LAW IN DRAG: TRIALS AND LEGAL PERFORMATIVITY

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To import Judith Butler's work into a conversation about law is to unfurl a provocative new map of a familiar landscape and to revel in the pleasure of traveling it, off-road, looking anew at landmarks so many have passed by for so long. She has a way of talking about law that pins down its complicity in a stubbornly enduring social order even as she breathes life into it as a domain for exploration and critique. The force of her thinking—for me, particularly her thinking about performativity —shatters conventional ideas about what law is by enabling us to ask how it is enunciated, what it produces, how it is "done." Can one think of law as a kind of subject formation in itself, one that authorizes itself via what Butler has called a "sovereign conceit" but that in fact is called into being in the very act of calling others to account?

Taking up performativity this way might seem slightly off-color. After all, as Butler has framed it, the interpellative process has a political edge to it. "Its purpose," as she proposes in *Excitable Speech*, "is to indicate and establish a subject in subjection."[1] One could hardly argue that law is a "subject in subjection." And yet, in what follows, I will try to elaborate on the ways in which at least one kind of legal operation, the trial, is implicated in an interpellative process[2] that destabilizes its own relation to state power, though neither fully nor innocently.

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[1] JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 33–34 (1997) [hereinafter EXCITABLE SPEECH].

[2] An interpellative process is a process that calls legal subjects, and law itself, into being.

Moreover, I will argue that the trial is a legal space ripe for critical analyses of identity formation, a place in which the norms that bring certain kinds of moral or moralized subjects into being are contested rather than assumed. In trials, alterity (that is, difference or otherness) within norms can be at least partially exposed because of the ways in which trials stage their own performative relation to "law."

Though I think one could make this claim as it relates to trials generally, I'd like to focus on one particularly self-reflexive trial—self-reflexive because of the way it *self-consciously* stages a fracturing of the meaning of "law" —by way of illustrating the incisiveness of the concept of performativity in complicating notions of the "juridical." While the arguments that follow should not be understood as a celebration of trials as radically transformative legal spaces, either for the law or for the social subjects that come before it, thinking about their performative enunciations of law does, in my view, open up a way to analyze moments of disruption and foreclosure in the ongoing citational processes that constitute social identity.[3]

Trials always begin with a story, but even in its barest outlines this one is perhaps more remarkable than most. In 1901, a sixteen-year-old woman named Evelyn Nesbit first met the

[3] Butler develops a theory of the citational nature of identity—that is, the idea that identity is constituted via the performance, repetition and deformation of social norms—in a number of major works. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1999) [hereinafter GENDER TROUBLE]; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); JUDITH BUTLER, UNDOING GENDER (2004); EXCITABLE SPEECH, *supra* note 1.

great New York architect and aesthete Stanford White.[4] A striking beauty, she had pulled her family out of poverty by moving from Pittsburgh to New York to find success as a photographic model and budding stage performer.[5] White, in his late forties, had a penchant for young beauties and he drew Nesbit into an extravagant world of glittering champagne parties and private modeling sessions before either seducing or raping her (depending on the account) in the mirrored bedroom of his private penthouse suite in the first Madison Square Garden (a spectacular building of his design).[6] Though clearly traumatized by the event, Nesbit became White's mistress even as she was being courted by other wealthy playboys, including her future husband Harry Thaw. She relied on White for money, of course, but they also appear to have been deeply entranced by one another, and though their affections eventually waned, Nesbit would never—even during her testimony in Thaw's trials—fully renounce him.[7]

Born to a wealthy Pittsburgh family, Harry Thaw lived an eccentric and profligate life, as debauched in its own way as was White's. Having seen Nesbit onstage at around the same moment White came into her life, Thaw's attraction to her quickly turned

