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Essay

Bedeviling Spectacle: Law, Literature, and Early Modern Witchcraft

Todd Wayne Butler*

Working on assize service in the late seventeenth century in Taunton Deane, England, Sir Francis North oversaw the trial of an old man charged with bewitching a thirteen-year-old girl. Sir Francis's brother Roger accompanied him and later recalled that "whenever the man was brought near [the girl], she fell in her fits, and spit forth straight pins." For Sir Francis, the pins were the first sign that something was not right; in cases of diabolical possession the expulsion of straight pins (rather than crooked) was particularly unusual. Sir Francis therefore carefully examined the old man and his witnesses, each of whom confidently testified that the charge was false and born out of malice. The case had to be handled carefully, for as Roger North explains, popular hostility toward witches could mean that if Sir Francis "did not tread upon eggs, [the jury] would conclude sinistrously, and be apt to find against his opinion."

Reluctant to conclude the trial, Sir Francis continued to question various witnesses in hopes of revealing proof of deceit, finally turning to the local Justice of the Peace who had made the initial examinations and asking him if he had anything to add. The Justice of the Peace initially expressed surprise that he was being called upon to testify after having already examined and jailed the old man, but upon reflection reported that "I think the girl doubling herself in her fit, as being convulsed, bent her head..."

* Todd Butler is currently an Assistant Professor in English at Washington State University. He received his Ph.D. in English Literature from the University of North-Carolina at Chapel Hill (2001), and is currently the President of the Modern Language Association's Law and Literature Discussion Group. He would like to thank the editors of THE YALE JOURNAL OF LAW AND HUMANITIES for their assistance with this article and his former students at the University of Tennessee-Martin for occasioning it in the first place.

2. *Id. at 250.*
down close to her stomacher, and, with her mouth, took pins out of the edge of that, and then, righting herself a little, spit them into some bystanders hands.”

This explanation “cast an universal satisfaction upon the minds of the whole audience, and the man was acquitted.” Sir Roger North further recalled:

As the Judge went down the Stairs, out of the Court, an hideous old woman cried God bless your Lordship. ‘What’s the matter, good woman?’ said the Judge. ‘My lord,’ said she, ‘forty years ago, they would have hang’d me for a witch, and they could not; and, now, they would have hang’d my poor son.’

On its surface, this story demonstrates the triumph of Sir Francis North’s reason over the easily-swayed multitudes. But the account of Sir Francis’s inquiries also has an air of desperation about it, as if Sir Francis—and by extension the account of his work—needed to find some spectacle of his own to compete with the young girl’s antics. The sudden revelations from both the Justice of the Peace and the old woman thus serve as a sort of counter-magic, a spell cast to dissuade not only the girl but also the jury and spectators. The praise of the “hideous old woman” then secures the effect for both North’s immediate listeners and the story’s later readers, as her impassioned thanks reinforces the sense that true justice has finally been secured.

Attending to the power of spectacle in Sir Francis’s story reminds us that there is more to justice than abstract objectivity. Acknowledging a positive role for performance in constituting legal authority problematizes our understandings of evidence and judicial decision-making by requiring not the dismissal but rather the acceptance of rhetoric as a legitimate element of the law. As we shall see, this difficulty has deep philosophical roots, with Plato’s struggles against the Greek rhetoricians providing the implicit if not explicit basis for some of the key challenges to the law and literature enterprise. Richard Posner, for example, has worried extensively over the power of narrative to sway an audience to believe in insufficiently supported conclusions. Posner contends that to react to accounts of oppression “sensibly and not just hysterically, systematically and not just episodically, we have to know its frequency—a matter that is in the domain of social science rather than narrative.”

Posner’s emphasis on quantified social science has been challenged by critics such as Martha Nussbaum and Richard Delgado, each of whom encourage the use of

3. Id. at 255.
4. Id.. Though popular perceptions of witches might vary widely among regions and countries, heredity could be a powerful determinant in accusations of witchcraft. ROBIN BRIGGS, WITCHES AND NEIGHBOURS: THE SOCIAL AND CULTURAL CONTEXT OF EUROPEAN WITCHCRAFT 19 (2d ed. 2002).
7. Richard Delgado, Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for
literature and story-telling as a means of making readers and citizens more aware of, and hopefully sensitive to, the injustices that the law ostensibly sets out to redress. As Nussbaum argues, "stories cultivate our ability to see and care for particulars . . . to care deeply about chance happenings in the world, rather than to fortify ourselves against them."\textsuperscript{8}

At the core of the debate over these issues lie deeply ingrained philosophical conflicts over the theatrical, legal, and social products of rhetoric—performance, spectacle, narrative—and their presumed power both to deceive and enlighten. I recognized this cognitive faultline when I designed and conducted a simulated witchcraft trial for an undergraduate seminar on magic and witchcraft in Renaissance English literature. Basing the simulation on the real case of Anne Gunter, who in 1604 leveled a false charge of witchcraft that ultimately attracted the attention of King James himself, I intended to teach my students the methods by which any investigator, early modern or modern, might uncover the "truth" behind witchcraft. Yet despite my careful planning, events rapidly outpaced the boundaries I had designed when a student, working within the discursive paradigm of early modern witchcraft, calculatedly disrupted our trial by going into fits. In creating her own spectacle my student did more than confound my design for the class. Her fits and the surprise they engendered forcefully demonstrated that, much as rhetoricians such as Cicero and Quintilian argued, persuasion and performance lie at the heart of the legal process. Recognizing this claim complicates our understanding of both historical and modern evidence, ultimately helping us to see rhetoric not just as deceptive theatrics but as an important method for bringing forward the isolated and uncomfortable experience of individuals in order that an entire community can be challenged, expanded, and hopefully improved. Doing so, however, is not simply an assertion of blind or naive faith in the power of tales well told (a charge occasionally leveled against the first generation of law and literature proponents), nor is it a willful disregard for the power of rhetoric to manipulate rather than persuade. Rather, from its classical beginnings rhetoric has contended that truth lies not simply with an assertion of objectivity but with the need for authenticity, a paradigm that demands that the persuasive power so feared by rhetoric's classical and contemporary opponents be married to a consonance with the represented self, a jointure that provides the occasion for the reflective judgment that ultimately characterizes the best hopes and workings of the judicial process.

