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Performing Justice

Jessie Allen
University of Pittsburgh
jallen@pitt.edu

Abstract

Formal legal process is sometimes viewed as a rational intervention in bias, including the emotional biases stirred by 'constitutional patriotism'. At the same time, critics have attacked the histrionic aspects of legal process as a trumped-up show that manipulates our emotions. I agree that adjudication is a performance, but I believe the very obvious artificiality of that performance may be its saving grace. The critique of what Jeremy Bentham called 'theatre of justice' ignores the way we see through the artifice of judicial process, even as we are morally and emotionally stirred by its effects. Courtroom performances do not produce objectively unbiased and uniquely correct legal outcomes. But they may provide some legitimacy for enforcing those outcomes by enacting a patently illusory ideal justice and confronting us with the gap between that ideal and our lived reality.

Keywords

Judicial decision-making – performance – law and culture – socio-legal studies – legal realism

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> [E]very appearing thing acquires, by virtue of its appearingness, a kind of disguise that may indeed – but does not have to – hide or disfigure it.
>
> HANNAH ARENDT[1]

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Allegiance is a problem in a liberal constitutional state. Citizens whose devotion to their government, is, as Coke puts it, 'written by the finger of the law in every one of their hearts', may not be able to assert their independent rights or even recognise injustice.[2] Absent all emotional ties, however, the state will likely fracture along racial, ethnic or religious lines. Jürgen Habermas proposes 'constitutional patriotism' as a possible solution. Rather than ethnic identification or love for a particular set of cultural values, constitutional patriots are bound by their shared devotion to interpreting their constitution in the best way possible.[3] Even such procedurally focused affection, however, troubles the rationality required for a liberal justification of the state's coercive power. Habermas suggests that 'the legal system's neutrality' can cool the patriotic heat and legitimate a constitutional state's violence.[4] The problem is that legal process looks less like a neutralising antidote to political passion than a performance designed to stimulate irrational feelings of attachment to the state that has produced it.

Public adjudication is the gold standard of legal process. But anyone who has set foot in a courtroom knows that what goes on there has as much to do with drama as with rational inquiry.[5] And like all drama, courtroom drama is fraught with illusion. Judges act as if they are finding legal rulings by applying objective rules, while making subjective choices about which rules to apply and how. Witnesses testify as if responding spontaneously to questions, but everyone knows they have been coached. Lawyers are professionally histrionic – paid to play righteous believers in their clients' cause under a code of ethics that reads like warning label: 'representing a client does not constitute

1 *The Life of the Mind* (New York: Harcourt Brace Jovanovich, 1978), 21.

2 Coke, *Second Part of the Institutes*, 121, quoted in William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Chicago: University of Chicago Press, [1765] 1979), 357.

3 Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998), 225.

4 Habermas, *Inclusion of the Other*, 225.

5 That is why there are so many more TV shows about lawyers than about scientists.

approval of the client's views or activities'.[6] The whole process is wrapped in a rule-bound formality that adds austerity and grandeur. All in all, public trials seem designed to generate sympathy for judicial outcomes, rather than a rational assessment of those results.

Judicial techniques are sometimes justified as necessary for the production of a fair trial, or at least for making participants feel like they have been treated fairly. Law and society scholars like the psychologist Tom Tyler have shown convincingly that litigants' perceptions of the fairness and dignity of legal proceedings are central to their willingness to comply with legal decisions: 'people who receive outcomes that they regard as unfavorable or unfair are more willing to accept those outcomes if they are arrived at through procedures they regard as being fair'.[7] Of course, as Tyler points out, for critical observers who see law as amplifying rather than reversing social and economic injustice, perceptions of fair treatment are just a kind of false consciousness, a matter of being taken in by an elaborate performance of fairness and justice. The state gets credit for a rule of law that is neither ideologically nor emotionally neutral. In this view, formal legal process is basically fraud – a show of objectivity that obscures a corrupt decision-making process actually driven by the decision makers' political and personal interests. This is the legal process Jeremy Bentham called a 'theatre of justice',[8] and the American Legal Realists derided as a 'ceremonial routine' of 'word jugglery' and verbal 'sleight of hand'.[9]

I want to respond to concerns about the insincerity of formal courtroom process in a different way. I agree with the judicial critics that what takes place in courts is a performance that deals in illusion. I disagree, however, that such judicial performances are necessarily harmful to the pursuit of justice and democratic legitimacy. In fact, the often-obvious hypocrisy of formal legal process may be its saving grace. Sceptics stress the phoniness of courtroom ritual – the way acting as if legal rules produce objective outcomes costumes politics as justice and masks the subjective decision-making at work. But what this critical insight overlooks is how we understand legal performances as unreal even as we act as if they are real. This double consciousness complicates the critique. If formal legal process is a mechanism for generating emotional attachment to government, it is also a process that reveals those emotions as

6 American Bar Association, *Model Rules of Professional Conduct*, Rule 1.2, Comment 5.

7 Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law,' *Crime and Justice* 30 (2003): 283–357 (292–93).

8 Jeremy Bentham, *Rationale of Judicial Evidence*, in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 1 (Edinburgh: William Tait, 1843), 354.

