

Legal Performance Good and Bad

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“Performance” and “performativity” have become central terms in the discussion of legal identity over the past decade or two, and “performance” and “theatricality” figure in a number of theoretical writings on law. This essay reviews these discussions, looking at the ways in which they construe legal performance and assessing what they have to say about its nature, meaning, and consequences for the law. Diagnosing a split in the critical literature between a vision of legal theatricality endemically complicit with the law’s authoritarian control of the subject and a vision of it as an agent of liberation from authoritarian subjugation, I identify this split with a longer history of ambivalence about the theatricality of the law. On the one hand, this essay is simply a map of what has been said in the past few decades about legal performance. On the other, it serves as a critical introduction to a longer-term study of the role of legal performance (as both instrument and concept) in the historical production and reception of the law.

I. Beginnings

In *Exodus*, when God decides to introduce the wandering Jews to the Ten Commandments, he does so with a spectacular sound and light show, one that Cecil B. DeMille’s *Ten Commandments* could hardly outdo. Thunder and lightning appear in the skies, and suddenly the voice of a trumpet “exceeding loud” can be heard. Trembling, the people are led by Moses to the foot of Mount Sinai, where, looking up at what might be mistaken for a raised stage, they see a vast smoky cloud. Suddenly, flames burst forth and the mountain begins to quake. Enter: God from the “heavens” in the form of fire (the original *deus ex machina*). The trumpet gives one long blast, getting louder and louder. And a dialogue between God and Moses begins, as God descends onto the mountain and Moses climbs up it. Just in case you don’t know who the actors are, God announces himself: “I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage.” And then he lays down the law.¹

Law, here, is founded through a performance (a sort of Wagnerian *Gesamtkunstwerk*) that achieves several things. First, in its terrifying display of thunder, lightning, and a mountain-quake, it offers a replay of violence, mastered or managed as rational authority. Lest the Jews forget that violence, God reminds them, linking the ocular evidence of devastating violence to

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1. *Exodus* Ch 19:16–25, 20:2.

the ocular spectacle in which God frames his giving of the law: “Ye have *seen* what I did unto the Egyptians.” Thus, the original *coup de force* is here turned into a *coup de théâtre*. This replay of violence, mastered through performance, underwrites God’s justification for authority. As in so many theatrical replays of violence (one thinks of the mock battles performed in Renaissance courts, for instance), re-performing violence both inscribes a debt and proffers a threat: the subjects are reminded that they owe their ruler allegiance for his (normatively masculine) use of force; the ruler implicitly threatens, “I didn’t hurt you this time, but behave or else!” This replay of violence as performance is constitutive, founding both a legal order and a nation: “if ye will *obey my voice* indeed, and *keep my covenant*, then . . . ye shall be unto me a . . . *holy nation*.”²

Second, performance makes authority visual, palpable, bodily (accessible to the senses). In this sense, it obviates the rational justifications for authority it offers: the whole point of a thunder and lightning show (and of beauty in general) is that it convinces through non-rational means, and transcends the demand for rational justification. At the same time, paradoxically, performance offers a screen for authority, concealing it behind awe-inspiring aesthetic display. For God makes his Wagnerian *Gesamtkunstwerk* simultaneously magnificent and terrifying – terrifying enough that a front-row seat suddenly seems less than ideal, and the crowd backs away: “And all the people saw the thunderings, and the lightnings, and the noise of the trumpet, and the mountain smoking: and when the people saw it, they removed, and stood afar off.”³ Speaking performatively (through thunder, lightning, smoke, and the trumpet’s blare), God effectively says, “don’t dare to look too closely” (in something of the same spirit in which the Wizard of Oz says “Pay no attention to that man behind the curtain!”)⁴ In so doing, God effectively establishes the mystical or occult nature of legal authority (in Montaigne’s famous phrase, the “fondement mystique de [l’]autorité”).⁵ The law may be revealed in a spectacular performance, but its foundation remains ultimately inaccessible, too dazzling to gaze upon and thus concealed just out of view.

Exodus gives narrative form to a trope central to the history of law and legal commentary: the trope likening law to drama and theatre, and noting the centrality of law’s performance medium to its message, its function, its power. If law generally has a secondary textual half-life, the central events of law – trials – (it is observed) are normally performed before live audiences by those specially trained to shed their own identities and “represent” others. Trials are the re-enactment of a conflict (an *agon*), whose essential narrative form is dialogue. They exploit iconic props as crucial clues to the

2. *Ibid.*, Ch 19:5–6.

3. *Ibid.*, Ch 20:18.

4. Victor Fleming, director, *The Wizard of Oz*, film (Los Angeles: Metro-Goldwyn-Mayer, 1939).

5. This quote, taken slightly out of context, is from a sentence made famous by the Derrida essay I will discuss below. See note 28, below.

unfolding of the narrative, and often rely on space, staging, costume, and spectacle in an attempt to bring back to life the dramatic event they are attempting to recount. Trials and theatre (it is noted) share an underlying structural similarity or have overlapping functions (in an anthropological sense): both are forms of conflict resolution through aesthetic and ritual means; both serve the consolidation of community through public scapegoating, ostracism, and expulsion; both act as vehicles for social catharsis. Performance is the central condition that links trials to theatrical events, but performance is an essential part of legal meaning outside the trial as well, where ceremonies of promulgation or the signing of treaties, festivals of justice, the choreography of policing, or the vast array of penal performances (public and private) display and publicize the law, demonstrate law's force, act as dramatic exemplars. Indeed, it has been argued, law is the ultimate performative institution: producing the frameworks of subjecthood and subjectivity through discursive acts.

Despite the persistence of the trope likening law to theatre, despite the vast body of critical writing on "law and literature," the rise of "Performance Studies" and the more general proliferation of the term "performance" in critical studies, there has been no sustained theoretical articulation of the nature of legal performance or the meaning of legal theatricality in the critical literature.⁶ However, ideas about performance and theatricality figure in the interstices of a number of important theoretical writings on law. They take a prominent place in several other kinds of discussions: of legal textuality, war crimes tribunals, and legal aesthetics, for instance. And "performance" and "performativity" have become central terms in the discussion of legal identity over the past decade or two. On the one hand, my rather limited goal, here, is to review these discussions, mapping what has been said in the past few decades about legal performance. My title, which unabashedly plagiarizes Nathaniel Berman's "Nationalism 'Good' and 'Bad,'" offers a hint of the kind of Manichean split I find in these discussions, a divide between a vision of legal theatricality as necessarily allied with the forces of evil and a vision of it as necessarily allied with the forces of good.⁷ On the other, what I am offering here is a critical introduction to

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6. The work of Bernard Hibbitts, which I discuss below, comes closest to offering such an articulation. In addition to the texts I discuss below, two collections are worth noting here insofar as they raise questions about legal theatricality: the papers given at the Cardozo Law School symposium entitled "Theaters of Justice and Fictions of Law" in the spring of 1999 (collected in *Cardozo Studies in Law and Literature* 11:1 and 11:2 [spring and winter 1999]); and Dennis Kezar, ed., *Solon and Thespis: Law and Theater in the English Renaissance* (Notre Dame: University of Notre Dame Press, 2007). Neither of these, however, deals directly with legal performance, though both deal extensively with law as represented in the drama (and elsewhere).
 7. Berman, "Nationalism 'Good' and 'Bad': The Vicissitudes of an Obsession," *American Society of International Law Proceedings* 90 (1996), pp. 214–18, addresses international law's historical splitting (in the psychoanalytic sense) of nationalism, its impossible attempt to distinguish doctrinally between "good" and "bad" nationalism – a rather different kind of formative ambivalence than that in law's relationship to its own theatricality but nonetheless suggestive for my project.