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Like Sir Francis North, whose work ultimately concludes not with his explanation but with its acceptance by his audience, scholars of modern

\textsuperscript{8} NUSSBAUM, supra note 6, at 184.
law must also grapple with arguments that legal success depends on a mastery of theatrical gestures. Bedeviling to me seems an appropriate descriptor for the challenge posed by such arguments, especially in its highlighting of the way in which the confounding of the law's apparent objectivity seems to involve the law's possession by theater. In addition to its more obvious religious usage, the root "devil" also has a less recognized link to the law itself, appearing in the nineteenth century as a term for "a junior legal counsel who does professional work for his leader, usually without fee." Used as a verb, in this sense "to devil" is to work for another without being formally recognized, precisely the sense in which theater and spectacle work for the law.

The dramatic nature of witchcraft trials offers a particularly fertile ground for exploring the connection between spectacle and law, particularly since an attention to the drama of such accusations reveals their deep complexity. The catalytic power of emotions helped make witchcraft a discursive phenomenon, one constituted not simply by the facts of a particular testimony but by its performance before and among an audience. Simulating the Gunter case, I thought, would be in keeping with this discursive emphasis. Beginning as our own small community, I hoped that our exercise might reveal to my students how presumably rational human beings might become caught up in the emotions that accompanied cases of demonological possession, and by extension how they could learn to read accounts of such cases with an eye and ear for what the historical record often took great pains to disguise.

I had created my simulation knowing the "true" story—or at least the historical record—of Anne Gunter's trial, detailed in James Sharpe's book-length study The Bewitching of Anne Gunter. Sharpe's tale begins with the twenty-year-old Anne falling sick in 1604 with an illness that local physicians, in the absence of any apparent natural cause, attributed to supernatural influence. Anne indeed appeared possessed, often vomiting pins and falling into fits and trances in which she declared three local women to be her tormentors. In March 1605 two of the women (the third having previously fled the village) were brought before the assizes and acquitted, apparently due to suspicions that Anne

10. Marion Gibson notes, for example, that the examination records compiled by local JPs after their interviews with suspected witches often read as if the first question was "when did you become a witch," a query that proceeds from a conclusion of guilt that may well have taken a whole series of earlier, unrecorded questions to establish. MARION GIBSON, READING WITCHCRAFT: STORIES OF EARLY ENGLISH WITCHES 14 (1999). Michael Dalton's widely reprinted THE COUNTRYE JUSTICE, meant as a comprehensive guidebook for the work of a Justice of the Peace, explains that "every Justice of Peace by himselfe is a Judge of Record, and one upon whose sole report and testimony, the law reposeth itselfe very much," a description that emphasizes the mutual dependency of investigative and judicial conclusions in early modern England. MICHAEL DALTON, THE COUNTRYE JUSTICE, 5 (5th ed. London, 1630).
was faking the symptoms of her possession. The case would have ended there but for her father's insistence on pursuing the matter further. The wealthy and litigious Brian Gunter used his connections in the nearby town of Oxford to arrange a meeting between his daughter and King James, who visited the university there in 1605. Brian Gunter did not receive his hoped-for redress from the King; instead, a skeptical James placed Anne under the care of the Archbishop of Canterbury, Richard Bancroft, and his skeptical chaplain Samuel Harsnett. Two months later, with the help of a young courtier with whom Anne fell in love, Bancroft and Harsnett finally induced Anne to confess to her deception. According to Anne, her father had insisted she simulate possession as part of an ongoing dispute he had with one of the accused witches. To further the appearance of bewitchment, Brian Gunter had fed his daughter various herbal mixtures designed to intensify her simulated fits and render her insensible.

Keeping these facts in mind, I had scripted a lesson in how the social and personal disputes of a village might combine to generate a false charge of witchcraft. What resulted was something much different.

* * *

The simulation itself occurred midway through the semester and began with each student receiving a sealed envelope containing a brief description of the town, an explanation of the immediate situation, and specific information about his or her particular character. Since community relations—matters of status, economics, group relationships, and the like—have regularly been identified as a key influence on the progress of witchcraft accusations, the town information I provided included the history of a brawl-filled soccer match in which brothers Richard and Jeffrey Gregory were killed by Brian Gunter, who had beaten both men with the pommel of his dagger. The resulting inquest yielded a ruling of "divine visitation," a term used to cover potentially suspicious deaths in which it was impossible or undesirable to bring a homicide verdict. Although the Gregories later initiated a case against Gunter, the jury declined to indict him, perhaps because he was the town's richest (and most contentious) individual.