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[4] For historical accounts of the Thaw-Nesbit-White affair, see generally MICHAEL MOONEY, EVELYN NESBIT AND STANFORD WHITE: LOVE AND DEATH IN THE GILDED AGE (1976); PAULA URUBURU, AMERICAN EVE: EVELYN NESBIT, STANFORD WHITE, THE BIRTH OF THE "IT" GIRL, AND THE CRIME OF THE CENTURY (2008); PAUL BAKER, STANNY: THE GILDED LIFE OF STANFORD WHITE (1989); GERALD LANGFORD, THE MURDER OF STANFORD WHITE (1962); FREDERICK ARTHUR MACKENZIE, THE TRIAL OF HARRY THAW (1928). For unreliable but fascinating contemporaneous accounts, see BENJAMIN ATWELL, THE GREAT HARRY THAW CASE: OR, A WOMAN'S SACRIFICE (1907); EVELYN NESBIT, THE STORY OF MY LIFE (1914); EVELYN NESBIT, PRODIGAL DAYS: THE UNTOLD STORY (1934) [hereinafter PRODIGAL DAYS]; HARRY THAW, THE TRAITOR: BEING THE UNTAMPERED WITH, UNREVISED ACCOUNT OF THE TRIAL AND ALL THAT LED TO IT (1926); *see also* Martha Merrill Umphrey, *The Dialogics of Legal Meaning*, 33 LAW SOC'Y REV. 393 (1999).

[5] For the most recent scholarly account, see URUBURU, *supra* note 4, at 53–78.

[6] *Id.* at 131–43.

[7] *See, e.g.*, PRODIGAL DAYS, *supra* note 4 (offering an interesting resuscitation of White).

into an obsession, and once she began to separate herself from White, Thaw leaped in as her protector and financial supporter.[8] Alternatively extravagantly loving and shockingly violent, his erratic behavior possibly the result of morphine addiction, Thaw begged Nesbit to marry him even as he badgered her with questions about her relations with White. In 1905, at the age of nineteen, Nesbit seems to have concluded that, under the circumstances, Thaw was her best bet.[9] They married, yet Thaw's jealousy of White continued unrelentingly. He engaged private investigators to tail White and report his continuing exploits to the notorious moral reformer Anthony Comstock and he forbade Nesbit from calling White anything but "the Beast".[10] Finally, on the hot evening of June 26, 1906, Thaw spotted White in the Garden's rooftop theater, walked calmly over, pulled out a pistol hidden under his heavy overcoat and shot him in the head. "I did it because he ruined my wife,"[11] Thaw called out to the panicked crowd around him as Nesbit looked on with disbelief.[12]

When Thaw entered a courtroom in early 1907 to plead not guilty before an international press corps, a tightly packed audience, a gaggle of attorneys, a presiding judge and a jury of twelve men, he entered a space of law. Who was he, in relation to law? What kind of space was it, and how should we characterize its legality? What kinds of power flowed through and around him over the course of his two trials? We might say from a theoretical point of view that Harry Thaw stood "before the law."[13] While he was always a legal subject in a thin sense by virtue of his incorporation in the body politic of the United States, his public courtroom appearance amounted to a literal

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[8] URUBURU, *supra* note 4, at 177–204,

[9] *Id.* at 205–48.

[10] *Id.* at 260–63.

[11] *Id.* at 282.

[12] *Id.* at 269–87.

[13] The allusion is to Franz Kafka's well-known parable *Before the Law*. *See* FRANZ KAFKA, THE TRIAL (1925).

interpellation: hey, accused man, you are now recognized as such by the law, you have become a legal subject in the sense that you are conjured, constituted, brought into being on the law's terms by standing accused before the law.[14] This is a scene of thick legal subjectivization spectacularized. Imagined in a Kafkaesque way, the feeling is one of entrapment, of being caught in law's discursive and institutional nets even before the powerful performative moment of judgment. Imagined (perhaps) more benignly within a liberal framework, to come before the law is to be constituted as a legal subject through the operations of the "rule of law," with the ideological effect that the man in the courtroom becomes an individual, a sovereign subject presumed rational and capable of choosing between right and wrong, abstract and atomized, and equal to all other individuals coming before the law.[15]

And yet what do we mean by "law" here? If one wishes to take up an event—an adjudicative event, one that both speaks and enacts legal judgment—it seems as though invoking the abstraction "law" naturalizes certain imaginings of the operations of state power even as it obfuscates the dynamics of legal subjectivization. It is easy enough to elide this fantasy of law with others: the pre-enlightenment sovereign,[16] or the Lacanian Symbolic,[17] or the rule of law, and to forsake attending to the various faces of "law" that, in their carnivalesque engagements with each other and with those that come before

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[14] On interpellation *see* LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS (Ben Brewster trans., 1971).

