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Introduction

LAW AND THEATRE: REPRESENTATION AND RHETORIC

'The law *is* theatre', said Sartre, in an interview with Kenneth Tynan in 1961; 'for at the roots of theatre is not merely a religious ceremony, there is also eloquence . . . The stage is a courtroom in which the case is tried.'[1] But dramatic works in different periods and places spring from different roots. Sartre was commenting on Greek tragedy, and his remark might even be equally applicable to the televised drama of American courts in our own times. However, in early modern England – the focus of this book – the roots, as well as forms, of drama were more mixed, as were the institutional forms of litigation. While the Athenian trial was a public spectacle with a clearly adversarial structure where both litigants presented their own case,[2] trials in sixteenth- and seventeenth-century England were jurisdictionally varied, mediated by counsel except in criminal cases, and consequently less starkly agonistic events. Yet the theatre-as-court metaphor is pervasive in Renaissance drama, sometimes suggesting the theatricality of trials, at other times the judicial structure of drama. Francis Beaumont, in his commendatory verses to *The Faithful Shepherdess* (1610), describes the Blackfriars playhouse as a court 'where a thousand men in judgement sit'.[3] Dramatists such as Kyd, Marlowe, Shakespeare, Jonson and Webster repeatedly open up the action of their plays, explicitly or implicitly, to the judgement, even 'sentence', of the theatre audience. Did the analogy between the two in English Renaissance drama amount to a substantive connection rather than a mere literary commonplace? Were there culturally specific affinities and investments driving the playwrights'

[1] Sartre, 'Interview', 126–7.
[2] See Eden, *Poetic and Legal Fiction*, 13–14; Todd, *Shaping of Athenian Law*; and MacDowell, *Law in Classical Athens*, Ch. 7.
[3] Beaumont and Fletcher, *Dramatic Works*, Vol. III, 490.

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preoccupation with the law? And where does the drama of trial scenes in these plays come from?

Curiously, such plays often anticipate current phenomena in law and life. Vittoria Corombona in Webster's *The White Devil*, and Anne Sanders in *A Warning for Fair Women* (anon.), accused of adultery and murder, self-consciously project their protested innocence through symbolic modes of speech and action, stepping into court with a white rose or fashioning a densely metaphorical rhetoric of moral whiteness. How different are such modes of self-representation from, say, Michael Jackson (accused of child molestation) and his entire family turning up dressed in white in the Superior Court of California in 2004? Or from Al Qaeda terrorists releasing videos of hostages in orange jumpsuits pointedly reminiscent of Guantanamo Bay prisoners' jackets, and related by the same token to the fantasy of symmetry and justice that has informed revenge in imaginative literature? Such gestures seem to speak to some human need to conceptualise and almost symbolise the experience of law, justice and injustice. They express the need for representation, not just in art or in law, but in life, suggesting a connection between the symbolic imagination and moments of crisis. Mary Wragg appeared in court in Lewes on 2 March 2005, wearing a blue ribbon and a lock of her son Jacob's hair on the lapel of her coat, claiming innocence and non-complicity in his killing by his father.[4] Is there something about the legal situation itself – functioning centrally through figuration – that calls up a commensurate representational impulse? The need for justice, the need for credibility, and the need for representation – all attributes of legal procedure – are common to people and texts engaging with the law in all ages. So is the question of how congruent the procedures of institutional law are with the laws that govern our emotional and moral lives. But their expressions take distinct forms, and in different social contexts, produce different alchemies with the dramatic imagination. One of the particular characteristics of legal plots is indeed the inflection of such inherent and abiding issues by historically specific conditions.

The aim of this book is to illuminate the nature and the extent of the engagement between the disciplines and cultural practices of the stage and the court in early modern England. Few periods or kinds of literature show such a deep and comprehensive engagement with the subject. A majority of English Renaissance dramatists had studied law at the Inns of Court, and the theatre audience itself contained lawyers and

[4] Jacob was a sufferer of Hunter's syndrome.