Elizabeth Gregory, the wife of a Gregory who testified against Brian Gunter, appears to have been the primary target of Anne's accusations of witchcraft. Like other cases of early modern witchcraft, the narrative of the Gunter case had complex roots. The other two accused women,

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12. Id. at 179.
13. Id. at 180-81.
14. Id. at 185.
15. Id. at 10-12.
16. Id. at 14-18.
17. BRIGGS, supra note 4, at 133-39.
Agnes Pepwell and her daughter Mary (who fled prior to trial), likely were targeted by the Gunters because of their already unsavory reputations—Agnes was widely suspected of being a witch, and it was widely rumored that she had conceived her daughter Mary with a mysterious vagrant. Along with Brian and Anne Gunter, Elizabeth Gregory, and Agnes Pepwell, students were assigned the roles of various villagers and Oxford physicians, all of whom had seen Anne’s fits. Each character knew various information about Anne’s bewitchment, and while some of that information was publicly known, other portions, indicated by brackets and font changes on the character sheets, were known to them alone, and could be shared or kept private based on their own decisions.

To my surprise, the simulation actually began with the distribution of this preliminary material. The distribution of the envelopes itself lent an air of theatricality to the experience, albeit a theatricality that presumed a particular claim on the truth. Somewhere in these envelopes, my students were free to suspect, was the “answer” to our upcoming trial—someone possessed it, and all they had to do was discover it. Spurred by the sealed envelopes and by what one student later described as my “unbearably coy” attitude about their contents, an air of tension and suspicion quickly arose in the class. Some students opened their envelopes immediately, guarding the contents from the wandering eyes of their classmates, while others quickly placed their envelopes away, intent on reading them privately. The moment was the first example of the spectacle that must have attended any charge of witchcraft, a vivid reminder that the definition of our own classroom community had been uncertainly altered.

Though I had initially intended to set the simulation in the court of James I on the eve of Anne’s confession, several factors made that attempt immediately problematic. While the setting was as regal as I could muster (a formal conference room directly adjacent to the Dean’s office), our situation was much different. For obvious reasons I could not arrange for Anne’s confession to occur the way the Archbishop managed it—through the careful cultivation of a love relationship between Anne and one of his courtiers—and since we had already studied together our class lacked the key element of interpersonal distance, often cited by modern historians as a crucial element of the English legal system’s handling of witchcraft cases. What occurred when class resumed was more like an initial inquiry into witchcraft—precisely the moment that Gibson identifies as the one most difficult for modern historians to recapture.19 During an initial witchcraft inquiry, a local Justice of the Peace would examine the parties and their supporters, developing formal depositions that could determine the possibility of indictment (and the indictable offenses) as well as

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18. SHARPE, BEWITCHING, supra note 11, at 26-27.
19. GIBSON, READING, supra note 10, at 3-5.
influence other evidence presented at trial. In his seventeenth-century
guide for the prospective Justice of the Peace, Michael Dalton suggests
that examination records may carry even more weight at the assize trial
than the indictment itself: "His Record (or Testimonie) in some cases, is of
as great a force, and in some other cases of greater force then an
Indictment upon the oath of twelve men."\(^{20}\) Historical records suggest that
the subsequent trial was likely a far more ragged experience than we might
imagine, with confrontations between the accused and victims common
and no doubt dramatic. As James Sharpe has commented, "The
combination of a central actor, a large and anxious audience and perhaps
‘experts’ who knew how to cure possession, or at least how to help the
afflicted, could imbue cases of possession with a massive sense of
theatricality."\(^{21}\)

Nowhere was this uneasy connection between law and theater
demonstrated more effectively to me than in the middle of our simulation.
As the student playing Samuel Harsnett was questioning Elizabeth
Gregory, the student playing Anne Gunter suddenly went into a violent fit,
choking and thrashing with such intensity that it unnerved the entire
classroom. Her "father" Brian bombastically began demanding that
Gregory cease bewitching his child, and thereupon Anne coughed,
thrashed, and spit up into her hands several pins.\(^{22}\) The immediate result
was a stunned silence from everyone in the room, including me. It was a
moment in which the boundaries of the simulation were broken and
reformed in innumerable ways—no longer was I in implicit control of how
the simulation was structured, and our class now shared a common
experience that by the very nature of its spectacle demanded to be
considered and accommodated.

Despite this common connection, however, the immediate result of my
students' theatrics was the complete collapse of the simulation. The very
idea of something unscripted happening in the classroom itself was
unnerving to many of them, and I suspect that at least a few thought I had
put Anne up to the stunt (would that I had been so clever). Silence soon
gave way to confused discussion in which personas were quickly dropped
in favor of animated congratulations for "the Gunter" and confused
glances toward me in hopes of regaining some sort of order. During our

\(^{20}\) DALTON, supra note 10, at 6. Justices of the Peace were thus, as Gregory Durston puts it, "the
main legal variable in witchcraft trials," and since there was no explicit expectation of impartiality,
Justices of the Peace might follow their own widely varying opinions regarding witchcraft. GREGORY
DURSTON, WITCHCRAFT AND WITCH TRIALS: A HISTORY OF ENGLISH WITCHCRAFT AND ITS LEGAL
PERSPECTIVES, 1542 TO 1736 at 245 (2000). For example, Brian Darcy, a publisher of several tracts
asserting the truth behind witchcraft, and Sir Reginald Scot, perhaps early modern England's most
well-known witchcraft skeptic, were both JPs, the former in Essex and the latter in Kent.

\(^{21}\) JAMES SHARPE, INSTRUMENTS OF DARKNESS 204 (1997).

