Analysis of historical events or practices disappears from view.

My object of study, then, is not law *in* literature, nor is it law *as* literature, which traditionally studies not legal events and practices but legal texts. What classically distinguished scholars of law as literature from legal historians was not merely their use of the tools of literary analysis, but their close attention to legal texts as critical objects in themselves, not as mere evidence of events, practices, or doctrines. Various subfields within both historical and literary studies (new historicism, *histoire des mentalités*, cultural studies) have, of course, long challenged the distinction between text as evidence and text as critical object, with some justification. As theorists in these fields have argued, it is predominantly through representations (largely verbal texts, but also images and recordings) that we know history.<sup>9</sup> Even the most purportedly documentary of sources is refracted through memory, judgment, and imagination. The Scottish witch trials' ostensibly verbatim depositions, for instance, probably represent not what the accused actually said but what those who took down the depositions *thought* they should have said. Moreover, even the most self-consciously aesthetic, or rhetorically readerly, of texts can provide evidence of historical events, practices, and meanings. If *Macbeth*, *Daemonologie*, or a judicial opinion offers us a representational world with its own logic, that logic is evidence of the meaning of the historical events it represents, however transformed through the process of narrative representation.

These views are in fact fundamental to my own work. And yet, the logic I seek in texts is the logic of historical events themselves, not the logic of authorial or textual consciousness (although these may overlap). For instance, *News from Scotland* is a paradigmatic new historicist law-and-literature text: flamboyantly expressive (rhetorically and visually), about as unreliable a witness to history as one can find, and thus revealingly symptomatic. Leaving aside its assertions about the witches' ability to conjure a raging storm in the North Sea, bounce a love rival off the ceiling, or kiss the devil's "arse," it is a piece of patent propaganda, inflated with lurid rumors about the accused (based largely on European witch lore, with a *souçon* of Apuleius's *Golden Ass*), rumors that, of course, tell us more about belief than about actual events.<sup>10</sup> If we look instead to the images as historical evidence, we learn that the woodcut purportedly showing James presiding from his dais—the only one that seems to represent the legal scene itself—is actually a stock woodcut, repurposed for the pamphlet: it tells us nothing about James's actual chamber or what the accused did there.

**(p.199)** Like other law-and-literature scholars, I might argue that, while the image does not represent James or the accused themselves, the printer's decision to include it does represent a set of attitudes, attitudes that may also have been at work in the trials and about which we can speculate. Perhaps, for instance, its inclusion offers a celebration of the subjection of the witches to royal legal power, or (on the other hand) a critique of royal legal violence. Perhaps it reminds readers that the trials were not merely enactments of legal judgment but demonstrative (a reminder emblemized in the royal minister's very indexical index finger). Like other scholars of law and literature, I might point to the pamphlet's stress on the king's "admiration," "wonder," and "delight," emotions replicated in the images, arguing that they reflect an affective logic that may also have been at work in the examinations themselves. Like other scholars of law and literature, I might dwell on the text and its images as a rich repository of the history of consciousness, history accessible only through interpretation.

That said, there is a difference between law and literature's reading of historical texts and images and my reading of historical events and practices *through* texts and images: a difference, perhaps, more of degree than of kind, or of foreground versus background, but a difference nonetheless. Looking at *News from Scotland* alongside the examinations, confessions, depositions, "dittays" (indictments), and other available historical evidence, unlike most law-and-literature scholars I try to bracket *News from Scotland's* textual effects and the singularity of its imaginative world in order to focus on what it (in conjunction with other evidence) tells us of the trials themselves and *their* imaginative world. Trained in literary analysis, I often find myself tempted by texts. But I try to resist the text's seductions—to resist allowing it to sideline the harder-to-access historical events and practices it represents. I try to foreground not the representation of events and practices, but events and practices as, themselves, representations.