9 Felix Cohen, 'Transcendental Nonsense and the Functional Approach,' *Columbia Law Review* 35 (1921): 809–49 (821, 841–42).

artificially created. It may be that the performance of legal process can offer a kind of partial legitimacy to the government it authorises exactly because the transparent artifice of that performance alerts us to its limits.

The partial legitimacy I am ascribing to legal performance falls far short of conceptual faith in an objective rule of law, but neither is it the purely empirical legitimacy Tyler describes as 'the property … an authority has when others feel obligated to defer voluntarily', even when those feelings are undeserved.[10] In the view I am proposing, court-authorised government violence is not underwritten by a rational belief that legal process produces substantively correct legal outcomes. But neither is it just a feeling of fairness. There is some real normative value added when obviously artificial courtroom performances both produce a model of ideal justice and force us to confront the difference between that performed ideal and reality.[11] Formal court procedures earn some respect for the government that employs them by showing us what justice looks like and repeatedly exposing the flawed and artificial nature of the justice they produce.

Treating the revealed flaws and illusions of a legal system as even a partial warrant for government force might seem like an absurd or disingenuous approach. But I mean it quite seriously. I mean to argue that courtroom performances, although shot through with hypocrisy, are not necessarily harmful to a democratic society that values truth. Formal procedures that treat all individuals with dignity and respect are an illusion in a state where the equal dignity of all individuals is not recognised in everyday life. But such formal enactments do not purport to transparently represent reality. They are not the sort of naturalistic representative drama that we associate with prime-time TV. By revealing the fabricated nature of what is being performed – the gulf between performance and reality – formal courtroom process gives the performance of justice paradoxical authenticity.

Justice Performed: Illusion and Construction

Formal adjudication shares with theatre and ritual the awareness of deliberately shaped appearances. Sometimes that awareness is subliminal – a judge

10 Tyler, 'Procedural Justice,' 307.

11 For another attempt to articulate a middle ground between classic normative legitimacy and the non-normative psychological legitimacy of empirical studies, see Denise Meyerson, 'Why Should Justice Be Seen to Be Done?' *Criminal Justice Ethics* 34 (2015): 64–86.

puts on her robe before going into her courtroom just because that is what judges wear. Other legal costume choices are more conscious. As a young woman attorney, I gave considerable thought to how wearing a skirt or pants might affect audience assessments of my character. And I recall once waiting in an empty courtroom for a trial to resume and watching a defense attorney pull a suit, shirt and tie from a closet hidden in a wood-panelled wall. Before the jury arrived, her client was brought in from the holding pen, and with his attorney's help he shed his prison jumpsuit and changed into the clothes she provided. When the jury was ushered in, they found the accused already seated at the counsel table, a well-dressed young man in a dark blue suit, looking like he had just come from a corporate office uptown, rather than jail.

At first this might seem to prove Bentham's point about the mendacity of legal theatre and its manufacture of false images. But this is where double consciousness comes in. Juries know that this kind of thing is going on behind the scenes; not, of course, that business suits are hidden in the courtroom walls, but that, just like a Broadway play, a trial does not unfold naturally, that it is produced with an audience in mind. The jury in the trial I observed did not know where the well-dressed defendant got his suit, but they were not under the misconception that he was dropping in on the trial from a midtown office.

Note that I am not arguing that the defendant's costume was necessary to prevent prejudice. That is the classic procedural justice explanation for the practice of providing jailed criminal defendants with street clothes for trial in US courts. Indeed, the US Supreme Court has explained that 'the State … cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes' because that would undermine the presumption of innocence accorded criminal defendants in our legal system.[12] It may be that jurors presented with a defendant in a prison jumpsuit are likely to infer that he belongs in prison, or to unconsciously shift toward rendering a guilty verdict in order to avoid the cognitively dissonant image of an innocent person dressed as a convict. But what I mean to call attention to is not the problem that the defendant's suit was ostensibly meant to solve but the theatrical nature of that solution. After all, if the goal was to avoid distorting the jury's view of the defendant's character as an accused but not yet convicted person, he might have been required to wear the clothes in which he was arrested, or some other clothing that he had actually worn in his life outside the courtroom. Instead, he and his attorney are free to choose the outfit they regard as most likely to convey the persona they want to present. In a different setting, we might regard

12 Estelle v. Williams, 425 U.S. 501, 512 (1976). *See also* L. L. Levenson, 'Courtroom Demeanor: The Theatre of the Courtroom,' *Minnesota Law Review* 92 (2008): 573–633.

that choice as amounting to a disguise. But everyone understands, and expects, that the participants in a trial will 'dress up'. We both see the defendant's costume and see through it, that is, see that it is a costume. This is the 'subjunctive' nature of performance, our recognition that performance creates an alternative 'as if' world in contrast with the world that actually is.[13]