a longer-term project. My goal in this longer-term project is to understand the role of legal performance (as both instrument and concept) in the historical production and reception of law: to see how both legal performance itself and law's ambivalent relationship to its own theatricality matter to the way in which law produces itself, to its specific outcomes, to its broader effects, and to its meaning or institutional self-conception; and to suggest an alternative legal historiography, more narrative and descriptively "thick" (in Clifford Geertz' famous formulation), more sensitive to law's paratexts, both complement and corrective to the doctrinal or institutional historiography of law.⁸

II. "Theatricality" and "Performance"

A word, first, about "theatricality" and "performance," as a way of understanding some of their resonances here. "Theatricality" – a term that invokes theatre, of course, but is used primarily to describe things that, by virtue of being *like* theatre, are *not* theatre – historically carries with it the burden of what Jonas Barish famously termed the "antitheatrical prejudice." This idea reaches back to Plato, associating actors with liars, hypocrites, and cross-dressers, and the theatre generally with artifice, affectation, excess, melodrama, deception.⁹ To be an actor was to be histrionic, was to be a hypocrite, was to be a hysteric (with all the gendered connotations). While such virulent antitheatricality lost some of its cultural force with the proliferation of theatres in the nineteenth century and the rise of mass entertainment in the twentieth, "theatricality" has retained a good deal of its negative associations in popular and more learned discourses. Michael Fried, for instance, famously set "theatricality" in opposition

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8. See Geertz, "Thick Description: Toward an Interpretative Theory of Culture," in Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), pp. 3–30. Much of legal anthropology of the past few decades offers precisely such narrative and descriptively thick readings. It is perhaps worth mentioning here a few studies that also seem to me to move in this direction, with a sensitivity to the resonance of "theatre" for law: Peter Goodrich, "Amici curiae: Lawful Manhood and Other Juristic Performance in Renaissance England," in *Literature, Politics and Law in Renaissance England*, ed. Erica Sheena and Lorna Hutson (London: Palgrave Macmillan, 2005), pp. 23–49; Pnina Lahav, "Theater in the Courtroom: The Chicago Conspiracy Trial," *Cardozo Studies in Law and Literature* 16 (fall 2004), pp. 381–448; Sarah C. Maza, "The Theater of Punishment: Melodrama and Judicial Reform in Prerevolutionary France," in Sara E. Melzer and Kathryn Norberg, ed., *From the Royal to the Republican Body: Incorporating the Political in Seventeenth and Eighteenth-Century France* (Berkeley: University of California Press, 1998), pp. 182–97 (and, less directly, Maza, *Private Lives and Public Affairs: The Causes Célèbres of Prerevolutionary France* [Berkeley: University of California Press, 1993]); Joseph P. Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York: Columbia University Press, 1996) (the sections on "Bodies of Law" and on *Plessy v. Ferguson*, pp. 55–63, 233–7); Katherine Fischer Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton: Princeton University Press, 1993); and James Thompson, "From the Stocks to the Stage: Prison Theatre and the Theatre of Prison," in Michael Balfour, ed., *Theatre in Prison: Theory and Practice* (Bristol: Intellect, 2004), pp. 57–76.
9. Barish, *The Antitheatrical Prejudice* (Berkeley: University of California Press, 1981).

to “absorption” (the work of art’s containment within its own world, its refusal to cross the mimetic frame), arguing that modern art was successful to the extent to which it had suppressed its own theatricality.¹⁰

But, while theatricality is maligned for its seductive artifices, it is also redeemed by them, or by what Roland Barthes framed more neutrally as its “density of signs and sensations,” the thickly legible effects of image, motion, sound, the human body, used as modes of cultural communication and expression.¹¹ Under one optic, theatricality calls attention to itself, preens itself in the viewer’s gaze, effectively waves to the spectator and says, “look at me!” But for Bertolt Brecht, it was precisely this insistence on consciousness that could give overt theatricality a political role.¹² For if illusion was seductive, calling one to submit to the seamless master narratives of history and culture, theatricality had the power precisely to challenge such submission through its insistence on making illusion visible *as* illusion. If theatricality was play, richly sensory spectacle, an embrace of flamboyant embodiment, symbolic expression, collective emotion, it was also a sophisticated awareness of the make-believe that is life. Here, the concept of “theatricality” harkens back to the Renaissance *theatrum mundi* metaphor: “All the world’s a stage, and all the men and women merely players,”¹³ says Jacques in *As You Like It*, with the implication that we ought, therefore, not to take it too seriously. Theatricality is a recognition of role-playing as the foundation of identity, and illusion as the foundation of life. Theatricality is an understanding that life is a performance. But what is performance?

“Performance” takes much of its current critical force from the meaning it has accrued in and through “Performance Studies,” a field inspired in part by anthropology and the sociology of culture but developed primarily by Richard Schechner as an extension of drama and theatre studies.¹⁴ Citing primitive rituals, religious ceremonies, sporting events, theme parks, parades, marriage ceremonies (among other things), Schechner famously defined performance as restored behavior or “twice-behaved behavior”: behavior that

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10. Fried, *Absorption and Theatricality: Painting and Beholder in the Age of Diderot* (Berkeley: University of California Press, 1980).
 11. Roland Barthes, *Critical Essays*, trans. Richard Howard (Evanston: Northwestern University Press, 1972), p. 25; quoted in Tracy C. Davis and Thomas Postlewait *Theatricality*, ed. Davis and Postlewait (Cambridge: Cambridge University Press, 2003), p. 23.
 12. See, for instance, Bertolt Brecht, “A Short Organum for the Theatre,” in Brecht, *Brecht on Theatre: The Development of an Aesthetic*, trans. John Willett (New York: Hill & Wang, 1964), pp. 179–205.
 13. William Shakespeare, *As You Like It*, ed. Agnes Latham, Arden Shakespeare (London: Methuen, 1975), pp. 55–6 (Act 2, scene 7, lines 139–40). For an excellent discussion of the far wider range of “theatricality” than I have indicated here, see Davis and Postlewait’s introduction to *Theatricality*, pp. 1–39.
 14. For helpful discussions of performativity and performance, see Andrew Parker and Eve Kosofsky Sedgwick, “Introduction” in *Performativity and Performance*, ed. Parker and Sedgwick (New York: Routledge, 1995), pp. 1–18 (relating the linguistic and theatrical “performative” in critical theory of the past few decades); W.B. Worthen, “Drama, Performativity, and Performance,” *PMLA* 113:5 (October 1998), pp. 1093–107; and Marvin Carlson, *Performance: A Critical Introduction* (New York: Routledge, 1996).

has been rehearsed, or that consciously evokes formal templates that serve the same function as rehearsal.¹⁵ Performance in this sense is often opposed to theatre analytically or ontologically: where theatre is *mimesis* (imitation), performance is *methexis* (participation); where theatre is pretending, performance is the real. But performance in the Performance Studies sense nonetheless aligns a wide variety of cultural practices with theatre as its exemplary instance: rehearsed and enacted for spectators who may also be participants; formal, ceremonial, choreographed; above all, live.¹⁶

At the same time, underlying the concept of “performance” in much literary discourse is the linguistic “performative.” In the classic formulation (associated with J.L. Austin’s *How to Do Things With Words*), linguistic performatives are speech acts that do things, or perform them, producing or transforming a situation, rather than merely referring to one: “I do” (in the marriage ceremony), “I swear,” “I command.” Performatives are the opposite of constatives: speech acts that describe the ostensible facts (truly or falsely), referring to things that exist outside of themselves. The value of performatives (unlike that of constatives) does not lie in their truth content, for, by virtue of being stated, they constitute truth. While they may rely on “twice-behaved behavior” or conventional formulations for their success, by definition they create something new.¹⁷

The two conceptions – the twice-behaved quasi-theatrical performance and the linguistic performative – may seem in some ways antithetical: “performance” in Performance Studies is reiterative, deriving its meaning from its repetition of the same; the linguistic performative is by definition non-reiterative, deriving its meaning from its creation of the new. And indeed, Austin’s classic example of performative “failure” involves the performative as a performance: “[A] performative utterance will . . . be *in a peculiar way* hollow or void if said by an actor on the stage,” for here language is “used not seriously, but in ways *parasitic* upon its normal use.”¹⁸ It is no accident that theatrical performatives represent, for Austin, the failure of “real” performatives: for theatre is the ultimate iterative activity, imitative, referential, unreal. Performatives – and performances that adhere to their logic – are real (they make something real happen in the world), but theatre is false (it pretends to make things happen in the world, but actually only imitates them).