\(^{22}\) The student later explained that she simply placed the pins in the small pocket between her
cheek and gums and then rolled them forward when necessary.
conversations immediately after the simulation, I was struck by how deeply the narrative I had scripted and the entire notion of a “trial” had shaped my students’ participation in the class. While the student playing the lawyer most strongly felt the burden of completing the narrative, several students who had been relatively quiet (poor performers, I had initially thought), later explained they hadn’t said much precisely because they had expected to be asked more questions. When they were passed over they were unsure how to further participate. Most surprising was the response from the student who played the accused witch, Elizabeth Gregory. She confessed that after having thought about her character for some time, she had concluded Gregory actually was a witch. Though her conclusion was contrary to both my and Sharpe’s narrative, my student liked the notion that this woman, tormented by both an individual and the legal system, actually had some power in this scenario. 23

The class laid bare what Shelia Murnaghan has identified as a primary challenge in understanding the relationship between theater and the law, whether we might see in drama (theatrical or legal) “its expressive power, its capacity to capture moments of experience that in their seeming immediacy defy analysis and classification, or its scripted nature.” 24 I was confronted by a pedagogical paradox, for my students had done precisely what I would have wished—gotten deeply involved in the simulation—but in doing so, they had confounded the narrative I had designed. To use a legal term, my students had seized jurisdiction over the class. I have come to realize, however, this was not a mistaken or chance event, for in the act of speaking (dicere) the law (ius) my students placed the very certainty of law into play. My students and I came to realize that the answer to Anne Gunter’s case was not to be found in the scripted case descriptions I had distributed. Rather, the truth of the story emerged in its very telling, a conclusion that challenges the presumptive completeness of printed trial records while simultaneously returning us to the larger question of the place of theater within the law.

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For early modern English juries, fits and the expulsion of pins were, along with abnormal bodily marks, crucial evidence for evaluating charges of witchcraft. 25 At its core, English witchcraft law relied upon the demonstration of maleficium, the causing of evident harm or loss to the

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23. Such shifts in belief were not necessarily unusual in the early modern period. Reginald Scot explains that often an accused witch, “being called before a Justice, by due examination of the circumstances is driven to see her imprecations and desires, and her neighbors harms to concur... so confesseth that she, as a goddess, hath brought such things to pass. Wherein not only she, but the accuser and also the Justice are foully deceived and abused.” WITCHCRAFT IN ENGLAND, 1558-1618, at 175 (Barbara Rosen ed., Univ. of Mass. Press 1991) (1969).


victims and/or their property.²⁶ Fits like those Anne Gunter suffered were visible outward significations of an inaccessible inner torment, evidence that made plain in a legally actionable way the commission of an otherwise undetectable crime.²⁷ Unlike continental law, which authorized the prosecution of crimes such as night flight or making an initial compact with the devil, English witchcraft law generally demanded the performance of harm as the means by which the legal system could make sense of spiritual or supernatural failings. When publicly displayed through the body of a young girl, the impact of such a connection between the spectacular and the unnatural possessed a power far greater than just its legal significance. An account of Anne’s interview before King James, published by one of the monarch’s Scottish courtiers in 1655, emphasizes the theatrical nature of the entire event:

At the time when the King was staying at Oxford a young girl of about eighteen years of age aroused the wonder of the people of Britain on account of her strange cleverness in deception, which imposed upon the astonished multitude. Whereupon James was seized with the wish to see someone so celebrated in popular report. Accordingly, she was at once brought to the King. To the great amazement of the bystanders she lacked all sense of pain when she was stuck with pins. The strangeness of this created great astonishment. Not only was this wonderful in the eyes of those who were present, but she also cast out of her mouth and throat needles and pins in an extraordinary fashion.²⁸

Though the accuracy of this account must be questioned (like any other text on witchcraft), its insistence upon the power of spectacle is remarkable. Despite the author’s careful delineation between the monarch and the multitude, in this case even James appears to have fallen under Anne’s spell, as his curiosity possesses (“seized”) him with the desire to see someone so famous. A similar reversal of power occurred in the uproar that followed my own student’s voiding of the pins, as my carefully constructed simulation took on a life of its own. Though she had discussed her general plan with the student playing Brian Gunter, the choice as to when and how to fall into a fit was entirely Anne’s—she controlled the course of the discussion from then on. As both the original Anne and our modern recreation demonstrates, the power of Anne’s performance partly lies in its sudden and remarkable strangeness. Anne’s cleverness is

²⁶. Passed in 1563, 5 Eliz., c. 16 was the first English law to include maleficium as a significant determinant of witchcraft. The law was replaced in 1604 by 1 Jac. 1, c. 12, which expanded the range of relevant crimes to include not only actual injury but also the unsuccessful attempt at witchcraft. The relevant statutes are reprinted in WITCHCRAFT IN ENGLAND, 1558-1618, supra note 23, at 53-58.
²⁸. SHARPE, BEWITCHING, supra note 11, at 182.
“strange,” that is unusual in a profoundly unnatural way that renders her audience almost paralyzed by wonderment, simultaneously awe-struck and deeply desirous of a continued performance which only she could provide.

It is not simply the common presence of spectacle, however, that links theater and the law. Rather theater and the law both use spectacle in the service of a larger narrative. Shakespeare’s use of the play-within-a-play in *Hamlet* provides us with a familiar example, as the full import of Hamlet’s desire to see *The Murder of Gonzalo* becomes sensible only when understood within the broader context of his suspicions about his father’s death.29 The potentially destabilizing power of performance so aptly demonstrated in Anne’s appearance before the king and his nobles must therefore be co-opted, employed to recover a pre-existing truth rather than to constitute the facts of a case. Both theater and the courtroom, Patricia Parker argues, share an “obsessively staged desire to see or spy out secrets,” and thus to create through testimony a coherent story.30 Parker’s theory is supported by Richard Bernard’s advice to Justices of the Peace on pursuing an investigation of a potentially false witchcraft accusation:

Having thus considered the first thing for the discoverie, the next is, to know what he goeth about to counterfeite, not professedly, as Stage-Players doe, the actions, manners, conditions, places, and states of men; but one of these two, either the naturall (but violent) diseases, or supernaturall workes of the Devill.31

Bernard distinguishes between an actor and an accuser simulating possession—one studies the work of humans, the other the work of nature or the devil—but the difference is one of degree rather than kind. Bernard’s ultimate concern lies with the mimetic nature of such spectacles, for though these counterfeiters present no true evidence of suffering, “some can so lively resemble the same, as the spectators shall judge the parties to be so indeed, as they seeme to bee in outward apparance.”32

Too great an emphasis on the nexus between theater and witchcraft, however, can obscure a crucial point, namely that these events occurred not on stage but in the physical, cultural, and cognitive setting of a court trial. Though both the stage and the courtroom draw upon spectacle for much of their implicit power, legal spectacle differs from theatrical spectacle precisely because it makes an explicit claim to the real. Without such a claim legal proceedings become simply hollow performances,

32. Id. at 29.
fascinating and exciting but potentially illegitimate. Stephen Greenblatt has identified a similar process operating in the ritual of exorcism, in which the exorcist must work to exclude the very notion of the theatrical and its attendant taint of imposture from an event that itself was inherently spectacular. Thus came the need to hold such exorcisms in a sanctified space, enabling the exorcist, in Greenblatt’s words, “to intensify and prolong this collective enchantment while excluding all contractual and fictive elements.” Though the proceedings of divine and civil justice might deploy the power of wonder, they cannot openly acknowledge this relationship without threatening their authority.

The reason for this dilemma lies in part with the implicit connections between claims to legitimacy and claims to the real. In a famous early modern essay on poetry and dramatic performance Sir Philip Sidney would offer an amused dismissal of those who make a truth claim for stage-acting:

What child is there, that, coming to a play, and seeing Thebes written in great letters upon an old door, doth believe that it is Thebes? If then a man can arrive to that child’s age to know that the poets’ persons and doings are but pictures what should be, and not stories what have been, they will never give the lie to things not affirmatively but allegorically and figuratively written.

Using Sidney’s terms we might say that through the mechanisms of a trial performances like Anne’s fits are transformed from “pictures what should be” into “stories what have been,” events that have already occurred and are now recounted on the stage of the real. Writing to reaffirm the existence of witchcraft, Alexander Roberts would thus defend the use of ancient literature as useful evidence rather than simply the product of creative license:

But because the reports of these may seeme to carry small credit, for that they come from Poets, who are stained with the note of licentious faining, and so put off as vaine fictions; yet seeing they deliver nothing herein but that which was well knowne and usuall in those times wherein they lived, they are not slightly, and upon an imagined conceit, to be rejected: for they affirme no more then is manifest in the records of most approved Histories, who essence is and must be truth, as straightnesse of a rule, or else deserve not that title.

Where Sidney contends the poet “nothing affirms, and therefore never lieth,” Roberts argues that the poetics of witchcraft affirm precisely that which is true. It is the nature of this truth, however, that is of particular

34. SIR PHILIP SIDNEY, AN APOLOGY FOR POETRY 124 (Geoffrey Shepherd ed., 1967).
35. ALEXANDER ROBERTS, A TREATISE OF WITCHCRAFT 129 (London, 1616).
36. Id. at 123. Karen Cunningham has recently argued that Sidney’s distinction is belied at least
importance here, for Robert’s argument relies not just upon the power of historical documentation but upon the reproduction of beliefs “well knowne and usuall.” When moments of bewitchment are congruent with accepted social and cultural standards, the power of performance is intensified precisely because it does not seem to be performance and thus can more easily be accepted in an arena which makes a deliberate claim on the real.

This presence or absence of “the real” has been particularly troublesome to more contemporary considerations of the interplay between law and literature. As Julie Stone Peters recently noted, variable claims to the real have bedeviled the field almost since its inception, with literature offering itself as a dose of reality for a law sterilized by social sciences while simultaneously seeking to secure for itself the law’s power in the real world, power that might finally offer literary critics some modicum of social influence. This troubled line between the real and the performed also helps drive some contemporary critics of the law and literature movement. For example, in his recently revised Law and Literature, Richard Posner remarks that Supreme Court Justices who participate in mock trials of the Shakespeare authorship question “do not realize that by doing so they are conferring legitimacy on a misuse of trial procedure that undermines standards of historical accuracy.” On its face this charge itself seems excessively dramatic, especially as it follows his more serious analysis of the similar abuse our trial system endures at the hands of those who deny the Holocaust. At its core, however, Posner’s hostility lies with his concern that story-telling requires no inherent connection to the truth but instead often relies upon the evocation of emotion and a careful arrangement of material into narrative. Careful attention to an audience and the processes of composition thus enables story-tellers (of which lawyers are a type) to transform assertion—itself a sort of performance—into presumptively objective truth.

somewhat by the practical interest that early modern lawyers took in using poets as models for persuasive rhetoric. KAREN CUNNINGHAM, IMAGINARY BETRAYALS: SUBJECTIVITY AND THE DISCOURSES OF TREASON IN EARLY MODERN ENGLAND 4-5 (2002). While Cunningham’s point is well taken, even she acknowledges that at least the end results of trials (her interest lies in treason cases) and plays are substantially different. Luke Wilson, by contrast, contends that English common law provided early modern theater with useful models of human action and intention. LUKE WILSON, THEATERS OF INTENTION: DRAMA AND THE LAW IN EARLY MODERN ENGLAND (2000).