Of course there is no essentially authentic 'real life' outside the courtroom that is devoid of artifice. Social theorists have long pointed out that all social interaction involves performance, that being one's self in various situations amounts to playing different characters.[14] For that matter, William Shakespeare famously articulated the performance aspect of everyday life: 'All the world's a stage, / And all the men and women merely players'.[15] Nevertheless, we understand performance as an experience, or an aspect of experience, distinct from the unconstructed quality of everyday life. There are many different definitions of performance, but they generally involve a quality of displacement – of opposition to, escape from, or separation from the flow of ordinary events and behaviour. Richard Schechner identifies 'restored behavior' as 'the main characteristic of performance', that is, the use of texts, sequences of movements, or styles of action that 'exist separate from the performers' who carry them out.[16] Joseph Roach emphasises what he calls 'surrogation', the idea that performance 'offers a substitute for something else that preexists it', or 'stands in for an elusive entity that it is not but that it must vainly aspire both to embody and to replace'.[17] And Seligman et al. describe ritual performance as enacting an 'order that is self-consciously distinct' from 'the possible social world'.[18] Rather than illustrating beliefs about the nature of the real world, then, legal performances proceed in tension with 'the participants' experience of lived reality'.[19]

13 Victor Turner describes the subjunctive as 'a world of "as if," ranging from scientific hypothesis to festive fantasy,' and contrasts it with the indicative world of 'actual fact.' *From Ritual to Theatre: The Human Seriousness of Play* (New York: PAJ Publications, 1982), 83. See also Adam Seligman et al., *Ritual and its Consequences: An Essay on the Limits of Sincerity* (New York: Oxford, 2008), 20–21.

14 See, for example, Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959).

15 William Shakespeare, *As You Like It*, act 2, scene 7 (London: Edward Blount, William and Isaac Jaggard, 1623).

16 Richard Schechner, *Between Theatre and Anthropology* (Philadelphia: University of Pennsylvania Press, 1985), 35–36.

17 Joseph Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York: Columbia University Press, 1996), 3.

18 Seligman et al., *Ritual and its Consequences*, 20.

19 Seligman et al., *Ritual and its Consequences*, 20.

Yet performances sometimes stimulate feelings that are indistinguishable from our emotional reactions to real events. Like theatre audiences, juries bracket their knowledge of artifice in order to respond to the performance as if it were unscripted. Indeed, juries are often explicitly instructed to do what theatrical audiences are implicitly expected to do – ignore some of what they see and hear in order to take the performance on the terms offered by the performers. An instruction to disregard a witness's 'hearsay' answer seems dubious until we remember that theatregoers routinely overlook much of what they observe – the artificiality of the painted backdrop, an actor's false moustache, the fact that they have heard these same lines before – to have deep feeling responses to the performance. Still, even as they respond emotionally as if the staged drama were real, theatre audiences know that what they are watching is a make-believe world. At the end of *Hamlet*, some audience members will have real tears in their eyes, but no one will be surprised when the bodies littering the stage rise for the curtain call. The capacity to act, and feel, as if something we know is artificially created is real is at the heart of legal performance's potential for both obscuring and constructing reality. As Bentham observed, judicial theatre is capable of hiding injustice behind a show of legality, further entrenching injustice.[20] But it is also true that by staging the subjection of government power, the performance of legal process puts liberal values of equality and individual dignity at least momentarily into practice.[21]

Related contradictions are present *within* legal performance. The formalisation of roles – judge, plaintiff, defendant, jury, witness, prosecutor – emphasises the distance between those wielding legal power and those subject to it. But at the same time, it loosens the boundaries between them. Recognising that staged personae are distinct from the individuals playing them at any given moment opens the possibility of recasting. What Joseph Roach observes of performance in general is true in spades of legal performance: it makes publicly visible 'both the tangible existence of social boundaries and, at the same time, the contingency of those boundaries on fictions of identity'.[22] If power is a mask that can be put on or taken off, then anyone playing the part will be em-

20 Jeremy Bentham, *A Comment on the Commentaries*, ed. J. H. Burns and H. L. A. Hart (Oxford: Oxford University Press, 2010), 200–01.

21 Judith Resnik has written persuasively about the value of judicial performances, proposing that public adjudication contributed to the development of liberal democracy as 'rites turned into rights.' Judith Resnik, 'Constitutional Entitlements to and in Courts,' *St. Louis U. Law Journal* 56 (2012): 917–35 (923). See also Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011).

22 Roach, *Cities of the Dead*, 39.

powered. We can imagine ourselves shedding a role of subjection and stepping into a more dominant part, or we might fear that we could be stripped of a dominant role and forced to play a subordinate character. In another sense performance subordinates *all* the participants, who must commit themselves to playing their roles as conventionally determined. As Seligman et al. put it, ritual performance 'creates and recreates a world of social convention and authority beyond the inner will of any individual'.[23]

An example of the paradoxically equalising power of a hierarchical legal performance appears in an old common law procedure known as 'surrender'. In baronial courts, peasant farmers who performed a surrender acquired the ability to transfer their rights to farm parcels of land. As Blackstone describes the procedure, the tenant farmer first offers some symbolic object to the landlord in open court. After the surrender is accepted, the lord transfers the farming rights to whomever the surrendering tenant designates, 'by delivering up to the new tenant the rod, or glove, or the like, in the name and as the symbol, of corporal seisin of the lands and tenements'.[24] The key point is that once the rite of surrender is properly performed, the landlord is bound to follow its terms – if he wants to maintain the land as a tenant farm. The lord could choose to take possession of the land himself. But if he wants a tenant to farm it, he is bound to take the person named by the surrendering tenant, who thus acquires a right to transfer his tenancy that Blackstone says was enforceable in chancery court.[25]