And yet, as Austin begins to qualify the concept of the performative, his performatives begin to look a good deal like Schechner’s performances. Austin recognizes that “*all* . . . ritual or ceremonial, all *conventional* acts” are “heir” to an “ill” similar to that which afflicts theatrical performatives.¹⁹

15. “Restoration of Behavior,” in Schechner, *Between Theater and Anthropology* (Philadelphia: University of Pennsylvania Press, 1985), p. 36.

16. See Philip Auslander’s fascinating investigation of the meaning of liveness here and in a number of domains (including law) in *Liveness: Performance in a Mediatized Culture* (New York: Routledge, 1999).

17. J.L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1965).

18. *Ibid.*, p. 22.

19. *Ibid.*, pp. 18–19.

Their very conventionality, the quotation marks around them, may make them performatively “hollow.” That is, they may fail in their task of doing, and end up simply referring. Given his central example, the legal pledge “I do” in a marriage ceremony (perhaps the exemplary ritual, ceremonial, conventional act), it is unclear whether any performative can escape this fate. Here, the fact that performatives are inevitably performances seems to undo them. Performatives are world-creating acts. But, at the same time, like performances, performatives are always “twice-behaved.”

In fact, these two concepts have come together in a number of ways in critical theory, most notably in Judith Butler’s discussion of the “performative” constitution of gender (and its critical offshoots): her argument that gender is at once a kind of action akin to a performative speech act (in Austin’s sense, an act of constituting or creating gender through its performative declaration), and performed (in the theatrical sense), assumed or feigned or impersonated.²⁰ If all performatives are in some way performances, all performances may, equally, be in some way performatives: acts of creative constitution.

Legal performance partakes, ambivalently, of both these faces of performance as well as their ontologically ambiguous fusion. Like the linguistic performative (whose primary instances, in Austin, are legal), legal performance executes something. In legal documents, “performance” is primarily used as a contract term, which expresses this executory meaning well. (“Specific performance” might be thought of as the ultimate doctrine of the performative, insisting that, however much the law may rely – like money – on the circulation of symbolic objects, a real object may not be replaced by a symbolic one: performance means the execution of the real.) In this sense, law is the ultimate performative institution: its assertions (or modes of expression) by definition make something happen. The law’s performative statements – when a sovereign says “I command” or a judge says “I sentence you” – might be thought of as super-performatives: performatives backed by force. On the other hand, law is the ultimate institution of twice-behaved behavior: its performances represent and replay social conflict and violence, turning history into dramatic narrative, fictionalizing social trauma, transforming it into the system of social representations, exchanges, surrogacies that make up the law.²¹ As we will see, this double nature – law’s conjoint performativity and theatricality – are both problem and power.

20. See, primarily, Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), and her clarification of her views on the politics of gender performance in *Bodies that Matter: On the Discursive Limits of “Sex”* (New York: Routledge, 1993) and *Undoing Gender* (New York: Routledge, 2004) (gender is “a practice of improvisation within a scene of constraint” [1]).

21. This sense of legal “performance” comes closest to that in Victor Turner’s discussion of law as one of several “redressive” mechanisms in the wake of a “social drama.” Turner does not directly discuss law as performance, but he repeatedly theorizes rituals as performances (rather than, for instance, rules), and he clearly understands law as a kind of ritual performance, often offering closure to a “social drama.” See, for instance, Turner, “Social Dramas and Stories about Them,” in *On Narrative*, ed. W.J.T. Mitchell (Chicago: University of Chicago Press, 1981), pp. 137–64.

To suggest the range of meanings associated with “performance” and “theatricality” is not to attempt to define the field of “legal performance” or “legal theatricality” (which are not, after all, objective modalities of law but instead descriptive terms inflected by various sets of historical attitudes). Rather, it is to direct awareness to how these larger conceptions of performance and theatricality may be at work in the discussions I look at below.

III. Derrida and the “Performative Force” of Law

Early in Jacques Derrida’s “The Force of Law: The ‘Mystical Foundation of Authority,’” there appears a short passage on the “foundation or institution” of law, a passage that evokes the specter of performative legal origins that we have seen at work in *Exodus*:

The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force. . . . [Law’s] very moment of foundation or institution . . . , the operation that amounts to founding, inaugurating, justifying law . . . , making law, would consist of a *coup de force*, of a performative . . . violence that . . . no previous law with its founding anterior moment could guarantee or contradict or invalidate.²²

For Derrida, “performative” here carries the linguistic (not theatrical) meaning. In “Signature, Event, Context,” Derrida famously attacked the distinction between the performative and the constative.²³ In “The Force of Law,” however, he invokes the performative as part of the myth or ideology of legal foundations. In this sense, originary law grounds itself not in some prior authority, but in its own self-originating power, performative in the sense that it enacts and thus creates law, rather than referring to law outside of itself. Such founding legal performances are self-legitimizing (literally so): on the one hand, they cannot appeal to a prior law to legitimate or guarantee them; on the other, no prior law can change or override them.

22. Derrida, “The Force of Law: The ‘Mystical Foundation of Authority,’” in *Deconstruction and the Possibility of Justice*, ed. David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (New York: Routledge, 1991), p. 13.

23. A performative statement, Derrida explains, cannot “succeed if its formulation [does] not repeat a ‘coded’ or iterable statement, in other words if the expressions I use to open a meeting, launch a ship or a marriage [a]re not identifiable as *conforming* to an iterable model, and therefore if they [a]re not identifiable in a way as ‘citation.’” That is, “the structure of *locution* . . . already bears within itself [a] system of predicates,” in Derrida’s nomenclature “*graphematic*.” Just as speech relies on a notion of presence whose realness and immediacy is always feigned, so does the performative. Jacques Derrida, “Signature Event Context,” in Derrida, *Margins of Philosophy*, trans. Alan Bass (Chicago: University of Chicago Press, 1982), pp. 326, 322 (and generally pp. 321–30).

Derrida revisits this issue briefly in “The Force of Law”: “[A] performative . . . found[s] itself on conventions and so on other anterior performatives, buried or not. [And] every constative utterance itself relies, at least implicitly, on a performative structure (‘I tell you that, I speak to you . . .,’ and so forth)” (27).

(One might think of the Declaration of Independence as a classic example: the act of declaration itself constitutes the new political-legal entity.)²⁴

This self-legitimation is born in a *coup de force*, a moment of performative violence that is (as in *Exodus*) also a *coup de théâtre*. As Derrida makes clear, we should not understand this violence as merely law's servant (enforcing it), nor should we understand the law as the servant of violence (legitimizing it). Violence is internal to law: essential to its groundless (performative) founding, its rupture from everything that came before. That is, founding violence is performative, and the performative is necessarily violent (conceptually and cognitively). To say that "the origin of authority" is, as Derrida writes, "a violence without ground"²⁵ is to say that law is founded in a performative *coup de force* rather than, for instance, fundamental principles or the logic of right. This violent performative moment, where the origin of authority resides, represents a limit, an "*aporia*" (as Derrida writes): "a non-road, . . . the experience that we are not able to experience."²⁶ And, as he explains, "[e]ven if the success of performatives that found law or right . . . presupposes earlier conditions and conventions, . . . the same 'mystical' limit will reappear at the supposed origin of said conditions, rules or conventions."²⁷ Performance is, in this sense, its own beginning: a continual site of origin. It is thus that authority, grounded only in the performative moment, has a "mystical foundation" (the "mystical foundation of authority" to which Derrida's title refers, quoting Montaigne).²⁸ This *aporia* – the invisibility and incomprehensibility of the foundation of legal authority (the terrifyingly unapproachable God of Mount Sinai who appears only through a *coup de théâtre*) – both constitutes law's authority and keeps it ever inaccessible.