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law-students.[5] Beaumont himself, the son of a common law judge, attended the Inner Temple Inn, and the private theatre audience whom he describes in terms of judicial spectatorship is likely to have included students of law, Blackfriars having been practically next door to the Middle Temple.[6] Besides, the Inns themselves were, among other things, a site of theatrical playing – the best-known example being the first staging of *Twelfth Night* at the Middle Temple on Candlemas Day in 1602.[7] So there was an immediate proximity between the professional worlds of theatre and law in the cultural geography of London.

At the same time, the conceptual link between legal and dramatic structures in ancient Athens, formulated most clearly in the Aristotelian tradition, was mediated to the English Renaissance primarily through the adaptations by Latin rhetoricians and commentators on Terentian comedy.[8] This transmission created a parallel culture in the northern European Renaissance where proofs became integral to dramatic analysis – a phenomenon familiar to most of our English dramatists. The perception of structural affinity between theatrical and legal practice allowed playwrights to address actual legal issues of evidence, interpretation and judgement – the commonest preoccupations of plays interested in the law. Evidence, of course, entails representation, and this immediately links courtroom practice to theatrical mimesis. Representation is indeed one of the features that reconnects the ancient Greek legal arena with the apparently different early modern English courtroom. When Sartre talked about 'eloquence', he was registering the rhetorical aspect of judicial procedure: the presenting of a case involves the staging of truth, and the verbal representation of litigants by lawyers – what Quintilian calls 'prosopopœiae' or 'fictitious speeches of other persons'.[9] In that sense, as well as in the more specifically rhetorical sense of arguing both sides of a case and constructing as well as assessing probability, the Renaissance English courts were as much engaged with eloquence as the Athenian ones. But also, like the people's courts of ancient Attica,[10] the jury system that replaced older forms of trial in England reinforced, in this period, the

[5] On the Inns, see glossary; Prest, *Inns of Court*; and Baker, *Legal Profession*, 3–98.
[6] On the children's companies' satirical drama and 'private-theater audiences of law students, lawyers, and litigants', see Shapiro, *Children of the Revels*, 53–8 (55).
[7] The earliest reference to the play is indeed a note on this performance in the diary of the barrister John Manningham: see Manningham, *Diary*, 48. On theatre at the Inns, and the 'continuum between the court and Inns revels', see Axton, *Queen's Two Bodies*, 1–10 (8).
[8] For a discussion of this transmission trajectory, see Ch. 1, pp. 45–7 and n. 96.
[9] Quintilian, *Institutio*, 6.1.26.
[10] See Humphreys, 'Evolution'; Bullen, 'Lawmakers and Ordinary People'.

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role of the people's representatives in independently evaluating evidence, including witness testimony, especially in the functions of the 'trial jury' (as opposed to the 'grand jury' who could only decide if bills of indictment were actionable or not).[11] The notion of the audience as an equitable jury that underlies so much of Renaissance drama, often providing a provocative basis for alternative criteria of judgement, is surely related to this. What Joel Altman calls 'the equity of tragedy' is a version of precisely such an investment of judicial authority in audience response to the theatrical representation of a 'case'.[12]

The use of drama to create an alternative framework of judgement, however, points to a complexity inherent in the relationship between rhetoric and the theatre since classical times, which goes beyond straightforward affinity. The prohibition against acting on stage in Justinian's *Digest of Roman Law* (seventh century AD) on pain of *infamia* (loss of citizenship or civil death)[13] is located by Peter Goodrich in the paradoxical combination of proximity and rivalry between law and rhetoric.[14] Both practices were determined by forms and conditions of representation. Rhetoric, a discipline that originated in the legal context of persuasion – often called *theatrum veritatis et iustitiae* (the theatre of truth and justice) – was 'the medium through which the drama of law was . . . played out' (418); it focused the performative and argumentative aspects of legal procedure. But the legal tradition itself developed a resistance to acknowledging the fundamentally rhetorical character of legality, going back to Plato's distinction between performance and law, or rather, between verbal performance and the theatre of justice which was meant to persuade to a truth beyond artifice. Traces of such a denial of the affective and social function of legal oratory find their way into later periods, including the Renaissance, when interpretation and passionate persuasion were not always perceived by the law as legitimate roles for the legal orator whose aim should be to arrive at an incontestable 'science or truth that exceeds the realms of contingency' (422). Admittedly, this is a residue of the Roman glossatorial tradition which revered the authority of the text