[15] The literature on liberalism and equality is large. Ronald Dworkin's work can serve as a representative example: "No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community—without it government is only tyranny . . . " RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000).

[16] For one analysis of such a sovereign, *see* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979).

[17] On the symbolic, *see* JACQUES LACAN, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, *in* ECRITS: A SELECTION, (Alan Sheridan trans., 1977).

them, both enable and disrupt the exercise of various forms of power. From this perspective, in order to begin to say anything about how one is made subject to law, one ought to tease out and distinguish among various kinds of law, and to consider the ways those variants are themselves constituted and how they claim the name of law.[18]

Butler's rich theory of performativity has opened up two distinct lines of thought in my work that have moved it in directions oblique to canonical scholarship on trials in legal studies or to legal theory more generally.[19] The first line considers how trials conjure both fractured and powerfully normalizing social identities in ways that reveal their contingency and theatricalize the discursive boundaries that appear to render these social identities culturally coherent. The second line, which perhaps less obviously implicates the cultural politics of performativity but is nevertheless deeply political, asks the question: in what ways can it be said that trials are, or "do," law?

Harry Thaw's two trials are an unusually helpful example of what I think occurs more generally in any trial that has

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[18] For one example of such an approach *see* Umphrey, *supra* note 4.

[19] For examples of scholarship that, taken together, do take up the performative and cultural aspects of trials, *see* MILNER S. BALL ET AL., TRIALS (Martha Merrill Umphrey ed., 2008). Most historical books on famous trials narrate trial proceedings and events leading up to them relatively straightforwardly. *See, e.g.*, JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE VERSUS O.J. SIMPSON (1997); EDWARD LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (2006); RICHARD WIGHTMAN FOX, TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL (1997); IDANNA PUCCI, THE TRIALS OF MARIA BARBELLA: THE TRUE STORY OF A 19TH-CENTURY CRIME OF PASSION (1997); GILBERT GEIS LEIGH B. BIENEN, CRIMES OF THE CENTURY: FROM LEOPOLD AND LOEB TO O.J. SIMPSON (2000). Law and society and legal theory work on trials tends to emphasize trial process and narrativity rather than the performative aspects of the proceedings. *See, e.g.*, W. LANCE BENNETT MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981). For two at least partial exceptions to this general tendency *see* ROBERT P. BURNS, A THEORY OF THE TRIAL (1999); ROBERT HARIMAN ET AL., POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW (Robert Hariman ed.,1990) [hereinafter POPULAR TRIALS]. For an excellent overview of the idea of legal performance, *see* Julie Stone Peters, *Legal Performance Good and Bad*, 4 LAW, CULTURE HUMANITIES 179 (2008).

integrity to it, revealing the ways in which trials are law-making (not just law-applying or law-interpreting) events *because of their performativity*. They are performative in two senses: they not only enact law, both theatrically and linguistically, in their very doing,[20] but also performatively constitute the law they enact. By that I mean that, paradoxically, though they are discrete and singular events, trials also proceed reiteratively, drawing upon and repeating particular discursive formations and invoking conceptions of cultural and legal subjectivity whose sedimented meanings have no final, non-contingent ground or origin. As Butler has suggested, "[I]s iterability or citationality not precisely this: *the operation of that metalepsis by which the subject who 'cites' the performative is temporarily produced as the belated and fictive origin of the performative itself?*"[21] Put another way, the performative authority of law in the Austinian sense emerges out of its very performativity in Butler's sense. Just as the gendered body is constituted through repetition (*Gender Trouble*), and meaning accreted through the sedimented historicity of words (*Excitable Speech*), so too "law" and the legal subjects who come before it are fabricated and staged through "a reenactment and reexperiencing of a set of meanings already socially established"[22] in prior trials.