Since performative founding (founding without ground) is a fiction, founding is always actually a re-founding pretending to be a site of origin. Each time law is founded, it "violently resolve[s]" all the norms, reasons, assumptions, inscriptions that have preceded it, "that is to say [these are] buried, dissimulated, repressed."²⁹ At the same time, every legal case is, in a sense, a kind of founding. The decision of a judge, writes Derrida, does not merely follow a rule or general principle of law. Each time a legal decision is made, the judge engages in an act that reinvents the law: by approving, or confirming, or disconfirming, or pretending to confirm, "as if ultimately

24. See Derrida's investigation of the performative "We" in the Declaration, in Derrida, "Declarations of Independence," trans. Tom Keenan and Tom Pepper, *New Political Science* 15 (1986), pp. 7–15. And see Jay Fliegelman's further exploration: *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford: Stanford University Press, 1993).

25. Derrida, "Force of Law," p. 14.

26. *Ibid.*, p. 16.

27. *Ibid.*, p. 14.

28. Montaigne means something rather different. He writes: "Or les loix se maintiennent en credit, non par ce qu'elles sont justes, mais par ce qu'elles sont loix. C'est la fondement mystique de leur autorité; elles n'en ont point d'autre." Montaigne, *Oeuvres complètes*, ed. Albert Thibaudet and Maurice Rat, Bibliothèque de la Pléiade (Paris: Gallimard, 1962), p. 1049 (*Essais* Book III, Ch 13, "De l'expérience").

29. Derrida, "Force of Law," p. 23.

nothing previously existed of the law, as if the judge himself invented the law in every case.” Every decision, he writes, “must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case [and] rejustify it.”³⁰ Since each decision is different and requires an absolutely unique interpretation, “which no existing, coded rule can or ought to guarantee absolutely,”³¹ argues Derrida, each case reinvents the law.

IV. Pierre Legendre and the Theatricality of the Forbidden

For Derrida, law involves a purportedly non-referential making that in fact simply represses its reiteration of what has preceded it. For the French psychoanalyst-lawyer Pierre Legendre, law involves a theatrical fictionalizing that in fact somehow accesses the Real which lies behind it. Theatre and theatricality are central metaphors for Legendre: for the psyche (the space for the performance of the theatre of Reason); for the space of the social generally (a “stage or scaffold” on which its subjects “think the normative order theatrically”)³²; for identity (we are “masked individual[s],” *personas* in the Latin sense)³³; and for the law.³⁴ But law is not just one of the many theatrical domains for the corporealization of discourse. It is at once metonymic of the broader theatre of the social order and the *ur*-theatre of

30. *Ibid.*, p. 23.

31. *Ibid.*, p. 23.

32. Legendre, *De la société comme texte: Linéaments d'une Anthropologie dogmatique* (Paris: Fayard, 2001), p. 25; trans. Legendre, “Appendix: Fragments,” in *Law, Text, Terror: Essays for Pierre Legendre*, ed. Peter Goodrich, Lior Barshak, and Anton Schütz (New York: Glass House Press, 2006), p. 148 (and see generally *De la société comme texte*, pp. 23–34, and throughout).

33. Legendre quotes Cicero, *De Oratore* (II:193): “*ex persona ardent oculi histrionis*” (“through the mask shines the eyes of the actor”). Legendre, *La 901e conclusion: étude sur le théâtre de la Raison*, Leçons I (Paris: Fayard, 1998), p. 235. And see the following: “Notez l’une des constructions centrales du droit civil, celle que nous appelons, conformément à la nomenclature de Justinien, *droit des personnes*: la littéralité du latin *persona*—qui désigne d’abord le masque de l’acteur—m’autorise à rendre la formule *de iure personarum* par du *droit des masques*. En tout système institutionnel, la politique du sujet passe par les masques,” Legendre, *Le désir politique de dieu: étude sur les montages de l’État et du Droit*, Leçons VII (Paris: Fayard, 1988), pp. 225–6.

34. See, primarily, Legendre, *Le désir politique*, pp. 235–69; and Legendre, *Le crime du caporal Lortie: traité sur le père*, Leçons 8 (Paris: Fayard, 1989). In *La 901e conclusion*, Legendre takes up the metaphor of theatricality in a sustained and explicit way, but here theatre is primarily a figure for the “scene” of the mind in its encounter with the symbolic, with echoes of the Freudian “scene” and Lacanian mirror. See also two discussions inspired by Legendre on legal theatricality: Cornelia Vismann, “‘Rejouer les crimes’: Theater vs. Video,” *Cardozo Studies in Law and Literature* 13 (spring 2001), pp. 119–33; and Stephanie Lysyk, “Theaters of Justice: Love of the Censor: Legendre, Censorship, and the Theater of the Basoche,” *Cardozo Studies in Law and Literature* 11 (winter 1999), pp. 113–27. In this tradition, see also Lior Barshak, “Between Ritual and Theatre: Judicial Performance as Paradox,” in Oren Perez and Gunther Teubner, eds., *Paradoxes and Inconsistencies in the Law* (Oxford: Hart Publishing, 2006) (arguing that the ritual theatricality of the courtroom at once sacralizes the role of the judge and transforms law into worship).

the symbolic order, the central social institution for performance of the social Text. Legendre quotes the seventeenth-century Cardinal and lawyer Giovanni Battista de Luca: law (in the restricted institutional sense) is a “*Theatrum veritatis et iustitiae*” because in the actualized legal arena Law with a capital “L” (the logic of the symbolic order) is staged and registered in discourse (bodily and verbal).³⁵ Law thus follows a “totemic” or theatrical logic: authority (the absent deity, the symbolic Father) is figured corporally so that “the ‘*missing principle*’” (invisible but omnipresent authority) “can be ‘*seen*.’” This may be produced in such icons as painted images of divine authority or the figure of the cross or (in the U.S. courtroom) a giant eagle, or in the figure of the robed judge. Or it may be produced figurally, through language. In either case, the totem or theatrical figure stands as the guarantor of the Law of the Father, the truth and authenticity of dogma.³⁶

The concrete manifestations of this theatricality are important to its effects: law unfolds in rites and ceremonies, orchestrations, liturgies, images, staging itself for the spectators of the state. It is from an “*inexorable . . . theatrical imperative*” that ritual, most notably legal ritual, emerges. The ritual function is a power function, and the purpose of its theatricality is to hold together all “the bits and pieces that we call society.”³⁷ As Legendre writes in a particularly rich passage in *Le crime du caporal Lortie*, “[t]he great [legal] prohibitions are founded and deploy their effects not only in explicit legal pronouncements, but . . . by means of forms and *mises en scènes* that exceed speech.” Theatricality is “necessary to the functioning of normativity.” For it “manages the unspeakable,” and thus, at the same time, represents it.³⁸ The theatrical rites and ceremonies of the law – “forms and *mises en scènes* that exceed speech” – are the essential vehicles of “[t]he great prohibitions.” Theatricality is essential to law’s coercive power, subjecting us to its commands. Here, the law’s aesthetic dimension places us under the jurisdiction of an “institutional play of images.”³⁹ And its aesthetic dimension, rather than freeing us into pleasure, is part of its coercive power. For the aesthetic is, by definition, incapable

35. See, for instance, Legendre, *Sur la question dogmatique en Occident: aspects théoriques* (Paris: Fayard, 1999), p. 263.