Legal historians, of course, similarly focus not on texts themselves but on historical events and practices. Earlier, I pointed out that my attention to the aesthetic, symbolic, or rhetorical features of legal events and practices differentiates my work from that of most legal historians. But there is a second important difference: I focus on events and practices that are expressive or demonstrative, events and practices that do not merely do law, but *show* the doing of law. The events and practices I examine are articulated and communicated in embodied ways in space and time: three-dimensional, extratextual, produced collectively in the moment. Investigating such events and practices necessarily includes an inquiry into backgrounds: how people and things got where they are; why they are as they are. But my **(p.200)** primary focus is on the present of event and practice: moments that we might understand as “scenes” (and that are often understood as such by contemporaries). I am interested in the relationships and movements of people in space, their gestures and vocal effects (what the Greeks called *hypokrisis* and the Romans called *actio*), their projection of ethos and emotion through tone, duration, and tempo, the objects, architecture, sounds, and images that are in play in a given moment, the scene’s production of embodied phenomenal, sensory, kinaesthetic, semiotic, psychic, affective, ritualistic, or other kinds of meaning. In short, I am interested in what has come to be called “performance.”

#### “Performance”

The word “performance” has been naturalized in a number of fields and subfields in the humanities and social sciences over the past few decades: cultural studies, literary studies, anthropology, microhistory, visual studies, theatre studies, and, not least, performance studies, with which (of course) my project can most readily be identified. However, the word presents certain problems. First, there is the notorious difficulty of defining it. Early theorists of performance studies, while acknowledging that any action might be a performance of sorts, strove to distinguish performance from other social phenomena, in the hope that the distinctiveness of the field’s objects would establish the distinctiveness of the field itself.<sup>11</sup> For Richard Schechner, performance was (famously) “restored” or “twice behaved” behavior. At the same time, for Peggy Phelan, performance was what could not “be saved, recorded, documented, or otherwise participate in the circulation of representations *of* representations: once it does so it becomes something other than performance.”<sup>12</sup> Meanwhile, poststructuralist discussions of “performativity” taught that performance could *not* be set apart as distinctive. As Jacques Derrida and Judith Butler (via Erving Goffman) taught, everyday life, utterances, identities, even subjectivities were produced through performance, or “performativity.”<sup>13</sup>

These definitional difficulties have been compounded by the word's mutable history. The most common meaning of the word "performance" in English was—and in fact remains—"the accomplishment [or] doing of an action," or "[t]he quality of execution of such an action ... when measured against a standard," as in the performance of a duty, promise, or cure.<sup>14</sup> Through the early modern period, title pages and advertisements for theatre, opera, or dance usually referred to these kinds of performances as "representations." If they used the word "performance" (as they did **(p.201)** occasionally), the word did not identify the representation as belonging to a special class of arts, but merely signified that it was an "accomplishment" (an *ouvrage*, or work, as Abel Boyer's 1767 English-French dictionary translated the word).<sup>15</sup> Its meaning was the same as that in such phrases as a "philosophical performance" or a "performance of penmanship," or, for that matter, "the regular Performance ... of the animal *Secretions*, and *Excretions*" so necessary to health.<sup>16</sup>

Only in the later eighteenth century did usage of the word "performance" begin to split, retaining its primary meaning but also taking on a specific association with public exhibition before spectators. Samuel Johnson's *Dictionary of the English Language* (1755) was the first to note this special secondary presentational and aesthetic connotation: the word "performer," Johnson explains, is "generally applied to one that makes a publick exhibition of his skill."<sup>17</sup> However, it was not until the 1828 edition of Noah Webster's American dictionary that we find a definition of "performance" registering this special secondary connotation, a connotation that does not appear in British dictionaries until the mid-nineteenth century.<sup>18</sup> In nineteenth-century aesthetics, theatre, opera, and dance were not treated as "performing arts" but still generally clustered under the word "representation."<sup>19</sup> In fact, the classification "performing arts" did not appear until well into the twentieth century.<sup>20</sup> In short, the aesthetic and presentational usage—in which "performance" connotes public exhibition and spectatorship—was a gradual formation, fully established only in the twentieth century.