[11] See Green, *Verdict according to Conscience* and *Twelve Good Men*; Stone, *Evidence*; Shapiro, *Culture of Facts*, 11–13, on the commensurate importance of witness testimony and jurors' assessment of 'facts'. See also Hutson, 'Rethinking "the Spectacle of the Scaffold"', on the implications of jury trial and the participatory nature of the common law for Renaissance revenge tragedy, meant to be a corrective to Hanson's reading of the investigative methods of English common law in terms of the French inquisitorial system in *Discovering the Subject*.
[12] See Altman, *Tudor Play*, esp. 283; cf. 394.
[13] Justinian, *Digest*, Vol. I, 3.2.1.
[14] Goodrich, 'Law'.

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whereas common law was based on precedence, and therefore implicitly on the logic of probability.[15] But as we shall see, these traditions were less segregated in English legal thinking than they might seem to have been. Ironically, the parodic, esoteric figure of the term-spewing, hair-splitting lawyer, common in comic drama,[16] is at least partly a result of the reduction of the role of the legal rhetorician and the displacement of rhetoric from law to literature. At her trial, Webster's Vittoria is described by the Latin-speaking lawyer as a woman 'who knows not her tropes or figures' (III.ii.40).[17] But by making fun of the lawyer and exposing the rhetorical strategies of her prosecutor Monticelso, Vittoria at once relocates legal procedure in artifice and turns the traditional hierarchy upside down by claiming the superior order of rhetoric for her own affective defence plea.

The relation between law and rhetoric, then, is one of the vital clues to the double-strand of similarity and critical distance in drama's relation to law. Rhetoric is at once what aids recognition of the probable nature of the arguments and enthymemes of law, and what allows plays to address it more clearly than legal practice or theory could. It is what aligns the theatrical and the legal through a shared exercise in staging narrative and enargeically representing truths. But if, as Goodrich puts it, 'forensic rhetoric encodes and formalizes the affective and performative dimensions of legal practice' (417), drama decodes it by a more untroubled deployment of rhetorical principles.

But the rhetoricity of legal representation is no more knotty than the business of representing invisible intentions and secret actions – a difficulty that the theatrical medium not only comments on, but enacts, and shares with courtroom investigations of evidence. In the process, the incertitudes of law allow dramatists to create carefully defined areas of uncertainty around the motivation and action of characters onstage. Thus, drama not only addresses but also exploits uncertainties and conflicts within legal procedure and discourse. Its focus on intractable

[15] The glossatorial method characterised the twelfth-century reception of Roman law, which prohibited commentary and interpretation to preserve the inviolable text of the law. See Goodrich, 'Law', 423; Maclean, *Interpretation*, esp. 12–66; and 39–40 on the inbuilt checks to infinite interpretative proliferation in the *CJC* itself.

[16] Tangle in Middleton's *The Phoenix*, Throat in Barry's *Ram Alley*, Lurdo in Day's *Law-Tricks* and Otter and Cutbeard in Jonson's *Epicne* are only a few examples. Voltore in Jonson's *Volpone* is a well-known comic treatment of a corrupt lawyer. See Tucker, *Intruder*, on dramatic representations of the common lawyer, and Johansson, *Law and Lawyers*, on legal figures in Jonson and Middleton.

[17] Webster, *White Devil*. For satire on legal obscurantism, see also Day, *Law-Tricks*, Ruggles, *Ignoramus*, and Jonson, *Epicne* and *The Staple of News*.