The surrender procedure embodies two opposing aspects of performance – illusion and construction. The landlord only acts as if he is bound to surrender, when in fact he has the power to blow up the whole proceeding by taking back his land. At the same time, once the landlord goes along part way, it is likely that he will complete the ceremony that gives the tenant an enforceable power to sell or will his tenancy to another person. After all, the landlord gets something in exchange for his submission to the ritual. The lord's enactment of obedience to custom, and of treating tenants with dignity, likely makes his tenants more inclined to view his dominion as legitimate, making it easier to maintain without using force.[26] Thus, the further paradox that through ritual submission the more powerful party actually gains power, or at least insulates his power, even as the less powerful party also gains. Ultimately, the

23 Seligman et al., *Ritual and its Consequences*, 11.

24 Blackstone, *Commentaries on the Laws of England*, ed. Wilfrid Prest and Simon Stern, vol. 2 (Oxford: Oxford University Press, [1766] 2016), 248–49 [366].

25 Blackstone, *Commentaries*, ed. Prest and Stern, vol. 2, 250 [368].

26 See Tyler, 'Procedural Justice,' 306–09.

surrender performs a social equalisation that puts the dignity of every individual into practice, and makes it possible to imagine that dignity embodied in the subordinated person in the real world. Like all imaginary worlds, this one has the potential to distract attention from reality or to inspire real world transformation.

This dual illusion–construction effect is not limited to obscure feudal rites. A similar entrenchment of existing hierarchy and enactment of equalising dignity takes place in courtrooms today each time a party with less social status manages to publicly compel a socially dominant party to comply with legal procedure. To the extent that legal ritual appears to have erased the power gap, it casts an illusion that obscures injustice; to the extent that it creates a pathway to greater dignity and equality for the subordinated party, it constructs (partial) justice.

Performance and Revelation

To these two aspects of legal performance, illusion and construction, I would add a third – call it revelation. This is the ever-present possibility of a hitch or screw-up that reveals the incongruity between performance and reality. All public performance has a tendency toward such revelations, born of the fact that audiences actually do see everything that happens, not just what appears within the 'as if' frame. At some point audiences become unwilling or unable to disregard things that disrupt the alternative performance world. Legal performance is no exception. As Bentham observed, 'men, though in the theatre of justice accustomed to talk morality, as a poor player in the like character might do upon the stage, such men will, like the poor player, sometimes forget their part'.[27] The hyper-formalisation of role performances in court – the robed judge on a raised platform, the tailored attorneys, the orchestrated sitting and standing at the bailiff's cries, the oaths and obsequious address – 'your honour' 'my esteemed opposing counsel' – create a certain vulnerability to disruption, a potential for revealing – accidentally or on purpose – the imperfect humans at work behind the curtain of formality.

Revelation can be the product of a particular audience perspective, or some accident that throws a critical light on the whole performance. The sceptical Bentham saw the nods, winks and smiles among experienced judges and lawyers that signalled that they knew the testimony they treated as truthful was

27 Bentham, *Rationale of Judicial Evidence*, Book 3, Chapter 13.

actually false.[28] Doubtless those tell-tale breaks in character were visible to many other participants, but went unnoticed by observers with a less critical gaze. Likewise, we may tend to overlook the fact that in city courthouses throughout the United States, most of the staff and criminal defendants are people of colour, while most of the lawyers and judges are white. Occasionally, however, something happens that makes such inequities hard to ignore. A colleague recently recounted one such revelatory hitch that took place in a Pittsburgh housing court. Tenants in that court are usually unrepresented, and most attorneys are white men. On this day, however, a young African American woman attorney rose to state her appearance for her tenant client. The judge, an older white man who may have been having trouble hearing in the noisy courtroom, appeared confused and asked her again who she was, and she repeated her name. The frustrated judge then began demanding 'who are you' 'why are you here' – apparently not stopping to consider that this young black woman could be 'appearing' in his courtroom not in the role of an impoverished tenant but as a lawyer. Finally, the court clerk, realising the judge's mistake, pointed to the lawyer's name listed on the counsel sheet, and the performance of racially neutral judicial evaluation was back on track.

The violation of idealised courtroom justice creates a powerful dramatic effect. As Thurman Arnold points out, 'the cultural value of a fair trial is advanced as much by its failure as by its success'.[29] It may be that expectations are raised and unfulfilled, or it may have something to do with the perceived hypocrisy of going through the formal motions of justice while producing substantive injustice. The young Bentham felt a 'mixed sensation of disgust and melancholy' to see lawyers 'noting perjury and treating it as a good joke'.[30] And no one present in the Pittsburgh housing court could have missed the lesson on the racialised casting of legal roles.

Sometimes revelatory disruptions are not accidents but an orchestrated part of the performance. Broadway producers open the flies to expose backstage machinery, and puppeteers appear on stage so that we can watch them pull the strings that make the inanimate performers seem so alive.[31] Counterintuitively, such deliberate revelations tend to dampen rather than arouse an audience's scepticism. It may be that what most compels an audience's

28 Bentham, *Rationale of Judicial Evidence*, Book 3, Chapter 13.

29 Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935), 142.