One of the central innovations of performance studies has been to fuse the early (and still dominant) usage with the more recent aesthetic usage. On the one hand, performance studies is not theatre studies because it engages with a wide array of events, practices, and forms of expression, including nonaesthetic ones (such as political protests, football matches, zookeeping, or “the presentation of self in everyday life”). In fact, the “performances” performance studies analyzes (for instance, secret rituals, surgery, psychotherapy, masturbation, ...) do not necessarily have spectators per se. On the other hand, in performance studies (as Schechner explains in his classic textbook), performance is not merely the *doing* of an action, as in early modern and much modern usage, but the *showing* of doing.<sup>21</sup> That is, if performance studies often focuses on nonaesthetic, nonpresentational being and doing, what it *highlights* in these is the aesthetic and presentational (associated with the modern secondary meaning of the word “performance”), frequently leaning heavily on the modern theatrical associations of the word.

**(p.202)** In the early years of performance studies, “theatricality” was often vilified as the bourgeois twin of “performance”: where performance was presentation, theatricality was representation; where performance was real, theatricality was false; where performance was raw, theatricality was overcooked.<sup>22</sup> But Judith Butler’s discussion of the theatricality of drag performance helped redeem “theatricality,” which, it turned out, had been the subversive twin of “performance” all along. For Butler, theatricality could be “a resignifying practice [that] contest[ed] the terms of [a norm’s] legitimacy,” allowing for “subversion,” a “*working [of] the weakness in the norm.*” The drag performer (for instance) could use theatricality to “*mim[e] ... discursive convention[s]*” and “*rende[r] [them] hyperbolic,*” thereby “*revers[ing]*” them. Theatricality thus became a practice not of compulsory repetition (as in the performance of normative gender) but of *citation*, a kind of citation of norms that rendered them visible and could thus “resignif[y]” them.<sup>23</sup>

Nevertheless, the word “performance” (or “performativity”), used as a form of ontological critique challenging the naturalness or inevitability of norms or analytic categories, has continued to play a key interpretive role, not only in performance studies but in the humanities and social sciences more generally. Over the past few decades, it has become axiomatic that all categories, and especially those things once thought natural, are really “performative”—that unveiling hidden “performativity” (especially of identities: racial, ethnic, gendered, sexual, ...) can help us subvert coercive normativity and make visible a history of performative resistance. This usage is broad (in fact, universal) in its application: everything is performance, or performative. But it is narrow in its singular, politically charged critique: if we reveal the hidden performativity of the allegedly natural, we might free ourselves from its stranglehold.

The definitional quandaries surrounding the word “performance” have not disappeared. Is performance a distinctive kind of thing? Or is everything performance? Is it, by definition, twice-behaved? Or is it unrepeatable? And yet performance studies seems to have embraced its own ambiguities. The brochure for Performance Studies at NYU (where the field originated) describes it (and, implicitly, its objects) as a “provisional coalescence on the move,” made up of “more than the sum of its inclusions.”<sup>24</sup> In this, of course, performance is no different from the objects of any other field (literature, religion, art, philosophy, math, ...), all of which remain manifestly undefined, in richly generative ways.