37. ROBERTS, supra note 35, at 129.
38. Such problems remind us that there is another element of “the real” that distinguishes theater and the law, namely that in the end the conclusions of a court have an impact, liberating or pernicious, on actual people rather than literary characters. See Patrick Colm Hogan, On Reading Law as Literature, 25 COLLEGE LITERATURE 233 (1998); Finbarr McCarthy, Poetic Justice: The Literary Imagination and Public Life, 25 COLLEGE LITERATURE 293 (1998).
40. POSNER, LAW AND LITERATURE, supra note 5, at 354-55.
41. Id. at 354.
Such worries are not simply products of recent criticism. Rather they recreate, perhaps unwittingly, a classical juxtaposition of philosophy and rhetoric, between the certain and the protean, between truth and opinion. Our originary moment, if we can identify one, thus becomes not the rise of critical legal studies but Plato's long-standing endorsement of philosophy as the only reliable means to truth. Plato's hostility toward rhetoric is well-known—in Gorgias Socrates rapidly dismantles a series of surprisingly unskilled Sophist opponents, while in The Republic poets are banned because of their skill in denigrating the gods. For Plato the psychological power of the poets, in particular their ability to engage their audiences as a means to instruct and influence them, represented a profound challenge to the objectivity The Republic seeks to establish. With objectivity—the separation of self from the thing being represented—came the abstraction necessary for thinking about the laws or justice as a concept, removed from the particulars of time, space, and individual. Poetry's ability to engage its listeners as a means of instruction and influence, Plato believed, represented a direct threat because it insisted not upon an audience's distance but upon its association with the person or event being represented.

Posner is similarly positioned. While like Plato he recognizes, and even appreciates, the aesthetic properties of literature, he studiously denies aestheticism a role in forming moral and legal judgments. In its place Posner promotes the use of economics to guide decision-making, emphasizing its rational and objective elements as a means to calculate the costs and benefits to society of a particular action or decision. Such calculation is perhaps the ultimate expression of objectivity, since according to Posner the normative potential of economics extends not to the selection of principles (what societies should value) but rather to the costs and benefits that accompany policy. For Posner, the use of performance and literature to aid legal decision-making reorients this calculus toward profoundly non-rational impulses. In particular he worries over the dangerous potential for legal story-telling to assert typicality, inciting an audience to draw an improper generalization from evidence of a single incident. Posner is especially hostile to the use of legal narrative "to illuminate the plight of the oppressed," a usage Posner regards as "whiny and self-pitying" in a modern era of opportunity.

Of course it seems pitiful, but the presence of pity, when properly directed, is far from disabling. According to Quintilian, the famed Roman

42. PLATO, The Republic, COMPLETE WORKS, 595a-608c. (John M. Cooper & D.S. Hutchinson eds., Hackett Publ'g Co., 1997).
43. See ERIC HAVELOCK, PREFACE TO PLATO (1967).
45. POSNER, LAW AND LITERATURE, supra note 5, at 349.
rhetorician who wrote *Institutiones oratoriae* to instruct legal orators, outrage and pity combine to form a powerful persuasive tool, but its use requires that orators move beyond themselves to understand the needs and passions of their clients.\(^46\) Cicero for example insists the virtue of the orator rests largely in how that orator perceives his clients, for “we cannot, even if we are defending total strangers, keep on regarding them as strangers, if we want to be considered good men ourselves.”\(^47\) Classical orators believed that to arouse sympathetic emotions in the audience, the speaker must also be moved by his own oratory. As Antonius explains in Cicero’s *De oratore*, “I swear to you that every time I have ever wanted to arouse grief or pity or envy or hate in the hearts of jurors through my oratory, I was invariably . . . stirred myself by the same feelings to which I was trying to lead them.”\(^48\) Both Quintilian and Cicero see parallels in this process to the experience of an actor so moved by his character’s pain that he sheds genuine tears beneath his stage mask. By speaking as if it is the victim who speaks, Quintilian explains, the advocate’s words “become more effective by being as it were put into their mouths, just as the same voice and delivery of the stage actor produces a greater emotional impact because he speaks behind a mask.”\(^49\) Similarly, in *De oratore* Antonius recalls being so moved in his defense of a soon-to-be exiled citizen named Manius Aquilius that “when I called forward the grieving old man, dressed in mourning clothes, . . . [I was prompted] by deep grief and passion, to do what you, Crassus, were praising—I ripped open his tunic and exposed his scars.”\(^50\) Much the same thing occurred in our class simulation, in which the scars of Manius Aquillius became pins from the body of Anne Gunter, drawn forth by a student who found herself fascinated—perhaps even possessed—by the trials of a girl and time long since past. Only after she fully invested herself in the role I had assigned to her, transforming not just her speech but each physical action, did my student’s performance become effective. To undergo such a transformation first required that Anne Gunter’s story be interesting enough to envision—in this case the advocate needed to be willing to lose her own imaginative control before she could sway the imaginations of her audience. In doing so she secured legitimacy for her performance by ensuring its authenticity, its genuine consonance with her own experience.