Most legal theory characterizes law otherwise. While natural law theory unambiguously locates law outside the ambit of the social,[23] for legal positivists interested in theorizing on the operations of sovereign power, law is (as John Austin first described it) a command backed by threat of force.[24] This top-down model conjures law as the effect of a unidirectional flow of power, constituting legal subjects through both fear and

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[20] Many of J.L. Austin's exemplary performatives—"I do" or "guilty!"—are, after all, drawn from legal settings. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS lectures 1 2 (1962).

[21] EXCITABLE SPEECH, *supra* note 1, at 178 (emphasis in original).

[22] GENDER TROUBLE, *supra* note 3, at 140.

[23] *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[24] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfred E. Rumble ed.,1995) (1832).

appeals to self-interest.[25] That model continues to inform much contemporary liberal legal theory, which conceives of law as a coherent set of rules to be applied equally to all citizens.[26] Perhaps champions of the common law come closest to a trial-oriented theory of law insofar as they argue that the common law emanates and evolves out of the customs of the country rather than the commands of nature or of the sovereign. The common law is essentially trial-based, and so a certain interpretive elasticity is built into it as a structural matter. Yet classic theorists downplay that aspect, rather emphasizing the ways in which it is tethered to the past (rules become laws only when they have been in place from "time out of mind"[27]) and stabilized by the weight of precedent in judicial rulings.

Yet conceiving of law as "performative" suggests that we can forward an expansive understanding of law not just as the application of formal legal rules or past precedent, but as a set of contingent enunciations made across a number of legal locations: the street corner, the interrogation room, the district attorney's office, a lynching scene and, of course, the trial. Particularly in the United States, with its long (if waning)

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[25] This is the model Michel Foucault equates with "law," as opposed to "discipline," in his work on both discipline and governmentality. *See* FOUCAULT, *supra* note 16.

[26] *See generally* H.L.A. HART, THE CONCEPT OF LAW (1971).

[27] But common law theorists tend to emphasize both its stability over its variability and its elitist, anti-democratic tendencies. As Sir William Blackstone describes it:

> Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law . . . .

1 WILLIAM BLACKSTONE, COMMENTARIES *45. On Blackstone's conservatism, *see* DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1941). On common law reasoning in American constitutional interpretation, *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

tradition of jury trials,[28] the trial offers a space in which law is put into play, contested and sometimes transformed in its enunciation. This is so in large part because of its formal properties: the adversarial format, the narrativity and theatricality of advocacy and the public nature of the proceedings. While a flat-footed, judicial-confirmation-hearing version of adjudication would suggest that legitimate decision-makers simply apply the law to particular fact situations (the "judge as umpire" fantasy[29]), more nuanced theorizing about trials tends to conceive of them as spaces of contest over the "interpretation" of law.[30] But the claim that trials "perform" law focuses an analysis not only on questions of meaning but also on questions of power. How is law discursively constituted such that it produces particular renderings of both law itself and legal subjectivity?

Legal rules—both substantive rules defining the criminality of the acts at issue and procedural rules governing the introduction of evidence—do matter in creating and choreographing the context for the enunciation of law: they shape the incriminatory and exculpatory narratives of fact and responsibility told to the jury over the course of the trial.[31] At the same time though, it's theatricality, particularly the central role audience reception plays in determinations of guilt and innocence, renders the space of the trial a porous one in which legal rules can be inflected, overdetermined and even dismissed out of hand. Significantly, to succeed attorneys must appeal to competing versions of cultural common sense—not just any argument that comes to mind—in order to narrate stories that are internally persuasive to the audiences before them by drawing

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[28] On the decline of trials as a legal form, see Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

[29] For a recent example of its use, *see* Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1.

[30] *See* BURNS, *supra* note 19.

[31] *Id.*, at ch. 3; *see also* Martha Merrill Umphrey, *Introduction: Legal Performances and Public Cultures*, *in* TRIALS xi (Martha Merrill Umphrey ed., 2008); POPULAR TRIALS, *supra* note 19.

on prior stories, prior scenes of judgment and prior scripts that define the parameters of responsibility. To that extent, trials are both fresh and reiterative, and they put the grounds of "law" into question in ways that are both singular and citational.