Thus disavowing the necessity of definition (in solidarity with my fellow scholars across the arts and sciences, who, mostly, do not feel required to define their objects), I do nevertheless tend to use the word **(p.203)** “performance” in particular ways. Stressing the aesthetic and presentational over the ontological, I tend to use the word not as a tool for unveiling the pretense of naturalness but as a qualifier for identifying particular expressive or demonstrative effects. Rather than setting “performance” and “theatricality” in opposition (political or otherwise), I treat them as part of a continuum, using “theatricality” to describe more overt or conspicuous forms of “performance.” I do look at legal ritual and *habitus* (to use Pierre Bourdieu’s term)<sup>25</sup>—practices that often seem normal and are thus invisible to contemporaries—attempting to make their strangeness comprehensible or their familiarity strange. But I mostly focus on legal events and practices that are distinctively, often intentionally, sometimes embarrassingly theatrical. Poststructuralist theory is needed to expose invisible performativity, but once exposed, its lesson is simple: you thought it was real, but it’s performative. Nothing is needed to expose overt theatricality: it is always already exposing itself. But, however raw its visibility, its meaning is a labyrinth of ambiguities: enigmatic, contradictory, equivocal, without determinate politics, often not reducible to a political proposition at all. In its peculiarities, its eccentricities, its sometimes outlandish caprices, conspicuous theatricality usually surprises us: we often don’t know what to do with it, and thus it does things with us.

I cannot do without the words “performance” and “theatricality” as transhistorical shorthand for identifying the expressive legal events and practices that are the objects of my study. But neither word is perfectly satisfying: the modern presentational and aesthetic sense in which I use the word “performance” suffers from anachronism; the word “theatricality,” with its historically negative associations, suffers from too much attitude. Thus, while I do use them as shorthand, they do little analytic work for me. The words that serve as my primary analytic tools arise instead from the historical lexicon. When a sixteenth-century Scottish polemicist describes the accused as “dancing,” “playing,” or “capering,” or a seventeenth-century French judge calls a trial a *comédie*, or an eighteenth-century English prisoner describes the road to Tyburn as a “sad pageant,” when observers describe legal events as “representations,” “shows,” “entertainments,” or “dramas,” “staged” or “acted” in “scenes” for “spectators,” these words—often associated transhistorically with theatre and entertainment, but historically and geographically inflected in particular ways—are my primary keys to the events and practices they describe. Each of these words has a distinctive history and a distinctive valence, with its own temporal, spatial, ethical, and aesthetic associations. But together they form a lexical constellation, more useful than “performance” or “theatricality” for **(p.204)** understanding legal events and practices, and the concepts, attitudes, and judgments inseparable from them.

Law in Performance and Law of Performance versus Law as Performance  
The only general book on law and performance is Alan Read’s short guide, *Theatre and Law*,<sup>26</sup> but there is a small but growing body of scholarship that might be called law and performance studies. Largely under the influence of critical race and queer theory, many such studies address questions of identity formation; for instance, Joseph Roach’s influential exploration of the creation of circumatlantic racial identities through both law and performance, or Joshua Takano Chambers-Letson’s study of law, performance, and Asian American identity.<sup>27</sup> Some focus on legal processes (for instance, Catherine Cole’s analysis of South Africa’s Truth Commission), symbolic legal action (for instance, Robin Chapman Stacey’s study of legal performance in early Ireland), or protest as legal counterperformance (for instance, Lucy Finchett-Maddock’s study of illegal occupation as performance).<sup>28</sup> Traditional literary topics, such as the representation of law in drama, and traditional legal topics, such as the regulation of theatre and performance, have come to include work on the dynamic between legal and theatrical performance.

If we can no longer neatly divide law and literature into “law in literature” and “law as literature,” neither can we neatly divide law and performance into object-defined categories: studies of law and performance tend to move freely among legal texts, their instantiation in legal performance, and representations of these in theatre, media, and popular culture. Nevertheless, attending to differences among kinds of objects in these studies can highlight crucial methodological differences. These objects might be separated into three broad categories: law *in* performance (theatrical, quasi-theatrical, or quotidian performances that represent or enact law and its effects); law *of* performance (legal texts and rules that construct or regulate performance and its effects); and law *as* performance (expressive legal events and practices themselves).