36. Legendre, *Sur la question dogmatique*, pp. 292, 287. The absent deity and the totem are identified with the Father, in the Lacanian sense. Since the state (from which law emerges) is the ultimate embodiment of the Father, every time the law is violated, it is a form of parricide. And every time the law punishes its violation, it reinstates the Law of the Father (see, here, especially, Legendre, *Le crime*). Law (in the restricted institutional sense) thus gives symbolic expression to Law with a capital “L”: the Law of the Father, the laws or logic of the symbolic order more generally. Thus, law (in both senses conjoined) is the principal vehicle of social reproduction. For, through the agency of the State, it reproduces the social order across society (laterally in space) and through successive generations (temporally): it “institute[s] the procedures of humanization.” Legendre, *Sur la question dogmatique*, p. 15; trans. Legendre, “Appendix,” p. 151 (translation modified).

37. Legendre, “Note marginale,” in Ernst Kantorowicz, *Laudes regiae: une étude des acclamations liturgiques et du culte du souverain au Moyen âge*, trans. Alain Wijffels (Paris: Fayard, 2004), p. 9.

38. Legendre, *Le crime*, p. 25.

39. Legendre, *Sur la question dogmatique*, p. 15; trans. Legendre, “Appendix,” p. 151.

of mistake: one cannot argue with or disprove beauty. Thus, the aesthetic function in law at once produces and ratifies the normative order *as normative*. The aesthetic makes law infallibly right.

As in Derrida, “found[ing]” and “deploy[ing]” here are not analytically distinct: law perpetually re-founds itself; every founding is a re-founding. But the performance of foundations may – like theatricality generally – have a functional role. For just as the symbolic generally achieves its effects by staging its foundations (for instance in the Eucharist),⁴⁰ so law (that manifestation of the symbolic) “achieves its effects” by staging and restaging our entry into the symbolic and our concomitant submission to the Law of the Father. That is, law overpowers us by making us re-enact the drama of our submission to the Father. At the same time, in staging foundations, law accesses the “great prohibitions” (incest, parricide) on which it is founded. Here, and in the host of smaller prohibitions of which the law is made, which regulate our actions at the micro level, but which ultimately reference the “great prohibitions,” law offers a glimpse of “the forbidden” or the “unspeakable”: at once that which is prohibited and the inaccessible Real which lies beyond language and images. As Legendre writes elsewhere, “[s]ymbolization begins with . . . the theatricalization of the *aporia*”⁴¹: the invisible and unspeakable are transformed into theatre, inaugurating the symbolic order. To theatricalize the *aporia* in law is to restage this foundation of the symbolic order. As in *Exodus*, the “unspeakable,” an invisible unseen power at the site of origins in which mystical (legal) authority resides (here, the inaccessible space of the Real from which the authority of the Father emerges) can be presented only theatrically. But even while this theatricality reveals the mystical authority that underlies the law – the law’s guarantor – it continues, at the same time, to shroud it in its ritual forms.

In Derrida and Legendre, performance is law’s tool, assisting law in its work of subjecting us to its authoritarian commands. One can think of these two theorists here as kindred to several other post-structuralist theorists (Foucault, Bourdieu, Lyotard most notably) in whose work law plays an axial role. Indeed, it is one of the central tropes of post-structuralist theory generally that we are subject to a disciplinary micro-politics intrinsic to late modernity, in which we constantly perform invisible laws diffused in the myriad administrative and institutional regulations of the modern state.⁴² Here, there is less focus on the production of law than on its reception in the legal subject, who

40. See, for instance, Legendre’s discussion in “Id Efficit, quod figurat (It is the Symbol which Produces Effects): The Social Constitution of Speech and the Development of the Normative Role of Images,” trans. Peter Goodrich, *Legal Studies Forum* 20 (1996), pp. 247–63 (extracted from Legendre’s *Dieu au miroir: Étude sur l’institution des images* [Paris: Fayard, 1995], pp. 199–215).

41. Legendre, *Sur la question dogmatique*, p. 294.

42. For Foucault, for instance, the spectacular performance of baroque punishment is transformed at the end of the eighteenth century not only into the specific disciplinary practices of the prison, but into the social panopticon more generally, in which body and soul are subject to the micro-regulations of the invisible disciplinary gaze. For Bourdieu, law comes to us primarily not as a series of explicit commands but in the form of social

unconsciously performs the mandates of the state. But law is nonetheless, in this work, cast as a medium or agent of performance, and legal performance as a mechanism of a brutal regime of authoritarian regulation.

V. Queer Identities, Human Dramas, the Populist Videosphere, and Other Counter-Performances

Should we, however, think of legal performance and its theatrical adjuncts as wholly agents of hegemonic authoritarian regulation? If we were looking for a counter-story, we could find it in the work that has emerged in the past few decades largely under the banner of Judith Butler's discussions of the performative constitution of gender. For Butler (following Foucault), law is the central "compulsory forc[e] that [produces and] police[s]" the performance of identities (and structures of being generally).⁴³ "Juridical power inevitably 'produces' what it claims merely to represent."⁴⁴ Here, as in the theorists of disciplinary micro-politics, it is the legal subject, not authority, that performs; or rather, authority performs through the legal subject. But, while performance is produced in the legal subject, the subject may also produce resistant counter-performances: by refusing to become one's gender (for instance); by parodying the production of gender (through drag, for instance); by deploying this refusal as a means of revealing the constructedness of the subject and thereby destabilizing legally produced and policed identities.

Bringing together the linguistic and theatrical valences of performativity, in the figure of the gender performer who at once acts out and constitutes her gender, Butler's arguments have been taken up in the legal sphere, standing primarily for the proposition that legal identities are not natural

formations that reproduce themselves as *habitus*: a dialectic between our actual behaviors and structures that we have internalized as second nature, and that unconsciously control our practices, our beliefs, our bodies. For Lyotard we are subject through law (and through more extended forms of social "legislation") to the demands of "performativity" of a different kind: the performativity of late capitalism, in which value is accorded to the most efficient performances (those that have the most efficient input/output ratio, technologically measured). As the title of a recent book suggestively puts it, we are subject to the imperative: *Perform or Else!*

See, for instance, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977); Pierre Bourdieu, *The Logic of Practice*, trans. Richard Nice (Stanford: Stanford University Press, 1980); Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (July 1987), pp. 805–53 (situating *habitus* more specifically sociologically in the legal milieu); Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoff Bennington and Brian Massumi (Minneapolis: University of Minnesota Press, 1984), especially pp. 11–2, 41–64; and Jon McKenzie, *Perform or Else: From Discipline to Performance* (London: Routledge, 2001). For an argument that the practices of everyday life can constitute counter-performances, see Michel de Certeau, *The Practice of Everyday Life*, trans. Steven Rendall (Berkeley: University of California Press, 1984).

43. Butler, *Gender Trouble*, p. 33 (in a passage not dealing specifically with law but with "various forces" more generally).

44. *Ibid.*, p. 2.

entities but may be created, and recreated, through performance.⁴⁵ For instance, Ariela Dubler traces the role of “wifely behavior” – the performance of marriage – in the legal production of common law marriage in nineteenth- and twentieth-century America, in an essay that sets historical performance into Butler’s framework to argue (implicitly) for a return to a performative conception of marriage (freeing the concept of marriage from hetero-normative definitions).⁴⁶ Performance, here, becomes a liberating instrument, undermining the law’s attempts to capture us within its rigid frameworks and to delude us into believing its identity categories natural. Both in the courts and on the streets, performance offers the legal subject the freedom to remake herself (or, under a queer optic, to remake herself as *himself*).