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intentions, however, also conveys its understanding of a simpler, but urgent, often fierce, human impulse. As Edgar says in *King Lear*, we 'rip . . . hearts' to know minds (*Lear* F, IV.v.254); Lear himself seeks to 'anatomise Regan' to 'see what breeds about her heart' straight after the mock trial in the Quarto (III.vi.33); Bracciano in *The White Devil* vents his hermeneutic frustration on Vittoria's supposed love-letter to another – 'I'll open't, were't her heart' – and swears to 'discover' her cabinet (IV. i.22, 76). The urge to uncover the inward is not simply a concern of representation but of finding out truths that we do not understand, though the two are not unrelated, as representation presupposes a degree of knowledge and control over material. It is a desire driven by the sense of the inscrutable at the core of the psyche, a mystery that can entice or horrify, tempt as well as resist 'plucking [out]'.[18] Consequently, its literary expressions become inseparable from legal as well as epistemological ideas of discovery; at any rate, from legally inflected language, if not frameworks such as trial or inquisition.[19] Indeed, they symptomise the way in which drama addresses what happens when legal process provides structures of feeling and articulation. When Othello raves, 'It is the cause, it is the cause, my soul',[20] he is expressing his innermost compulsion in terms that are specifically legal: William West, writing in 1590 about contracts in law, defines 'cause' as 'a business, which being approued by law, maketh the Obligation rise by the contract, & the action vpon the obligation'.[21] In other words, 'cause' does not only mean the nature of offence, i.e. adultery, as modern editors seem to assume,[22] but is also the property

[18] Shakespeare, *Hamlet*, III.ii.365. References to Shakespeare's plays are to *The Riverside Shakespeare*, unless specified otherwise.

[19] See Hanson, *Discovering the Subject*, on the inquisitorial context for the contemporary discourse of discovery.

[20] Shakespeare, *Othello*, V.ii.1.

[21] West, *Symbolaeography*, A3[b]; the 1597 edn. cites St. German's *Doctor and Student*, Bk II, Ch. 24, as the authority: A3[a]. See also Sacks, 'Slade's Case', 30, which recounts the entire intertextual conversation.

[22] Cf. Riverside, New Cambridge and New Penguin editions. When Lear asks, 'What was thy cause? Adultery?' (*Lear* F, IV.v.106), he echoes lawyers who spoke of 'cause of action' loosely to mean the abstract nature of the offence involved in a case (e.g. defamation, breach of contract, etc.), and litigation itself as a 'cause' in an even looser sense. But in *Othello*, the word resonates with more technical and specific legal meanings: harking back to the Roman *causa*, it could mean either that in return of which a promise is made; or the reason why a promise is made (*causa promissionis*), defined in a broader sense than common law did; or, finally, the classic English sense of consideration, or why a promise is actionable (*causa actionis*, closely related to the question of *quid pro quo* in the first of these three senses). It is this last sense that is most significant in Othello's use, leading to his putting the case to legal action and referring Desdemona to 'each article' (54), i.e. each item in a formal indictment. On the association between cause and obligation, see Baker, 'Origins of the "Doctrine" of Consideration', 385–7. On the use of *causa* in Quintilian as a case worthy of being

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that lends a bare agreement the weight of lawful 'consideration'. 'Consideration' in turn was defined by judges in a landmark case from 1574 as 'a cause or meritorious occasion, requiring a mutual recompence in fact or law'.[23] The perceived breach of marital contract by Desdemona gives rise to a 'consideration' which provides Othello his 'cause': a solemn and rightful covenant with himself, an actionable case requiring and justifying legal satisfaction, which finds the language of technical legitimation. From meaning Desdemona's crime, through the route of legal signification, 'cause' almost comes to mean a moral purpose, a mission. When Tomazo, in Middleton and Rowley's *The Changeling*, complains, 'How is my cause bandied through your delays!/'Tis urgent in blood, and calls for haste', he is, similarly, pressing his case, demanding justice or 'recompence' for murder and adultery committed by others, not suggesting the nature of any crime perpetrated by him.[24]

Overall, legal plots in drama communicate a sense of law as a tentative and contingent measure, made human and less-than-apodeictic by the same token; enabling and manipulable at the same time. They are alive at once to the detrimental consequence of the exploitation of loopholes by individuals, and the range of human and emotional possibilities often opened up by precisely such cunning use; to the merely probable end of legal logic as well as to the miraculous probabilities created by mobilising law. Sometimes the inflexibility of certain laws is seized upon to create gaps and errors in experience that are tragic in content, but formally conducive to comic resolutions; in such cases, the law becomes analogous to the rules of comedy, and each becomes the other's tool. Thus, dramatic explorations of legal issues not only illuminate the workings of literary form in relation to the matter of experience, but in the same act communicate an apprehension of law as social action and communication. This perception is confirmed and sometimes modified by the archival research in which this project is grounded.