30 Bentham, *Rationale of Judicial Evidence*, Book 3, Chapter 13.

31 Likewise, shamans reveal tricks. Michael Taussig, 'Viscerality, Faith and Skepticism: Another Theory of Magic,' in *In Near Ruins: Cultural Theory at the End of the Century*, ed. Nicholas B. Dirks (Minneapolis: University of Minnesota Press, 1998), 221–56 (222).

admiration and sympathy is the way performers manage their inability to perfectly control even the ideal world of performance. As Richard Schechner observes, 'performers specialize in putting themselves in disequilibirium and then displaying how they regain their balance psychophysically, narratively, and socially – only to lose their balance, and regain it, again and again'.[32] Judges engage in this kind of purposeful self-revelation when they point to the incapacity of legal doctrine to resolve a particular conflict and then proceed to reach a decision by applying that same indeterminate doctrine.[33] Likewise, a federal judge who issued a local rule encouraging more substantive roles for the young women lawyers appearing in his courtroom was both exposing a gap in the legal performance of formal equality and performing his power to close that gap.[34]

On the other hand, unplanned and unacknowledged disruptions may expose legal performance in a harshly critical light. Consider what happened during a 2012 military tribunal hearing at Guantánamo. The hearing, for five men who, under torture, confessed to helping plan and carry out the 9/11 terror attacks, was illusionist in the most crucial sense that its outcome is as predetermined as any future event can be. In the United States military justice system, there is no realistic possibility that these men will be set free. Moreover, the government took extraordinary measures to control how the hearing would be perceived. No spectators were allowed in the courtroom. Instead an audience composed of journalists and family members of 9/11 victims was assembled to watch from behind glass, and video of the proceedings was screened live on several US military bases. The sound for both the video and the on-site audience was produced with a forty-five-second delay, allowing a censor to cut the audio feed in case classified information was mentioned.

The paradox of such heightened control is that even momentary breakdowns become extraordinarily meaningful. So it was that a clumsily executed dramaturgic choice vividly conveyed the prisoners' unjust treatment at the hands of the US government. When one of the defence attorneys referred to his client's torture, the audio feed was suddenly replaced with a jarring rush

32 Richard Schechner, *Performance Theory* (Abingdon: Routledge, 1988), xi.

33 See, for example, Derdiarian v. Felix Contracting Corp., 414 N.E. 2d 666 (1980), noting that the doctrine of proximate cause is 'elusive' and 'incapable of being precisely defined to cover all situations' and then proceeding to apply a formal doctrinal analysis. *Derdiarian v. Felix Contracting Corp.*, 670.

34 Alan Feuer, 'A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule,' *New York Times*, 23 August 2017, https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html?_r=0.

of static.[35] If I were a theatre director looking for a way to dramatise ham-fisted state suppression, I could hardly have done better. The burst of electronic noise wiping out the words made the state's violent control over the defendant's body chillingly manifest. Torture, after all, aims to isolate its victims in a kind of pain beyond articulation.[36] So drowning out the lawyer's voice with electronic noise eerily reenacted the torture he was attempting to describe. In a final irony, the choice to censor the attorney's voice had the effect of greatly expanding the hearing audience. Public radio reports that could not broadcast the proceedings freely reproduced their static interruption for listeners throughout the country. The static gave listeners a concrete reminder of the hearing's failure to provide the most basic due process standard – a 'right to be heard'.[37]

Ritual, Reality, Falsehood, and Reckoning

The defendants in the 2012 hearing are some of the few prisoners left at Guantánamo. At the end of the Obama Administration in January 2017, only forty-one prisoners remained, down from the more than 500 there when President Obama took office. But that reduction does not represent any slackening of the US government's use of coercive violence against individuals accused of terrorism. Instead of capturing alleged members of terrorist organisations, the US government now identifies them for targeted killing by drone strikes, commando raids or other forms of bombing. During President Obama's eight years in office, the US carried out over ten times as many drone strikes as the Bush administration, for a total of 542 strikes that the Council on Foreign Relations estimates killed 3,797 people.[38] In his first year in office, President

35 Charlie Savage, 'At a Hearing: 9/11 Detainees Show Defiance,' *New York Times*, 5 May 2012, http://www.nytimes.com/2012/05/06/us/9-11-defendants-face-arraignment-in-military-court.html.

36 Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford: Oxford University Press, 1985), 4. 'Physical pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned'.

37 See, for example, Schroeder v. City of New York, 371 U.S. 208, 212 (1962), noting that the right to be heard is 'one of the most fundamental requisites of due process.'

38 Micah Zenko, 'Obama's Final Drone Strike Data,' *Council on Foreign Relations*, 20 January 2017, https://www.cfr.org/blog/obamas-final-drone-strike-data. The numbers of casualties – both of targets and bystanders – are contested. The Obama Administration estimated that as many as 116 'civilians,' i.e., bystanders who were not targets, were killed in drone attacks between 2009 and 2015, *The White House Office of the Press*

Trump is said to have further increased the frequency of drone attacks and other forms of targeted killing, from one every 5.4 days during the Obama Administration to one every 1.25 days.[39]

The only way to reconcile the practice of targeted killing with a claim to government by the rule of law is to view those killings as military operations. The problem is that they look less like war than like law enforcement without any legitimating performance of legal process. The targets are not soldiers in any state military force, they are individual non-state actors whom our government identifies as dangerous, that is, just the sort of person who would ordinarily be the target of criminal investigation and prosecution. Surely if the drone killings seem wrong, or at least suspect, that is because they lack the performed trial ritual that would precede a death sentence in a system of criminal justice.