Like law *in* literature, law *in* performance might be defined by its concern with the representation or enactment of law in extralegal spheres (in, for instance, theatre, the streets, or everyday life). Such representations or enactments may be agents of law, creating legal subjects of their actors and spectators. But, like literature, they represent law outside its official institutional structures. Like law *as* literature (and the studies of **(p.205)** the legal regulation of literature that have sometimes been called law *of* literature),<sup>29</sup> law *of* performance might be defined by its concern with legal texts. Looking at (for instance) judicial decisions and statutes dealing with theatre, obscenity, public speech, or religious attire, it focuses on their *textual* effects, their rhetorical postures, and the ideologies reflected in their language.<sup>30</sup> That is, the study of law *in* performance focuses on performative representations of law. The study of law *of* performance focuses on legal representations of performance. But neither examines legal events and practices as, themselves, representations, taking place in courtrooms, examination chambers, places of judicial torture, execution sites, police precincts, prisons. This kind of analysis, law *as* performance, is what I am attempting in my larger project.

Such distinctions, of course, rely on a set of artificial boundaries that depend on spatial and medium metaphors (inside/outside, text/performance),—metaphors that are, like the aesthetic/nonaesthetic distinction, subject to many qualifications. It is the virtue of most studies of law and performance to ignore such artificial boundaries, showing law to be created precisely through its refraction among various kinds of objects. Nevertheless, however artificial such distinctions may be, they do allow us to see how rare it is, in fact, to find sustained analysis of the visceral, kinaesthetic experience of legal events and practices: analysis of courtroom performances quickly disappear into readings of judicial opinions; analysis of police actions quickly disappear into readings of the performance pieces that represent them. Those who have worked on such material understand why: legal records do not tend to tell us about the viscera of event or practice; evidence is often maddeningly sparse and impenetrable; even when it can be found, its veracity is always suspect. But attention to such effects is uniquely valuable. If analysis of legal performance per se is routinely diverted into analysis of extralegal performance or the legal text, we cannot come to understand the specific narrative, structural, and kinaesthetic dynamics of law *as* performance. We cannot fully come to understand how legal events and practices work.

#### Some Law-as-Performance Paradigms

While each event or practice has its own historical particularities, a few transhistorical paradigms have come to shape my understanding of legal performance (paradigms that are not exclusive to law but particularly marked there). First, legal performances often attempt to reenact past events, whether literally (for instance, in trials) or symbolically (for **(p.206)** instance, in torture or punishments). They are acts of conjuration: concretizing these events, relocating them in immediate time and space, transforming them into visually, spatially, kinaesthetically legible happenings, subject to the intervention of spectators. Attempting to root out outlawry, legal actors must also conjure it, and in so doing, they reproduce it, representing it in myriad forms. Scholars of law and literature often evoke narrative theory's classic dyads to describe the relationship between the background events leading up to a trial and the trial itself: the background events are the "story" (or *fabula* or *histoire*); the trial is the "plot" (or *sujet* or *récit*) that, effectively, narrates those events. But a dyadic analysis does not register the work that performance does. To understand this, we would arguably need to add a third term to narrative theory's classic dyad: "enactment," or "mimesis" in Aristotle's sense (that is, showing as opposed to telling). Legal examinations, or trials, or torture not only tell people what happened but *show* what happened. If legal narration elaborates, reorders, and resymbolizes the events it represents, so legal performance elaborates, reorders, and resymbolizes both background events and legal narratives.

Second (a point related to the first), in legal events, people regularly stand in for or represent others: lawyers stand in for plaintiffs or defendants; executioners stand in for the people or the princely power. What Joseph Roach has said of theatre and celebrity culture, one might also say of legal performance: it “generates a parade of substitutes, surrogates, stand-ins, body doubles, and knock-offs.”<sup>31</sup> That is, legal performances are not only acts of conjuration but also acts of surrogation and symbolic substitution. Law seeks truth, but the mimetic substitutions that occur in legal events give that truth a multilayered fictionality. Law is supposed to be the institution in which language becomes reality through linguistic performatives, and decisions have the most real of bodily consequences. But, like theatre, it often works through representation or the staging of things that may be an illusion: figuring something absent (like metaphor or conjuration) or pointing to an elsewhere (like metonymy or the indexical). In this, law shares theatre’s condition of simultaneous corporeality and illusoriness: it is real and happening here (in the bodies brought before those who watch), but it is also somehow always (to borrow from Schechner) in the subjunctive mood, the “as if.”<sup>32</sup>