Plato or Posner might object, however, that my student deployed rhetoric in the service of a dangerous falsehood. According to the story

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48. *Id.* at 173.
50. *Cicero, supra* note 47, at 175.
she had been given, Anne was lying, and lying about a crime whose prosecution in the early modern period was rife with the abuse of innocent women and men. Importantly, however, this was not the cultural or legal setting in which our simulation occurred. Rather we were skeptics living in a society whose communal narrative—so much a part of the culture of witchcraft accusations—denied rather than affirmed the existence of such a crime. Intensifying this bias, which had been built into the simulation itself, was that of my investigating student, who confessed after the simulation had collapsed that her first response to these sudden fits was simple paralysis. As a twenty-first century skeptic, she explained, she already knew there was no such thing as witchcraft, and this implicit understanding formed part of the structure of our courtroom no less than the formal scripts and character descriptions I had created. Spitting up pins, we might thus argue, was the only way Anne Gunter could have been taken seriously in my classroom. Without such a dramatic act, the potential truth of her possession likely would not even have been seriously considered. Frances Dolan has demonstrated the extensive influence conventional expectations had on the testimony of both witnesses and the accused during early modern witchcraft trials, a process that was inevitably enabled and magnified by the power of print.\footnote{FRANCES DOLAN, DANGEROUS FAMILIARS 171-236 (1994). Anne Gunter, for example, told her confessors that she drew many of the details of her fits from a 1593 tract by John Darrell detailing the torments of several children in Huntingdonshire. SHARPE, BEWITCHING, supra note 11, at 62. Darrell was the target of a concerted campaign by Samuel Harsnett to discredit the notion of exorcism (Catholic or Puritan). In his DECLARATION OF EGREGIOUS POPISH IMPOSTURES, Harsnett claimed that Catholic exorcists draw in believers by engaging in a discursive circle similar to the circulation of texts that influenced the Gunters: “First they omit no occasion...to talk of the strangeness of possession, of the wonders they have scene in possession, of the many marvelous possessions they have been at; and the Echo in all meetings is still possession.” SAMUEL HARSNETT, DECLARATION OF EGREGIOUS POPISH IMPOSTURES 35 (London, Iames Roberts 1603). Given these patterns, as Stuart Clark notes, “[w]hether witchcraft beliefs did in fact correspond with reality becomes, therefore, a question not worth asking—because there is simply no way to arrive at an extra-linguistic answer to it.” STUART CLARK, THINKING WITH DEMONS: THE IDEA OF WITCHCRAFT IN EARLY MODERN EUROPE 7 (1997).} We are thereby reminded that the courtroom and its occupants are themselves filled with biases and ideologies, and that theater and performance may represent not simply arguments but rebuttals, challenges to narratives present but invisible.

Instead of impeding justice, dramatic action can thus be the beginning of its realization, allowing the creation of an environment in which outsiders can be heard. Yet as Posner notes, recognition does not necessarily yield justice, since “[g]reat demagogues understand people all too well.”\footnote{Richard Posner, Against Ethical Criticism, 21 PHILOSOPHY AND LITERATURE 1, 10 (1997).} Nussbaum counters that simple empathy is indeed not sufficient. Rather the more complex notion of compassion is needed, a concept that requires listeners to recognize themselves in another’s
We should not underestimate the potential complexity of this process, for to do so unwittingly ascribes to rhetoric a power that, whatever its critics might believe, classical rhetoricians themselves did not fully claim. "Appeals to pity," Quintilian argues, "must never be long. . . . When time eases even real sorrows, the image of sorrow that we make by our words must vanish more quickly still." Quintilian, supra note 46, at 6.1.27-28. Revising Nussbaum's important essay "Compassion: The Basic Social Emotion," Maureen Whitebrook takes care to distinguish pity (that emotion that so unnerves Posner) from compassion, arguing that while the appearance of suffering may evoke feelings of pity, an act of compassion need not follow. Instead, she suggests, "action results from feeling refined by reflective judgment, including consideration of the best way to respond to the perceived vulnerability." In this sense, dramatic performance can yield a crucial yet limited shock to an audience's cognitive system, forcing observers to consider (or reconsider) their relationship to that which appears before them.

Such arguments are attractive to a rehabilitation of rhetoric's and theater's place in the law precisely because they support the assertion that performance might catalyze rather than undermine more considered judgments. The famous case of the Elizabethan performance of Marlowe's Doctor Faustus, in which a devil supposedly appeared on stage among the actors, is of particular relevance here. Worried that an invocation had actually summoned a devil, the players "after a little pause desired the people to pardon them, they could go no further with this matter; the people also understanding the thing as it was, every man hastened to be the first out of dores." Reading the incident as the emotional reflex of a terrified and superstitious audience perhaps too quickly disregards the range of the audience's potential calculations. Understanding something "as it was" is akin to making a factual rather than procedural judgment, the same distinction that differentiated English common law juries from their early modern counterparts on the Continent. The performance that halted my own class similarly engaged both my students' interest and their analytical abilities—they wanted to know both the mechanics of pin spitting and more about this young girl and her story.

54. QUINTILIAN, supra note 46, at 6.1.27-28.
55. Maureen Whitebrook, Compassion as a Political Virtue, 50 POL. STUD. 529, 540 (2002).
56. Quintilian will thus argue that anticipating an opponent's argument is a powerful strategy, in part because it drains the argument of its vitality. QUINTILIAN, supra note 46, at 6.1.20.
57. BRIGGS, supra note 4, at 127-28.
58. There are any number of "rational" reasons for the audience to have left the building, not the least of which could be audience's simple conclusion that the players' anxieties meant that the play was over.
59. MAUS, supra note 27, at 107.
As my students' reaction suggests, performance contributes to the growth of compassion by inviting one to consider more deeply and effectively the experiences of others. If we truly wish to perform reality, Quintilian explains, "let us assimilate ourselves to feel the emotions of those who really suffer; let our speech spring from the very attitude that we want to produce in the judge. Will the hearer feel sorrow, when I, whose object in speaking is to make him feel it, feel none?"\(^{60}\) Contrary to contemporary associations of rhetoric with celebrity lawyers, Quintilian insists that a true rhetorician must not only be a virtuous individual but must also strive for an authenticity of performance so profound that it ultimately is the client who speaks.\(^{61}\) Truth for Quintilian thus lies not necessarily in objectivity but in authenticity, with a performance that is consonant with both a desired result and with a prior injury. Joseph Vining offers a contemporary version of this argument in his contention that "if one is to be committed to and care about and affirmatively and imaginatively seek what the authoritative voice seeks, one must believe, or assume, that the voice means what it says, that it cares about what it is asking the other to seek, that it believes in what it is asking another to believe in."\(^{62}\) In place of objectivity's disembodied calculus and figurations instead comes a resolutely embodied claim, one that expresses the inherent power and dignity of individuals.\(^{63}\) To succeed the orator must truly connect with those he represents—their suffering must first become his if they are to become the jury's as well. In this sense the theories that ground the crime of witchcraft in the failure of village community have not only historical but also legal and rhetorical implications, for in the adversarial nature of the English judicial system witchcraft prosecutions relied upon accusations designed to highlight the exclusion and objectification of their subject. The Roman rhetoricians, by contrast, offer a more expansive vision of community in which the problems of justice become not simply matters to be analyzed and calculated but troubles to be experienced by all.