Harry Thaw's two trials exemplify the performativity of law insofar as his defense teams self-consciously attempted to delegitimize the authority of formal legal rules—particularly rules governing the adjudication of criminal responsibility. Thaw killed Stanford White intentionally and publically without immediate provocation and proclaimed his motives in ways that seemed to indicate obvious legal culpability. No matter how vile and lecherous the scandalous Stanford White became in the eyes of some, through the lens of formal legal rules Thaw was properly accused of murder, punishable by death.

Formally, Thaw's only option for full acquittal of the murder charge was to plead insanity, but in his first trial that plea was a ruse so that his California attorney Delphin Delmas could claim that Thaw ought to be exonerated on the basis of what was called the "unwritten law." The unwritten law was, at the time, a well-known concept invoked in the nineteenth century to legally exonerate certain kinds of men (who tended to be higher class, white, mostly but not exclusively southern and western) who killed their wives' lovers.[32] Appeals to the unwritten law carried the day in a number of notorious trials in the mid- to-late nineteenth century.[33] Drawing on a conception of responsibility steeped in the logic of honor, attorneys argued that no self-respecting man would or should turn to courts to redress the deep insult of cuckoldry or, more generally, the damage done to his authority and jurisdiction over his wife by her seducer. They claimed that unwritten law—along with other common practices of "extralegal" violence such as lynching, dueling and the like—*held the status of law* itself because it embodied the idea of popular sovereignty, the authority of which could, under proper

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[32] The most famous of these cases (the 1859 Sickles-Key case, the 1868 Cole-Hiscock case and the 1870 McFarland-Richardson case) are described in HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 242–86 (2000); *see also* Robert Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27 (1989).

[33] *Id.*

circumstances, override the authority of positive law itself.[34] This particular assertion of "law" asserted its legitimacy by grounding itself in natural law, in the "nature of things," that is, in a deeply naturalized heteronormative order so powerful that it accorded men widely-endorsed prerogatives that could defeat the universal application of the rule of law. When unwritten law cases were actually prosecuted (and no doubt many were simply let go), this kind of "law" was placed in direct conflict with positive law and criminal responsibility was negotiated and adjudicated out of that conflict. Once juries acquitted these defendants, the unwritten law argument itself was, performatively, made "law"; that is, enunciated as judgment in a context and in ways that made it felicitous—and therefore legitimated it—as a legal speech act. But it also became named and legitimated *as law*—the law governing criminal responsibility in these cases—because it was literally "cited" as law enunciated in prior cases. This is a naming of law: as Butler puts it, "the sedimentation of its usages as they have become part of the very name, a sedimentation, a repetition that congeals . gives the name its force."[35]

Harry Thaw's lawyer mimetically appropriated the logic and rhetoric of earlier unwritten law cases, lionizing Thaw's heroism in ridding the world of a moral monster. Under this logic, Thaw in effect became the law himself—a law legitimated by appealing not only to the "natural" protective role husbands took on in relation to their wives, but also to jurors as men of honor who would act knowingly and intentionally in the same way as Thaw acted under similar circumstances. This double identification—of Thaw with law and of jurors with Thaw—was essentially homosocial, but depended upon a profound heterosexualization and domestication of Thaw (whose actual sexual proclivities—bisexual, promiscuous, commodified, and sadistic—were anything but domesticated). In this way the trials

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[34] Apologists for lynching, both in the south and the west, clearly articulated this line of thinking. For one powerful imaginative culture example of such arguments, published just before Thaw's trials, *see* OWEN WISTER, THE VIRGINIAN: A HORSEMAN OF THE PLAINS ch. 33 (1902).