But how would engaging in a performance of formal adjudication, like the ones taking place at Guantánamo, confer any sort of legitimacy on the convictions that would be a foregone conclusion? In fact, given the certainty of that outcome, is not the desire to see the accused terrorists formally tried not just incoherent but kind of grotesque? If trials are performances deliberately crafted to stir up feelings of respect for the procedurally righteous government that puts them on, how can they legitimise government violence?

A performance of justice might be preferable to a candid political accounting of violence, because by going through the formal motions of adjudication we enact a vision of what justice *should* look like in a constitutional democracy, in a formal frame that alerts us to its unreality. Jonathan Smith describes a similar discontinuity between ritual enactments of bear hunting and the way bears are actually hunted in certain Siberian cultures. As Smith explains it, in hunting songs and ceremonies 'the controlling idea is that the animal is not killed by the hunter's initiative, rather the animal freely offers itself to the hunter's weapon'.[40] So, for instance, under ritual rules, hibernating bears are

Secretary, 'Fact Sheet: Pre and Post-Strike Measures to Address Civilian Casualties,' 1 July 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address. But observer organisations make higher estimates, 324 for the Council on Foreign Relations, Zenko, and between 380 and 801 from the Bureau of Investigative Journalism, Jessica Purkiss and Jack Serle, 'Obama's Covert Drone War in Numbers,' *The Bureau Investigates*, 17 January 2017, https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush.

39 Rupert Stone, 'Should We Be Scared of Trump's Drone Reforms?' *Al Jazeera*, 20 March 2017, citing Zenko, Council on Foreign Relations, http://www.aljazeera.com/indepth/opinion/2017/03/scared-trump-drone-reforms-170319074243420.html.

40 Jonathan Z. Smith, *Imagining Religion: From Babylon to Jonestown* (Chicago: University of Chicago Press, 1982), 59.

not to be slaughtered in their dens. It seems, though, that contrary to the ritual prescriptions, when a village needs bear meat to survive bears are actually killed in any way possible.[41]

These pragmatic killings are ritually denied. Singing to the bear's corpse, the hunters counterfactually declare that the killing was an accident, or a fulfilment of the animal's predestined natural death.[42] This seems like a perfect example of Mary Douglas's observation that in ritual the past is 'restated so that what ought to have been prevails over what was'.[43] That is, until the ritual restatement is interrupted with a candid exclamation of the hunter's success – 'O honour to you my spear!' – that exposes the difference between the ideal and real hunts.[44] The ritual requirements are not there to protect bears, Smith concludes, but to provide an example of how a perfect bear hunt ought to proceed.[45] Smith proposes that rather than a fraudulent claim about actual bear hunting practices, the elaborate ritual hunts create an opportunity for moral reckoning, when the hunter 'reflects on the difference between his actual modes of killing' and the idealised ceremony.[46]

It seems to me that the hunting ritual may also provide hunters with a sense of their potential to transcend culturally the struggle for physical survival. The ritual puts an element of choice back into the hunters' existence, whether the hunters ignore the ritual dictates or abide by them. If the ceremonies are ignored, they are still 'there' in some sense, as a guide not followed and a model for moral accounting. If the hunters do follow the ritual procedures, they offer a sense of control even if the hunt fails, because by adopting ritual handicaps and giving up an opportunity to kill their prey, the hunters' sacrifice enacts the power of culture to transcend natural limits. Likewise, by following constitutionally prescribed procedure for obtaining a criminal conviction, or acquittal, we perform a social triumph not just over the individual being tried, but over physical violence as a means to power. We enact a ritual world in which violence only enters when it is legitimately directed to deter or retribute criminal behaviour. But, like the bear-hunting rituals, that enactment is a make-believe, not a transparent account of how things really work.

The recognisable gap between the formal enactment and the real-world treatment of individuals identified as dangerous is not only present in GTMO

41 Smith, *Imagining Religion*, 60–63.
42 Smith, *Imagining Religion*, 62.
43 Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London: Routledge, [1966] 2001), 68.
44 Smith, *Imagining Religion*, 62.
45 Smith, *Imagining Religion*, 63–64.
46 Smith, *Imagining Religion*, 64.

hearings for accused terrorists. Consider that over ninety per cent of criminal convictions are obtained not through trials but by plea agreements, deals struck between prosecutors and defence attorneys.[47] Consider that for most defendants, the right to counsel means meeting once or twice with an appointed attorney who must handle hundreds of cases at a time.[48] Consider that although available data indicate similar rates of criminality among African Americans and whites, African Americans are more likely than whites to be stopped by police, arrested, charged, convicted and sentenced to incarceration.[49] The list of obvious gaps between rights-ritual and rights-reality goes on and on.