Thus, Derrida’s and Legendre’s parables of performance as the agent of legal authoritarianism, find their opposite in the celebratory paean to legal performance, or theatricality, or “performativity.” In the domain of the legal subject, such “performativity” allows one to reconstitute one’s identity free from the strictures of law. In the domain of the courts, legal performance has a range of virtues. For Milner Ball, for instance (writing several decades ago), the “theatrical quality” of trials allows “actors, judge and jury . . . to play parts in a government of laws and not of people.”⁴⁷ It encourages “disinterestedness in the decisionmakers,” contributing to both “unprejudiced judgments” and “creativity in judgment,” and increasing the players’ “potential for doing justice.”⁴⁸ “[L]ive presentation,” he argues, and “the human drama played out in court . . . giv[e] evidence that the case takes place within a greater drama of human realities not limited to rules or abstractions.”⁴⁹ Insofar as “the action of the courtroom [i]s a type of theater,” it is a place “in which citizens are to have parts of importance and dignity, to be taken seriously and with ceremonious, protective deference, and to have their rights and duties fairly recognized.”⁵⁰ The “humanizing dimension of theater” may be “critical to the capacity of our courts for justice.”⁵¹

45. Butler’s own work explicitly dealing with law tends to offer a complex view of the multi-valent power of the performative. See, for instance, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

46. Dubler, “Wifely Behavior: A Legal History of Acting Married,” *Columbia Law Review* 100 (May 2000), pp. 957–1021. For an important essay also strongly inflected by Butler’s work but with a more ambivalent attitude toward the politics of “performativity,” see Kenji Yoshino, “Covering,” *Yale Law Journal* 111 (Jan 2002), pp. 769–939.

47. Ball, “The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater,” *Stanford Law Review* 28 (1975), pp. 100–101. See also Ball, “All the Law’s a Stage,” *Cardozo Studies in Law and Literature* 11:2 (winter 1999), pp. 215–21. And see similarly J.D. Morton, *The Function of Criminal Law in 1962: five lectures for radio in the series CBC University of the Air* (Toronto: Canadian Broadcasting Corp., 1962), p. 30: “It is my contention that the criminal trial is not merely suitable stuff for a play but *is itself a play*, a drama deliberately staged in furtherance of the great general end of the criminal process, that citizens should so conduct themselves as to avoid the types of behaviour which society has legally condemned.”

48. Ball, pp. 100–101, 104.

49. *Ibid.*, p. 105.

50. *Ibid.*, p. 113.

51. *Ibid.*, p. 115.

More recently, in an incorporation of narrative theory and Aristotelian poetics, such critics as Shoshana Felman and Mark Osiel have argued that trials of the perpetrators of atrocities (or, by extension, such quasi-legal entities as truth commissions) are “dramas” or “theatres of justice” providing collective “catharsis.” Quoting Susan Sontag on the Eichmann trial, for instance, Felman writes that the “function of the trial was not “conform[ity] to legal standards,” but “tragic drama: above and beyond judgment and punishment, catharsis.” As Felman comments:

The legal function of the court, in other words, is in its very *moral essence*, a *dramatic* function: not only that of ‘doing justice,’ but that of ‘*making justice seen*’ in a larger moral and historically unique sense. It was through the perspective of this larger cultural and *historic visibility* the trial gave dramatically, historically, to justice that the Eichmann trial was ... *jurisprudentially dramatic*.⁵²

Osiel argues, similarly, that trials of mass atrocity quite properly attempt to stage a “theater of ideas”: defense counsel “will tell the story as a tragedy, while prosecutors will present it as a morality play,” but the “judicial task” is, in fact, “to recast the courtroom drama in terms of the ‘theater of ideas,’” contributing to a “social solidarity” essential to recovery from trauma. “[C]onsiderations of dramaturgy” are crucial: for “such trials should be unabashedly designed as monumental spectacles.” The result will be “dramatic catharsis and social connection.”⁵³

For J.M. Balkin and Sanford Levinson, looking not at the courts but at judicial interpretation, it is not so much that more performance is better for law as that a performance-based legal hermeneutics gives better outcomes than one based in the idea of the text as a fixed entity. Balkin and Levinson see themselves as taking hermeneutics beyond the “law and literature” paradigm: the “comparison between law and the literary text interpreted by an individual reader is inadequate in important respects,” for law is, in fact, “the acting out of texts rather than the texts themselves.”⁵⁴ Taking the legal realists’ shift from “law on the books” to “law in action” one step further (as they claim), Balkin and Levinson argue that “it is time to replace the study of law as literature with the more general study of law as a performing

52. Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge: Harvard University Press, 2002), p. 162; quoting Susan Sontag, “Reflections on *The Deputy*,” in *The Storm over The Deputy*, ed. Eric Bentley (New York: Grove Press, 1964), pp. 118–9.

53. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction Publishers, 1997), pp. 3, 291. See also Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), p. 110 (the Eichmann trial was a “ritual of collective catharsis”). For a critique of these views, and of sentimental legal theatricalization generally, see my “‘Literature,’ the ‘Rights of Man,’ and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony,” *Yale Journal of Law and the Humanities* 17:2 (May 2005), pp. 249–78.

54. Balkin and Levinson, “Interpreting Law and Music: Performance Notes on ‘The Banjo Serenader’ and ‘The Lying Crowd of Jews,’” *Cardozo Law Review* 20 (May/July, 1999), p. 1518 (published in a shorter version as “Law as Performance,” in *Law and Literature*, ed. Michael Freeman and Andrew D.E. Lewis (New York: Oxford University Press, 1999),

art.”⁵⁵ Here, Balkin and Levinson implicitly pit performance against a coercive textuality. Textuality stands for a kind of obtuse formalism (in American constitutional theory, governed by originalism or plain-meaning interpretive canons). Performance (textuality’s good twin) stands for fluid, context-inflected interpretation, free from the dogmatic strictures of formalist textualism. Recognizing law as performance helps us to honor the “triangular relationship” of interpreter-text-audience and to see “the responsibility that the legal actor or interpreter bears to the audience affected by what he or she does.”⁵⁶ It also liberates us from having to choose the “most faithful” or “best” interpretation of the text, allowing us to subtract objectionable portions of the text or add new ones, interpreting the law in light of “the institutional context of performance and the social consequences of performing it.”⁵⁷ When we see law as performance rather than textuality, we are able to see that, “[i]n the last analysis, the various audiences for performance – the people whom the performance moves, inspires, and affects – are the true judges of its fidelity and authenticity.”⁵⁸

Taking the entire range of legal expression for his domain, Bernard J. Hibbitts – probably the critic who has offered the most extended consideration to legal performance – has given a thickly anthropologically and historically documented account of the rich sensory theatre of pre-modern and primitive law (with its trials by performance, its contractual ceremonies, its aural formulae, its language of symbols). Hibbitts argues that the defeat of this performative legal order (crushed by a puritanical textualism) was part of an alienation of law from sensory and lived experience. At some point,

Literate groups no longer satisfied with merely sharing the cultural stage began competing for outright social and intellectual hegemony against the institutions and classes that continued to employ and embrace older expressive forms. In the process, spoken rhetoric was denigrated. Gestures were demeaned. Theater was suppressed. Paintings were whitewashed and sculptures were smashed. Smells and tastes were stricken from the accepted vocabulary of literary expression.⁵⁹

Appealing to us to “‘come to our senses’ long enough to transcend our writing-induced prejudices,”⁶⁰ he celebrates the return of performance

pp. 729–51). And see Levinson and Balkin, “Law, Music, and Other Performing Arts,” *University of Pennsylvania Law Review* 139 (1991), pp. 1597–1658. Similarly, James Boyd White writes: “Instead of thinking of language as a code, ... we can imagine languaging as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context.” White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990), p. xii.

55. Balkin and Levinson, “Interpreting Law and Music,” p. 1518.

56. *Ibid.*, pp. 1530–1.

57. *Ibid.*, p. 1525.

58. *Ibid.*, pp. 1571–2.