[35] EXCITABLE SPEECH, *supra* note 1, at 36.

literally theatricalized Thaw's identity as a husband (and Nesbit's as a ruined woman and White's as a villain).[36]

Thaw's trials took place at a threshold moment in the history of criminal responsibility,[37] and while this essentially pre-modern characterization of Thaw resonated with a significant segment of the public, it did not, in the context of turn of the century New York, carry enough cultural legitimacy to displace the formal, positive law of murder. Even so, neither did the formal law of murder override the unwritten law as Thaw's first jury hung. The indecisive clash between these two conceptions of law rendered indeterminate the whole basis for adjudicating criminal responsibility. From where did the "law" by which one judges Harry Thaw emanate? [38] To the extent that Thaw's trial dramatizes that question, it reveals law to be not natural or grounded but rather contingent, scripted, subject to disruption. From trial to trial, one can see a repetition of discursive frameworks, narrative strategies and strategic invocations of formal legal rules; and yet because of the agonistic structure of trials, one also finds the imminent potential of "a failure to repeat, a de-formity, or a parodic repetition that exposes the phantasmatic effect of abiding identity [of, for example, the rule of law] as a politically tenuous construction."[39] There one can locate transformations in law over time and space. Indeed verdicts—particularly jury verdicts, in the United States —parody the very notion of a singular and essential origin of

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[36] In that sense, the Thaw trials drew on familiar and powerful tropes from the genre of melodrama. On melodrama, see PETER BROOKS, THE MELODRAMATIC IMAGINATION: BALZAC, HENRY JAMES, MELODRAMA, AND THE MODE OF EXCESS (1976).

[37] On the early twentieth century history of criminal responsibility, see Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995).

[38] "Understanding performativity as a renewable action without clear origin or end suggests that speech is finally constrained neither by its specific speaker nor its originating context. Not only defined by social context, such speech is also marked by its capacity to break with context." EXCITABLE SPEECH, *supra* note 1, at 40.

[39] GENDER TROUBLE, *supra* note 3, at 179.

"law."[40] Hence the conceit of my title: the law trials make is law in drag, a law ironized, without ground or essence, constituted through a "stylized repetition of acts."[41]

In his second trial Thaw mounted a straightforward insanity defense and was acquitted. Yet one ought not read this seemingly straightforward outcome as the ultimate triumph of positive law or the consolidation of its legitimacy; indeed this second trial equally demonstrates the performativity of law. Thaw's psychological profile, however indicative of mental instability, clearly did not meet the criteria of New York's insanity standard. New York followed the M'Naghten test,[42] under which acquittal required that Thaw not know the difference between right and wrong, or the nature and quality of his act. He knew his acts were illegal and he asserted that they were morally correct; on either definition of "right" Thaw ought to have been convicted. But medical experts and lay witnesses in his second trial emphasized genetic and physiological evidence tending to support broader deterministic conceptions of responsibility—his glaring eyes, his staccato speech, his family history of insanity, his weakened constitution after childhood illness, his sudden violent outbursts, his sadism toward Nesbit and others, both male and female and his obsession with White and with Evelyn Nesbit's lost virginity—and such arguments tapped into broader cultural conceptualizations of degeneration and perversion.[43] Evidence of this sort signified a de-masculinized, medicalized subject whose own self-sovereignty

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[40] *Id.* at 175.

[41] *Id.* at 179.

[42] On the origins of the *M'Naghten* test, still in place in a number of states today, *see* RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN (1981).

[43] In the larger project, I connect this argument with a determinist cultural logic visible in the work of literary naturalists. *See, e.g.*, THEODORE DREISER, SISTER CARRIE (1900); THEODORE DREISER, AN AMERICAN TRAGEDY (1925); FRANK NORRIS, MCTEAGUE (1899); FRANK NORRIS, THE OCTOPUS: A CALIFORNIA STORY (1901).

was in question, not one who embodied the law.[44] Yet as with the first trial's unwritten law argument, this particular rendering of insanity contested the authority and applicability of formal legal rules, resignifying the meaning of "responsible legal subject."

What kind of legal subject, then, was wrought from this set of contests? Out of Thaw's two trials, three possibilities emerged: Thaw the "responsible" sovereign subject—a rational actor deserving of retributive punishment for the murder of Stanford White; Thaw the honorable husband, himself a lawgiver "responsible" for the production and maintenance of a powerful heteronormative order; and Thaw the irresponsible degenerate, exempt from the jurisdiction of positive law but not from the disciplinary apparatus of the asylum. Each took on meaning both from the sedimentation of past practice and judgment in prior trials and from broader cultural tropes and scripts that encoded the problematics of responsibility in incompatible ways. Thaw's acquittal might ultimately be understood as signaling the triumph of modernity, the moment when "law" took on a biopolitical conception of human subjectivity. Yet if a determinist rendering of responsibility prevailed in court, the pre-modern melodrama of the unwritten law remained powerfully explanatory; Thaw was hailed by many as a hero upon his release from Matteawan Asylum. As such, I see the Thaw trials as a condensation of a moment of dramatic instability in conceptualizing the legal subject, marking a crisis of vulnerability for positive law as a mode of governance. As would become clear, that crisis in the end shifted the "law" of criminal responsibility as it was performed in trials from a tilt in the direction of robust popular sovereignty toward a eugenicist logic of the sort that culminated in the infamous *Buck v Bell*.[45]