Third (and perhaps most important for my work), theatricality is not just a thing law does, but a thing toward which, in doing it, law expresses an attitude. That is, legal performances sometimes embrace their own theatricality, sometimes disavow it, or sometimes do both, acting out their ambivalence. Exploiting its performance medium, law may sometimes aspire to the power of theatre: its pomp and ceremony, its masquerades, its spectacular **(p.207)** effects, its manipulation of the passions, its electric connection to the crowd of spectators. At other times, it may revile, rebuke, or disavow its own latent theatricality: enact its opposition to legal histrionics, or perform its own invisibility (visibly concealing its occult secrets in behind-the-scenes chambers). Law sometimes enhances its power by exploiting theatrical means. But it also sometimes enhances its power—its legitimacy (its law-ness)—by repudiating those means: to refuse to allow law to become a “circus,” “carnival,” “theater and spectaculum” is to proclaim one’s superlegality. Overt theatricality appears in law as an embarrassing bit of supplementarity (law is, after all, supposed to be purely instrumental). And yet, that theatrical supplement sometimes turns out to be precisely the thing that is most instrumental to an outcome. Law oscillates between theatricality and antitheatricality, visibility and invisibility, make-believe and reality—an oscillation that is not an exception in law’s history, but a chronic refrain, deep in the structure of its institutions, practices, doctrines, and, above all, the events and practices through which it unfolds.



Answers to the questions I raised at the beginning of this chapter about the Scottish witch trials will have to await an essay dedicated not to methodology but to the specific meaning of those events. Letting that essay-to-come serve as the conclusion to this one, I will merely say here that, in those trials—as in so many legal events—expressive, communicative, three-dimensional, sensory, kinaesthetic, embodied articulation mattered, not only to specific outcomes, but to issues in the broader history of law. Looking at legal performance there, as elsewhere, suggests one new direction for law and literature—a way of taking what law and literature has taught us about the importance of representation, the aesthetic, and culture and using it to look into the heart of legal events—in the process transforming our understanding of law.

#### Notes

(1.) *News from Scotland* (originally 1591), in Lawrence Normand and Gareth Roberts, eds. *Witchcraft in Early Modern Scotland: James VI's Demonology and the North Berwick Witches* (Exeter: University of Exeter Press, 2000), 321

(2.) *Newes from Scotland* (London: William Wright, 1591?)

(3.) Giovanni Battista De Luca, *Theatrum veritatis, et iustitiae*, 21 vols. (Rome: Corbelletti, 1669–81)

(4.) *Estes v. Texas*, 381 U.S. 532, 571, 605 (1965); and *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

(5.) Julie Stone Peters, “Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion,” *PMLA* 120 (2005): 442–53

(6.) Clifford Geertz, “Thick Description: Toward an Interpretive Theory of Culture,” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973), 3–30

(7.) The classic distinction has arguably been superseded, since most law and literature studies treat both literary and legal texts, but it is nonetheless useful for distinguishing the field's objects.

(8.) Bypassing a more extended philosophical discussion, my use of the word “aesthetic” in this chapter is shorthand for the kind of representations generally treated as either art or entertainment: literature, theatre, visual art, theme parks, and so on. This shorthand is intended to distinguish between these and legal texts or historical events and practices, which also, of course, have aesthetic and representational properties but are not institutionally framed as art or entertainment.

(9.) Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas* (Durham, NC: Duke University Press, 2007), 20

(10.) The tale recounted in *News* (319–20)—in which John Fian bewitches the hair of a “young virgin heifer” (thinking it is his beloved’s pubic hair), and she proceeds to pursue him into his church, amorously mooing—appears nowhere in the legal documents. See the similar tale in *The Golden Ass* (Bks. 2.32 and 3.15–18), and the editors’ discussion in Normand and Roberts, *Witchcraft in Early Modern Scotland*, 299, 308.