METHOD

Integrating the methods of social history, intellectual history and literary criticism, this study constructs a history of law as lived experience from a

legally pleaded, see *Institutio Oratoria*, ed. Russell (hereafter, *Institutio*), 10.7.21. The only modern editor to gloss Othello's 'cause', albeit cryptically, as 'ground for action' or 'the case of one party in a law suit' is Honigman, in the Arden Shakespeare edition (1997).

[23] Calthorpe's Case, as cited in Simpson, *Common Law of Contract*, 323.

[24] Middleton and Rowley, *Changeling*, V.iii.134–8.

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research of three principal classes of primary material: play-texts; theoretical legal treatises such as Henry Swinburne's *A Treatise of Spousals* and *Of Matrimony* and Christopher St. German's *Doctor and Student*; and legal documents surviving from court cases, such as depositions, interrogatories, personal responses and exhibits. It also considers pamphlet literature generated by law cases.[25] A comparative enquiry is especially productive since each of these groups of texts is particular in its narratorial investments and strategies. Institutionally produced and often accidentally preserved, legal records give us essential facts, but tend to leave out details that would interest the cultural historian – often elusive and non-quantifiable. For these, I turn to literary texts, which translate historically specific perceptions through fictional devices that are distinct from the 'fictions' shaping court papers. But to map this larger interrelated field, I also look at legal theory – to be found, in this period, not only in the obviously legal texts but also in philosophical writing more generally. The book aims to recover, from these distinct sources, a sense of law as a site of changing notions of privacy, certainty and contingency in terms of custom and use; it posits, in the process, a nuanced way of writing the history of emotions and perceptions by drawing upon literature as substantive evidence. To quote Goodrich, 'a critically adequate reading of law should take account of the various levels of law as a social discourse, as a series of institutional functions and rhetorical effects.'[26] The present study offers precisely such a reading, showing especially how legal plots in drama bring together the affective and the discursive, concerns that can easily suffer an unfortunate separation in critical studies. Ideas such as probability and uncertainty, emerging in the legal and philosophical traditions of the period, are given a human face in plays.[27]

Attempting to recover the perceptions of individual and communal experience of law through drama has made it necessary to consider the subject across several jurisdictions. It has also meant being alive to gender-specific experiences. As a literary critic, I do not offer statistical analysis;

[25] The term 'law' is used in the widest sense to include law-texts, institutions, legal procedure and courtroom practice. Textually, however, statutes are less revealing for my purposes than legal treatises, commentaries and court papers. See Baker, 'Editing the Sources', 207–8, on how Acts of Parliament, though theoretically above the common law, never took the form of a comprehensive code and remained, until the nineteenth century, an appendix to the main body of English law.

[26] Goodrich, *Legal Discourse*, 205–6.

[27] On the emergence and development of probability in legal philosophy, see Shapiro, *Probability and Certainty* and *Culture of Facts*; Franklin, *Science of Conjecture*; and Hacking, *Emergence*, against which both Shapiro and Franklin react. Patey, *Probability*, is an exemplary study linking philosophic theory to literary form in a later period.

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but then, the objects of my study are, emphatically, qualitative rather than quantitative, perceptions rather than records, a *sense* of things rather than figures. Indeed, in some cases, as with the often quasi-legal role of women in court procedures, statistics could be positively misleading.

Some of the larger ideas about law intimated in this book would bear consideration over a longer period of change and development. The evolution of the notion of probability, for instance, calls for observation across the Civil War period and well into the first decade or so of the Royal Society's activities. This study points the way to this and other hinterlands, and has implications for the larger, possibly collective research that the subject merits.