59. Hibbitts, “Coming to Our Senses: Communication and Legal Expression in Performance Cultures,” *Emory Law Journal* 41 (fall 1992), pp. 875–6. See also Hibbitts, “Making Motions: The Embodiment of Law in Gesture,” *Journal of Contemporary Legal Issues* 6 (1995), pp. 51–81.

60. Hibbitts, “Coming to Our Senses,” p. 955.

culture to law with the rise of mass media, arguing that audio-visual media “extend the reach and multiply the power of performance” and thus diminish “the power of text-oriented gender, racial, ethnic and religious elites,” allowing “women, African-Americans, and others who by force or by choice have retained a relatively-greater respect for performance as a site of identity and resistance . . . increasingly [to] assum[e] positions of social and political authority.”⁶¹

Peter Goodrich, one of the only scholars to recognize the importance of the historical relationship between law and theatre (in an assessment in many ways quite close to my own), has argued similarly that during the Reformation authorities sought to quash both the theatre proper and the theatre of law, but that modern media technologies and specifically the “videosphere” have begun to reclaim theatricality for law.⁶² Goodrich claims to view the spectacle of the videosphere as “inherently neither good nor bad,”⁶³ and it is perhaps unfair to bracket this assertion, but his rhetoric suggests a fairly strong view that the performance culture the videosphere bears is a good thing for law. The return to theatricality via the videosphere, he explains, “change[s] the political meaning of law.”⁶⁴ It offers embodiment to “[a]n abstract and disembodied system of rules.”⁶⁵ It makes of law a “transparent rite.” Authorities can no longer “hid[e] behind occult writs or invisible prior judgments.”⁶⁶ The “clerical or professional and internal world of written law” – the “archaic and arcane world of writs and texts, of interminable delays and prohibitive expense” – becomes “visible and accessible.”⁶⁷ Law “is cut loose from the esoteric and occlusive dimensions of its language and its precedents.” The visibility of the body “necessarily breaks down or deconstructs certain of the more ancient truths or dispassionate protocols of legal judgment,” reintroducing the “play of life against the dead letter of law.” The videosphere is “transgress[ive].”⁶⁸ It permits “the construction of identities and ethnicities, sexual preferences and group memberships that escape the laws of gray tarmac and its straight white lines.”⁶⁹

VI. Theatricality, Antitheatricality, and Legal History

We have, then, a series of useful propositions (explicit and implicit) about what legal performance – or theatricality – does. In Derrida and Legendre,

61. Hibbitts, “De-Scribing Law: Performance in the Constitution of Legality,” Paper for the 1996 Performance Studies Association Meeting, <http://www.law.pitt.edu/hibbitts/describ.htm>.

62. Goodrich, “Europe in America: Grammatology, Legal Studies, and the Politics of Transmission,” *Columbia Law Review* 101 (Dec. 2001), pp. 2033–84. For a helpful essay that takes the relationship between law and theatre as its starting point, see his entry on “Law” in the *Encyclopedia of Rhetoric*, ed. Thomas O. Sloane (Oxford: Oxford University Press, 2001), pp. 417–26; and see Goodrich, “*Amici curiae*.”

63. *Ibid.*, p. 2081.

64. *Ibid.*, p. 2076.

65. *Ibid.*, p. 2070.

66. *Ibid.*, p. 2076.

67. *Ibid.*, p. 2070.

68. *Ibid.*, pp. 2076–8.

69. *Ibid.*, p. 2083.

law is (mythically) created through a kind of performative violence. This violent performative moment enacts authority as *aporia*, concealing its own groundlessness. The myth of violent performative origins also conceals the fact that every founding is really a re-founding pretending to be site of origin. At the same time, every legal performance is, in a sense, also a kind of founding – an attempt to legitimate authority through performance – and thus at once re-enacts the myth of founding and gestures, through symbolic reference, toward the absent authority at its mythical site of origins. Ritual performance serves as a vehicle for ushering primal violence and its prohibition into discourse, transforming these into law. If legal theatricality masks law's foundations in violence and the *aporia* of authority at its origins, this is part of how it achieves its effects: as in Lacan, the phallus only works if it is veiled; the hidden symbolic is the guarantor of the system. Thus, theatricality – insofar as it produces law in aesthetic (that is, unarguable) form, as the object of desire, and insofar as it veils the *aporia* of authority that underlies it – is essential to law's power to coerce.

In Ball, we get a kinder, gentler law. By providing rich dramatic context, legal performance encourages disinterestedness and lack of prejudice but, at the same time, judicial creativity. It gives the law ceremonial dignity. It humanizes the participants. In Felman and Osiel, legal theatricality expresses what is inherently beyond punishment. It produces collective catharsis. It renders justice visible (more important than that justice be done). It produces a theatre of ideas necessary to distance and recovery from trauma. In Balkin and Levinson, recognizing law as performance reveals the triangularity of the law-interpretor-audience relationship, the centrality of the audience to legal determinations. It liberates us from the obligation to faithful or ideal interpretations. In Hibbitts, legal performance returns us to a primordial connection to the manifoldly sensory. It diminishes the power of text-oriented gender, racial, ethnic and religious elites, allowing such minorities to assume social and political authority. In Goodrich, it offers embodiment to a disembodied series of rules. It makes law a transparent rite, visible and accessible, no longer allowing authorities to hide behind writs. It transgresses ideas of fixed identity. It makes the passionate body visible and thus deconstructs dispassionate truths. Through this body, for Butler and her followers, the law reproduces and polices identity. But this body also becomes the site of resistant performance, an arena for the contestation of the fixed categories of law.

While these views are complex (and obviously far more complex than I have suggested), we can see here an overarching normative opposition. We have, on the one hand, a legal performativity complicit with the law's authoritarian subjugation. Performance is bad because it is an agent of autocratic regulation, producing the law in a dramatic performance meant to conceal its violent origins and its ongoing groundlessness, pointing to an absent authority too terrifying to confront, masking law's continuing violence with ritual splendor, injecting law into our bodies and souls through invisible pathways. And we have, on the other hand, a legal performativity that is the primary agent of liberation from authoritarian subjugation.

Performance is good because it offers collective catharsis, resists formalist textualism, allows one to reconstitute one's identity free from legal strictures, and gives non-verbal language to the illiterate and inarticulate so that, in the new media age, law is at last in the hands of the people.

There are many things here about which we might be skeptical. Here are just a few of them: the claim that law legitimates its authority through performance, when performance often serves to undermine its univocal authority, and when the rhetoric of anti-performance is historically one of law's central techniques of legitimation; the claim that the violence that founds regimes is necessarily (or even often) the coherent act of an absent authority using the performance of force to blind the legal subject to the groundlessness of the law's claims (is the legal subject ever quite so hoodwinked?); the claim that legal theatricality masks law's foundations in violence and the *aporia* of authority at its origins, when just as often it exposes them, recalling violence and groundlessness precisely as a reminder of the absolute nature of the law; the claim that the state's legal theatricality is essential to law's power to coerce, when its power also derives from its invisibility, and when its visibility often makes it open to contest. We might equally be skeptical about claims for the virtues of legal performance: the claim that legal performance encourages disinterestedness or judicial creativity, for surely these depend not on the medium but on the judicial observers (judge and jury); the claim that it produces emotional distance or collective catharsis, permitting recovery from trauma, instead of (as often) smug complacency or collective rage; the claim that the omnipresence of new performance media in legal representation diminishes the power of text-oriented gender, racial, ethnic and religious elites, or that it in any way helps minorities to assume social and political authority, or that it democratizes law, for it is doubtful whether law is more democratic or participatory than it was before the advent of new media. Finally, we might be skeptical about the claim that performance offers the key to transgressing ideas of fixed identity, for if one can perform one can also be forced to unperform.