But eschewing legal ritual does not necessarily mean giving up illusion in favour of a more transparent view of political reality. Drone killing is a performance of state power that is spectacularly present to its targets. And the near absolute absence of any public rationalisation for this kind of targeted state killing creates an opaque and dangerous illusion – it makes the practice affectively non-existent to the political subjects on whose behalf it is ostensibly carried out. The real policy question now is not whether candidly discussing the political expedience of targeted killing would be better than staging military trials, it is whether trials, however artificial, are better than a spectacle of lethal violence that engulfs its targets and terrorises their families and communities but remains invisible to those it allegedly protects. But suppose there were pragmatic public explanations for targeted killings – would that practice be more politically and morally sound than the legal rituals at GTMO? Not necessarily. We had an example when President Obama stood at a lectern and described the mission 'to get Osama bin Laden and bring him to justice', and nothing about that account suggests that this sort of candid policy approach would produce greater legitimacy.[50] Indeed, in my view, it masked the questionable legitimacy of sovereign violence more effectively than formal court process, because its artifice was less readily apparent.

Along with the President's statement, the Administration released a series of photographs – not of the raid and killing but of members of the Administration monitoring the mission. In the photos, the President and his advisors stare at a screen outside the frame where (we are told) another government official is

47 Criminal Cases, *Bureau of Justice Statistics*, accessed 28 December 2017, https://www.bjs.gov/index.cfm?ty=tp&tid=23.

48 Laurence W. Benner, 'Eliminating Excessive Public Defender Workloads,' *Criminal Justice* 26 (2011): 24–33.

49 Jessie Allen, 'Documentary Disenfranchisement,' *Tulane Law Review* 86 (2011): 389–464 (406–07).

50 Barack Obama, 'Remarks by the President on Osama Bin Laden,' *The White House Office of the Press Secretary*, 2 May 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden.

providing a running report: 'They've crossed into Pakistan …'.[51] The informally staged photos look like stills from prime-time television, in particular, *The West Wing*, the idealistic 1990s comedy-drama about a liberal president and his quirky, conscientious staff. They invite us to identify with the characters, who, unlike ceremonially robed judges, seem like ordinary folks even as they supervise a momentous use of lethal government force. Reports in the press had a similarly intimate, folksy quality, noting for instance that as the day wore on the officials monitoring the killing got hungry, so '[a] staffer went to Costco and came back with a mix of provisions – turkey pita wraps, cold shrimp, potato chips, soda'.[52]

The informality and relatability of this account contrasted with the dramatically choreographed killing and its aftermath. The risky Navy Seal attack seems to have been chosen over an air strike primarily to produce a wounded body, but after reported verifications of its existence, that body was literally sent to the bottom of the deep blue sea. Details of bin Laden's last appearance – he was wearing white, he appeared sleepy – alternated with proclamations that he had disappeared forever: 'you won't see bin Laden walking on this earth again', President Obama assured us, before announcing that he would not release the 'gruesome' photos of bin Laden's corpse.[53] Just like that, we found Osama bin Laden and lost him again, unearthed and submerged him – displayed his death, obscured his corpse and ultimately mystified both his persona and the state violence that dispatched him. Yet this whole strobe-like display of fantastic state violence was represented as morally unexceptional, if historically extraordinary. To be sure it was exciting, even disturbing. But ultimately it provoked no terribly unsettling feelings in the sandwich-eating bureaucrats watching it unfold, whose perspective we were encouraged to share. In hindsight, even the most wildly hypocritical judicial performance of formalistic justice would have been less opaque.

Performance, Justice and Time

Another possible reason for preferring and preserving adjudicative performances is so basic that it might seem trivial, or even ridiculous: trials take time. In the familiar saying, 'justice delayed is justice denied', but in another sense,

51 Mark Mazzetti, Helene Cooper and Peter Baker, 'Behind the Hunt for Bin Laden,' *New York Times*, 2 May 2011, http://www.nytimes.com/2011/05/03/world/asia/03intel.html.

52 Mazzetti, Cooper and Baker, 'Behind the Hunt for Bin Laden.'

53 Ewen MacAskill, Declan Walsh and Julian Borger, 'U.S Confirms It Will not Release Osama bin Laden Death Photo', *Guardian*, 4 May 2011 https://www.theguardian.com/world/2011/may/04/osama-bin-laden-photos-raid.

justice delayed is justice. No doubt, as Robert Cover showed, judicial process is not *an alternative* to violence.[54] Cover pointed out that, psychologically speaking, formal legal proceedings function to distance the targets of government force, and so overcome the enforcers' ordinary inhibitions to inflicting violence.[55] Psychologically speaking, a trial's primary purpose is not, or not only, to legitimise state violence but to *trigger* it. Even so, as long as the judicial process continues that trigger has not been pulled.

The inefficiency of trials, their arduous formality, their tendency to say and do everything not once but three times, are techniques of a practice made to play for time, or to play outside of time. After all, performance is definitionally something other than the ordinary course of events. Whether the performance we recognise is a lavishly produced theatrical event or an oddly artificial aspect of some social interaction, we see it as a shift out of 'real life' into behaviour that unfolds outside of, or alongside, or intertwined with, everyday existence.[56] Performance does not just take time, it takes time *away from* life in the real world. In a genealogical view, public trials' habit of slowing down, stopping and starting and cycling back to the beginning with each new 'motion', does not distort or obstruct legal process; it constitutes that process. Trials postpone the violence they authorise. And despite Cover's warning not to confuse violently enforced judicial interpretations with aesthetic interpretations, this postponement reminds me of a famous literary work. I am thinking of the *Tales of a Thousand and One Nights*, that epic storytelling performance undertaken to distract and charm the violent prince and so keep the storyteller and all the other girls in the kingdom alive to see one more morning.