(11.) Richard Schechner, “Restoration of Behavior,” in *Between Theater and Anthropology* (Philadelphia: University of Pennsylvania Press, 1985), 35

(12.) Peggy Phelan, *Unmarked: The Politics of Performance* (New York: Routledge, 1993), 146

(13.) See especially Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, NY: Doubleday, 1959); Jacques Derrida, “Signature Event Context,” *Glyph 1* (1977): 172–97; and Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

(14.) “performance, n.,” *OED Online*, September 2016. Oxford University Press, <http://www.oed.com/view/Entry/140783?redirectedFrom=performance#eid>

(15.) Abel Boyer, *The Royal Dictionary Abridged* (London: Bathurst, et al., 1767)

(16.) Theophilus Lobb, *Rational Methods of Curing Fevers ... Together with a Particular Account of the Effects of Artificial Evacuations by Bleeding, Vomiting, etc.* (London: John Oswald, 1734), 66 *OED*

(17.) Samuel Johnson, *A Dictionary of the English Language*, vol. 2 (London: J. and P. Knapton, et al, 1755)

(18.) Noah Webster, *An American Dictionary of the English Language*, vol. 2 (New York: S. Converse, 1828) (no pagination). After Webster’s, I have found no dictionary giving “performance” this special meaning before Charles Fleming’s *Royal Dictionary English and French and French and English*, 2 vols. (Paris: Firmin Didot frères, 1846–60), 1:845.

(19.) In German, for instance, *die darstellenden Künste*.

(20.) *OED Characteristics* “Hungarian Radio Co. v. Gramophone Co., Ltd., London,” *American Journal of International Law* 29 (1935), 699 *OED*

(21.) “ ‘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.” Schechner, *Performance Studies*, 28, 2.

(22.) “*Performance, or the Subversion of Theatricality*,” *Modern Drama* 25 (1982), 154–81

(23.) Judith Butler, *Bodies that Matter: On the Discursive Limits of Sex* (New York: Routledge, 2011), 177

(24.) NYU Tisch School of the Arts, *Institute of Performing Arts Performance Studies B.A. M.A. Ph.D. Programs*, 3, <http://www.flipsnack.com/NYUPerformanceStudies/department-of-performance-studies-brochure.html>

(25.) Pierre Bourdieu, *The Logic of Practice*, trans. Richard Nice (Stanford, CA: Stanford University Press, 1990), 52–65

(26.) Alan Read, *Theatre and Law* (London: Palgrave, 2015)

(27.) Joseph Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York: Columbia University Press, 1996); Joshua Takano Chambers-Letson, *A Race So Different: Performance and Law in Asian America* (New York: New York University Press, 2013).

(28.) Catherine M. Cole, *Performing South Africa’s Truth Commission: Stages of Transition* (Bloomington: Indiana University Press, 2010); Robin Chapman Stacey, *Dark Speech: The Performance of Law in Early Ireland* (Philadelphia: University of Pennsylvania Press, 2007); Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (New York: Routledge, 2016).

(29.) Kenji Yoshino, “The City and the Poet,” *Yale Law Journal* 114 (June 2005): 1838

(30.) Such studies do sometimes look at the performances that the relevant legal texts discuss, but these are generally extralegal (splitting off into law *in* performance analysis within law *of* performance analysis).

(31.) Joseph Roach, “Celebrity Erotics: Pepys, Performance, and Painted Ladies,” *Yale Journal of Criticism* 16 (2003), 216

(32.) Schechner, “Restoration of Behavior,” 37.

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(25.) Pierre Bourdieu, *The Logic of Practice*, trans. Richard Nice (Stanford, CA: Stanford University Press, 1990), 52-65

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