The choice of literary material, though necessarily selective, is deliberately various, to indicate the generic determination of dramatic treatments of law. Similarly, well-known plays by dramatists such as Shakespeare and Webster are addressed alongside neglected plays such as the anonymous *Warning* or John Day's *Law-Tricks*, to indicate the range of early modern drama's preoccupation with law, and the diversity of literary texts that shared in this conversation. The archival research has been inevitably determined in part by practical considerations. The Cambridgeshire documents preserved in the University Library (including Ely diocesan records) have been an obvious treasure-trove. But in using canon law depositions I have tried to ensure a balance between disputed spousal litigation or adultery cases from northern dioceses like Durham and those from southern locations like Canterbury and Norwich, as older Catholic customs and practices died harder in the North than in the more Puritan-influenced South.[28] For common law sources, I have relied heavily on the archives of the Public Record Office. The research of social and legal historians has provided valuable pointers and facilitated my archival investigations. I have also looked at cases from Chancellor's courts of both Oxford and Cambridge, indicative of practices in the less clearly defined and lesser-known jurisdictions.

CONTENTS

In the last Act of Jonson's *The New Inn*, when Fly declares that Beaufort and Frank are married in the stable, the 'Host' – Lord Frampul in disguise – exclaims, 'I have known many a church been made a stable,/But not a

[28] But see chapter 1, p. 34 on overriding similarities of attitudes and social practices.

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stable made a church till now'.[29] Contrary to his feigned disbelief, many a stable and backyard was 'made a church' in early modern England, where a simple verbal pledge in the present tense could make a canonically valid marriage, no matter how much the Church and the State, not to speak of the Reformers, discouraged or denounced it.[30] Confusions were inevitable, and it was at times fiendishly difficult to ascertain the validity of marriages and indeed of spousals, from the assemblage of reports and evidences cited and refuted. The dramatic engagement with contemporary marriage law and sexual litigation provides a point of entry, in my opening chapter, into the larger issue of uncertainty that the law of evidence had to negotiate in trying to determine truths of motive and intention, and raises questions about the relation of the concept of probability to the dramatic form. The dramatic corpus is understood not only with close reference to legal records from the period, but also in relation to Swinburne's *Spousals* (c. 1600). This three-pronged approach demonstrates the need for subjecting legal texts themselves to a judiciously deconstructive attention where appropriate. Swinburne is singularly vexed by the potential of dissonance between positive law and the law of conscience:[31] this awareness opens his text up to the precise hermeneutic possibilities that are deliberately made visible by the fictional lens of legally preoccupied plays.

Chapter 2 focuses on the treatment of adultery in 'domestic' tragedies, concentrating on Heywood's *A Woman Killed With Kindness*. Rather than discussing critiques of legal evidence, it explores the implications of the social process of investigation and evidence-collection, especially in cases involving sexual conduct, and how the drama addresses the nature and limits of this procedure through a self-conscious, indeed self-critical,

[29] Jonson, *New Inn*, V.ii.13–14.

[30] Such a contract was known as spousal *per verba de praesenti*, to be distinguished from spousals *per verba de futuro* – contracts made in the words of the future tense, denoting a promise to marry in the future. Private chambers and bedrooms were also 'made a church', as testified by Webster's Duchess who has 'heard lawyers say, a contract in a chamber/*Per verba de praesenti* is absolute marriage', even as she marries Antonio in her bedroom, kneeling, and proclaiming that the church cannot 'bind faster' (*Duchess of Malfi*, I.i.477–9, 491). As a rough and ready distinction, then, 'spousal' could be either an engagement (when *de futuro*), or a present contract of marriage (when *de praesenti*), while 'marriage' usually referred to solemnised unions, though the confusion over contracts made that definition slippery.

[31] 'Positive law' refers to human, institutional law, as distinct from (but ideally reflective of) natural law – a moral standard deriving from the nature of the world and the nature of humanity. So, in theory, natural laws may be authoritative by value of their intrinsic morality, independent of social or institutional conventions. On natural law and the drama, see White, *Natural Law*; McCabe, *Incest*. See also Kahn and Hutson, *Rhetoric and Law*, Introduction.

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