Time-consuming judicial performances make time for reversals and revelations. However unlikely to change the outcome, these glitches may at least, like the static interruption of the GTMO hearing, disrupt the facade of formal justice and call attention to the moral diciness of state violence. As I write this, another GTMO proceeding has spun into folly. In the midst of a capital trial, three civilian defence attorneys abruptly quit, alleging that the government is

54 Robert Cover, 'Violence and the Word,' *Yale Law Journal* 95 (1986): 1601–29. Note that Cover's critique is in a way the opposite of Bentham's. Like Bentham, Cover is out to unmask judicial process as a sham, but Cover's argument is basically that judicial performance masquerades *as unreal*.

55 If Cover is right that judicial performance's *raison d'être* is overcoming inhibitions to inflicting lethal violence, then targeted killing using drones may obviate the psychological need for judicial process. The drones accomplish literally what the performed authority of formal judicial reasoning produces dramatically: a distance between the person killed and the person doing the killing.

56 Schechner, *Between Theater and Anthropology*, 35–36; Roach, *Cities of the Dead*, 3.

listening to confidential communications with their client.[57] In response, the military judge held the military lawyer in charge of the defence in contempt and sentenced him to twenty-one days' confinement.[58] Thus we have the dramatic plot reversal of a brigadier general in the US Marine Corps imprisoned at Guantánamo, albeit in his trailer, not the regular cell block.[59] Meanwhile, the only defence attorney left standing, a young lieutenant, has refused the judge's order to carry on with the trial, arguing that it would be unethical for him to continue without the assistance of experienced death penalty attorneys. In a recent news photo, one of the civilian defence attorneys who resigned is wearing a small gold pin on his navy suit lapel, where those ubiquitous American flags appear. The attorney's pin is shaped like a kangaroo.[60]

Performance, Artifice and Legitimacy

One often sees unfavourable comparisons of the military proceedings at Guantánamo with the US civilian legal system. 'Time and time again, federal courts have proven to be more efficient and more effective', one ex-prosecutor recently declared.[61] More efficient, yes, especially if you factor in the over ninety percent of criminal cases that skip trial altogether in favor of plea deals. But

57 Carol Rosenberg, 'Guantánamo Judge Orders Contempt Hearing to Try to End Defense Revolt at War Court,' *Miami Herald*, 31 October 2017, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article181879046.html. This is the trial of Abd al Rahim al Nashiri, accused of orchestrating an attack on a US Navy ship that killed twenty-six sailors.

58 Carol Rosenberg, 'GITMO Judge Sends Marine General to 21 Days Confinement for Disobeying Orders,' *Miami Herald*, 1 November 2017, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article182031196.html.

59 After three days, the general was released by a US District Judge, granting a habeas writ. The contempt conviction was later upheld by the civilian Pentagon official in charge of military justice, but he vacated the sentence. Carol Rosenberg, 'Marine General Asks Federal Court to Overturn his Guantánamo Contempt Conviction,' *Miami Herald*, 3 December 2017, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article187831404.html.

60 Carol Rosenberg, 'Guantánamo's USS Cole Death-Penalty Case in Limbo after Key Defense Lawyer Quits,' *Miami Herald*, 13 October 2017, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article178691836.html. Presumably, the lawyer's pin refers to a 'kangaroo court,' a tribunal that has no proper jurisdiction and ignores recognised standards of procedural justice.

61 Charlie Savage and Adam Goldman, 'Following Trump's Lead, Republicans Grow Quiet on Guantánamo,' *New York Times*, 4 November 2017, https://www.nytimes.com/2017/11/04/us/politics/republicans-guantanamo-military-commissions-civilian-courts-terrorism.html?_r=0, quoting Nicholas J. Lewin.

as for effectiveness in producing justice, in my view judicial performance's only hope resides in its vulnerability to the sorts of glitches that make the news at GTMO. The minute a judicial proceeding achieves the impenetrable rational smoothness that prevents one from seeing the gap between its performative illusions and reality, it loses all capacity to legitimate the violence that it triggers. Luckily, most formal adjudications do not get close to this kind of seamlessness. Judges turn purple and shout for no apparent reason, lawyers cajole, pontificate and spin. Jurors fall asleep. In courtrooms all across the country, the show goes on, every bit as artificial as the Westminster trials Bentham mocked.

What, then, of law's part in countering the passions of constitutional patriotism and legitimating liberal sovereignty? I see no reason to assume, as Habermas seems to, that legal process provides a rational antidote to the emotional pull of constitutional patriotism. As a matter of illusion and construction, adjudication is a performance, a world away from the objective neutrality ideally ascribed to legal outcomes. The work of performance lies outside of the opposition of violence and reason, in a queasy realm of double consciousness that succumbs emotionally to illusions. But even as we are moved by judicial performance, we recognise its artifice. In the obviousness of law's trumped-up ceremonies, then, there is some potential for a different kind of legitimacy. By stirring feelings of allegiance to a government's legal system and refusing to hide the dramatic art with which those feelings are aroused, formal court proceedings make plain just how irrational and partial our justifications for sovereign violence are. The theatre of adjudication confronts us with an idealised performance of justice that reveals the gap between that model performance and our government's conduct in the real world.