But even if these were all sometimes true, either of these normative attitudes (pro-performance/anti-performance), in isolation from the other, is obviously wrong. Ceremonies of colonial conquest and revolutionary festivals, executions and panopticons, police demonstrations and anti-war demonstrations, the identity performances of drag queens and of clansmen, flag burning and cross burning, witch trials and slave trials and sex trials and war crimes trials (and so on) – as these all remind us: performance is what performance does. The multifarious and morally complex political history of legal performance controverts the vision of a legal performativity wholly dedicated to liberating us from the strictures of the law, just as it does the vision of a legal performativity wholly complicit with the law's authoritarian subjugations. Theatricality may allow some all-encompassing totalitarian “symbolic” to achieve its effects or help “the great prohibitions” to “deploy their effects” (as Legendre says), but it also often embarrasses and confuses them. Performance matters, politically, to law. But how it matters depends

on who is using it, and how and when it is being used. And it always matters unpredictably. We might try to create a taxonomy of legal performance (in a moment of classificatory enthusiasm), attempting to identify the differences between performances in different types of regimes, endeavoring to determine the function of each type of legal performance, trying to ascertain how each element of performance rhetoric serves specific outcomes (good or bad). But we would fail because any given element of performance rhetoric can mean not just different but opposite things in different contexts. That is, the meaning and outcome of any given event depends upon a thick understanding of the historical context.

If this sounds like a deferral, it is, for it can only be shown with the kind of leisurely historical reading meant for a different essay.⁷⁰ But if one cannot tie legal performance (or any of its habitual rhetorics) to a particular politics, one can recognize legal events as historically triggering strong *claims* for the political virtues and vices of legal performance generally, and acting them out in legal events. If law has historically exploited its theatricality – offering an exemplary spectacle of punishment, awing its subjects with its pomp and ceremony, replaying the crime, and dramatizing the defendant’s story through impersonation – at the same time it has rebuked or abjured its own theatricality. While law has often gained a performative power from its exploitation of theatrical means, it has also gained a kind of surplus legitimacy from its disavowal of these means: we are not exploiting theatrical tactics (claim the producers of the legal event), and this is precisely what shows our strict adherence to the law. Theatricality is essential to the production of law. At the same time, theatricality in law often bears its historically negative charge: law is about accessing truth; theatre is about presenting lies.⁷¹ Law might be theatre’s cure, insofar as it can uncover the truth, but law must always be wary of the theatre that lies in its heart. In short, law’s history is marked by an oscillation between the antinomies of theatricality and antitheatricality, in a relationship of attraction-revulsion – a kind of *fort-da* – between the theatrical and its antithesis. Theatre is law’s twisted mirror, its funhouse double: ever-present, substantiating, mocking, reinforcing, undermining.

To recognize this dynamic requires a rethinking of legal history. For the oscillation between theatricality and antitheatricality is not just a minor subplot of legal history or supplement to law, but at its heart: defining it and

70. For an example of how I envision such reading, see my “Theatricality, Legalism, and the Scenography of Suffering in the Trial of Warren Hastings and Richard Brinsley Sheridan’s *Pizarro*,” *Law and Literature* 18:1 (spring 2006), pp. 15–45.

71. This antithesis is captured in Plutarch’s anecdote about the confrontation between Solon (the lawmaker) and Thespis (the actor), which serves to open Kezar’s *Solon and Thespis*: after attending one of Thespis’ plays, Solon asks Thespis “if he was not ashamed to tell so many lies before such a number of people.” Kezar ed., p. 1. Or, see Alan M. Dershowitz: “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.” “Life is not a Dramatic Narrative,” *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), p. 101.

shaping its self-conception. It lies behind myths of origin: *Exodus* registers at once the power of legal theatricality and the way in which theatricality masks violence, the glamour of spectacle and its deceptions. It lies behind most – perhaps all – legal events: sometimes merely as a faint undercurrent, sometimes as a central structural principle, organizing substantive claims and political contests. It marks the history of legal doctrine: criminal trials must be public, but not too public; show trials are bad, but secret trials are bad as well; evidence must be relevant, but not so dramatic as to be *too* relevant (no mutilated bodies on the legal stage); testimony must be live, but not be too lively (witnesses must stay in the box); what witnesses say and show should move juries, but it shouldn't move them too much. It is central to the meaning of the legal "text," given significance precisely through its opposition to the *ad hoc* performance of the law: just as theatricality comes to stand for artifice, emotion, deception, seductive appearances, the instability of truth, so – through this opposition – textuality comes to stand for stability, dispassionate fairness, fidelity to truth without prejudice, the blindness of the law.⁷²

One can see this dynamic in the form of ambivalence in the great orator Quintilian, counseling the lawyer to exploit gesture, facial expression, and dramatic props such as "blood-stained swords, fragments of bone taken from the wound, . . . garments spotted with blood, . . . wounds stripped of their dressings, and scourged bodies bared to view,"⁷³ but also warning that it was "unbecoming" to use the kinds of "ribald jests [that] are employed upon the stage" ("where the battles of the courts are concerned," he sighed, it was so very hard to separate drama and proper legal oratory).⁷⁴ And one can see it, equally, in a recent article (in a spirit not far distant from Quintilian), "Acting Effectively in Court," which insists: "BE NATURAL"; don't let the jury know you're acting; "[t]he courtroom is not a stage; [t]heater is make believe, while the world that revolves around our practice of law is harsh reality."⁷⁵ But it at the same time advises: train your voice; block your movements and gestures; learn to express emotion; and employ "character voices" (for instance),

[*Defense Counsel*] 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

72. On legal textuality as a historical concept in law, see, for instance, Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990), pp. 111–48. For a similarly formative dynamic in theatre itself, see my *Theatre of the Book: Print, Text, and Performance 1480–1880* (Oxford: Oxford University Press, 2000).

73. Quintilian, *The Institutio Oratoria of Quintilian*, trans. H.E. Butler, 4 vols., Loeb Classical Library (Cambridge: Harvard University Press, 1969–79), vol. II, p. 403 (Book VI, I.30–31); quoted in Jody Enders, *Rhetoric and the Origins of Medieval Drama* (Ithaca: Cornell University Press, 1992), pp. 61–2.

74. Quintilian, vol. II, p. 453 (Book VI, III.29); quoted in Enders, p. 24.

75. Donald B. Fiedler, "Acting Effectively in Court: Using Dramatic Techniques," *The Champion* 25 (July 2001), pp. 19–21. See similarly David Ball, *Theater Tips and Strategies for Jury Trials* (Notre Dame: National Institute for Trial Advocacy, 1994).

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.⁷⁶

In other words, don't be too theatrical. But be oh so very theatrical.

If the essays I've looked at here provide useful analytic tools for thinking about legal performance, they also replay in late modern form this great tradition of legal pro- and anti-theatricality. And their recapitulation of anti- and pro-theatrical positions, albeit in updated versions, tends to blind them to the political multivalence of performative rhetorics. That is, as for their theoretical forebears, legal theatricality is either politically good or politically bad, instead of messy, variegated, circumstantial. I am, however, less interested in condemning them than in recognizing the ways in which they are continuous with, and bear traces of the much broader and deeper discursive and conceptual history toward which I've pointed. Thus, rather than simply rejecting them for their one-sided normativity, we can embrace them as keys to this deeper history, and therefore important to our understanding of the present. Whether or not history follows the arc suggested by Hibbitts and Goodrich – from a rich culture of legal performance to a culture of oppressive textuality to a prodigal return to a culture of legal performance (and, though this would take another essay, I'd argue that it doesn't) – modern media technologies *have* changed our relationship to legal performance. We live in a world in which law is constantly on view in our living rooms, acted and re-enacted, multiplied and refracted through its fictional and real instantiations. The history of law's sometimes uncomfortable relationship to its performance medium and the theatrical double that haunts it is still to be written, but essential to our understanding of the past, essential to our conception of the nature of law, and essential to the ways we negotiate the cultures of legal performance in which we live.

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76. Fiedler, pp. 20–1 (italics added).

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