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[44] Indeed this line of argument resonated with emerging theories of criminality grounded in a logic of genetic determinism that challenged the very premises of a liberal legal conception of the "responsible" subject.

[45] Buck v. Bell, 274 U.S. 200 (1927) (holding that forced sterilization of institutionalized "feeble-minded" woman does not violate due process principles); *see also* Green, *supra* note 37; CHARLES ROSENBERG, THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND THE LAW IN THE GILDED AGE (1968); DONALD H. J. HERMANN, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES (1983). On *Buck v. Bell*, see PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008).

However indebted this analysis is to Judith Butler's work, it may be that I have appropriated the idea of performativity, as it were, inappropriately in the sense that I apply it to a subject—law, not social identity—that fundamentally alters its politics. Indeed I worry a little about its easy literalization in an analysis of trials, which are by nature theatrical and replete with so many contingencies. As Butler casts it, "performativity" describes the mode by which identity is constituted and naturalized via repetition and resignifying the naturalized is no easy task. Trials, and the law done in them, are so fundamentally and obviously linguistic and context-dependent that the dynamics of interpretation and resignification are inescapable. Perhaps the lesson here is that, as a normative matter, we ought to conceive of identity in ways that more nearly resemble the ways we conceive of law, but the challenge mounted by Butler's destabilization of identity certainly feels more profound than mine to the stability of law.

Too, while theorizing the performativity of trials reveals a certain democratic potential at the heart of law, it behooves us to wonder about the political ramifications of that potential, which from the point of view of subject formation seem perhaps less politically progressive the more one muses on them. If the contingency of trial-made law can often work against the seamless imposition of state power on the subjects who come before it, that disruption of one kind of power can come at the cost of the imposition of another. Indeed, Thaw's case suggests that, within the framework of trials, contests over legal subjectivity take a conservative rather than radical turn: either Harry Thaw was cast, within the penumbra of the unwritten law, as the embodiment of heroic heteromasculinity in a melodramatic narrative of violence and redemption, or he was placed under the pall of insanity as a degenerate madman. His own self-stylization and the complexities of his attitudes and acts (certainly queer, however unsavory) were rendered unsayable in court in any way that could credibly challenge a prevailing conservative heteronormativity.[46] The very terms of the trial, which always use "responsibility" as a touchstone, can

[46] Something similar occurs during the trial phase of gay marriage litigation, when same-sex couples and parents are profoundly normalized as the family next door.

easily render non-normativity into legal and moral irresponsibility, and hence using trials to challenge certain kinds of cultural common sense can run against the very logic of the legal form.

Still, I see real value to legal theory and scholarship in thinking about the performativity of law, which requires attending to both the theatricality of legal judgment and the processes of sedimentation by which legal meanings, and correlatively legal subjectivity, emerge and are transformed. If, as Butler argues, "a performative 'works' to the extent that *it draws on and covers over* the constitutive conventions by which it is mobilized,"[47] then trials draw the covers back, showing us the strenuous work required to instantiate and reinforce certain kinds of cultural commonsense about law's origins and legitimacy. They are also spaces of signification and resignification, dramatizing in a heightened and stylized way contests over human subjectivity and its relation to state and disciplinary power. Conceiving them that way, as Judith Butler's marvelous work enables us to do, can unmask what otherwise too easily remains hidden: the fault lines along which we produce and police the social construction of subjectivity.

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[47] EXCITABLE SPEECH, *supra* note 1, at 51 (emphasis in original).