Though evocative of a virtuous and enlightened society, these beliefs did not go uncontested in classical culture. Brian Vickers has suggested that a similar political vision spurred Plato's hostility to rhetoric and that of the Sophists, whose prominence in Athenian life coincided with an expansion of jurisprudence from a limited (and implicitly conservative)

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60. Quintilian, supra note 46, at 6.2.27.
61. Strikingly, both Quintilian and Cicero liken such a performance to that of an actor who, hidden beneath his mask, sheds real tears during particularly emotional scenes. See Cicero, supra note 47, at 2.192; and Quintilian, supra note 46, at 6.2.35. On the moral qualifications for an orator, see Quintilian, supra note 46, at 12.1.
63. Individuality, as Joseph Vining contends, is one of the key reasons that "law and rationality, rationality even of a kind conceived by men before and after the sway of rationalism, are not the same." Id. at 106.
magistracy to large citizen juries who controlled all the trial proceedings. In the Gorgias, the result of Plato’s antagonism to these social changes is the creation of a binary opposition between the corruption of politics and the purity of philosophical education, one in which if rhetoric does not consistently promote virtue it must inevitably lead to corruption. Much the same battle lies at the heart of Posner’s own hostility to many law and literature arguments. Posner contends:

[I]f society goes too far in making the administration of law flexible, particularistic, ‘caring,’ the consequence will be anarchy, tyranny, or both . . . . This was the problem with Athenian justice and is illustrated by the trial of Socrates, which Plato implicitly compared to the trial of a physician before a jury of children upon the accusation by a cook.

Posner’s supporting example, not surprisingly, is drawn from the Gorgias, in which Plato sets up Socrates as the philosopher-physician whose aim is to educate the citizenry rather than indulge their wanton pleasures. Yet as I have suggested, the Gorgias is shot through with Plato’s own bias and partiality. Most immediately relevant is the dialogue’s assessment of Greek tragedy, which occurs shortly before Plato proffers his physician-philosopher analogy. According to Socrates, the Greek tragedians, like the poets, seek “merely to gratify the mob of spectators” rather than to struggle against that which is charming but evil. In these terms, performance serves primarily to indulge the basest instincts of human beings rather than to direct its audience toward higher values such as justice and morality.

The theories of classical rhetoric, however, offer grounds to contest both the evidence and ultimate conclusions of this assertion, and in doing so they open a space for a positive reconsideration of the relationship of law and performance. Plato’s jaundiced assessment is not entirely born out by the evidence, for as a whole Greek tragedy is deeply invested in bringing to life the destructiveness of pride or the dignity of those who suffer, so much so that modern philosophers have often noted the resonance between Antigone and the trial of Socrates himself. Classical rhetoricians pursue similarly lofty aims, arguing that to be a truly good speaker one must first be truly virtuous and that rhetoric can catalyze as well as obscure higher thought. To break through the preconceptions that guided both her fellow

64. Brian Vickers, In Defence of Rhetoric 84-91 (1988). The training led by the Sophists similarly extended the civic franchise, offering rhetorical skill to anyone who could pay rather than just to the aristocratic elite.
65. Posner, Law and Literature, supra note 5, at 125.
66. Vickers, supra note 64, at 105. Posner levels precisely the same charge, contending that “the world of literature is a moral anarchy: immersion in it teaches moral relativism.” Posner, Law and Literature, supra note 5, at 311. For a more positive view of theater’s protean element, see Maria Aristodemou, The Seduction of Mimesis: Theater as Woman and the Play of Difference and Excess in Aeschylus’s Oresteia, 11 Cardozo Stud. in L. & Literature 1 (1999).
students and the narrative in which she had been placed, our Anne had to offer a competing and powerful vision of her own, a performance that, like Sir Francis North’s rescue of the innocent witch, appeared to move from the truth but instead reacted to the cognitive and structural narratives that already possessed our simulation. Through such spectacle we can be encouraged to recognize and perhaps even challenge the subtle discursive means by which knowledge and deviance are organized, transmitted, and recalled. The traditions of classical rhetoric thus offer a powerful position from which we might not only recognize but also defend theatre’s place within the law. As Quintilian explains, “[t]hese things commonly make an enormous impression, because they confront people’s minds directly with the facts.”\textsuperscript{67} Inherent in Quintilian’s argument is a fascinating claim, namely that it is through presentation that facts are both embodied and given meaning, for only in their representation do the facts of a case come completely into view.

\textsuperscript{67} Quintilian, supra note 46, at 6.1.31.