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## How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals

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HOW TO PLAY JUSTICE AND DRAMA IN ANTIQUITY: LAW  
AND THEATER IN ATHENS AS PERFORMATIVE RITUALS

*Emiliano J. Buis\**

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I. INTRODUCTION<sup>1</sup>

From the logics of extreme positivism — taken as a theory that rejects dealing with metaphysical issues — the relationship between law and literature remained an impossible task, since they were both fields of study which lacked in their basis a logical or rational construction. Only pure and abstract science could be the real object of academic interrogation. In this sense, literary texts and legal rules only responded to certain social and human criteria, and were therefore traditionally excluded from the scientific possibility of being analyzed in comparison. This perspective was luckily broadened by new interpretations. Therefore, it is possible to perceive that, quite recently, certain lines of thought have been casting

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1. This Article — whose original version was presented at the LatCrit Colloquium on International and Comparative Theory (Buenos Aires, Aug. 12-15, 2003) — is part of a Ph.D. dissertation in progress on Athenian law in ancient comedy; it has been undertaken as general research under the scope of the projects *La mujer y el espacio socio-cultural del género en el mundo antiguo* (UBACyT F148, directed by Prof. Elena Huber, Universidad de Buenos Aires, Argentina, 2001-2003) and *Extranjería en el mundo griego antiguo (desde los primeros documentos hasta finales del s. IV a.C.): aproximación filológico-jurídica* (BFF2002-02518, directed by Prof. Rosa Araceli Santiago Álvarez, Universidad Autònoma de Barcelona, Spain, 2003-2005).

doubts on this positivist assertion, and the topic of how both areas relate to each other can no longer be ignored by academics interested either in literature or law.<sup>2</sup>

The Argentine thinker Enrique Marí wrote several articles on the subject,<sup>3</sup> illustrating his own questions by bringing into discussion some irrefutable evidence:

Llegados a este punto, una pregunta se hace visible: ¿acaso el enlace que se quiere ver entre derecho y literatura no será un simple expediente para mitigar esa mala impresión que poetas de la talla de los mencionados [i.e. Goethe, Shakespeare, entre otros], y quizá en impensada revancha histórica contra Platón que los excluía de la ciencia, tenían del derecho y los juristas? ¿Un bálsamo quizá frente a ese negativo dictamen no sólo de estos poetas, sino también de una opinión pública muy generalizada? Creo, no obstante, que algo más ronda alrededor de esta propuesta y está relacionada con las cuestiones teóricas que venimos anunciando. De hecho la literatura se encuentra inundada de casos en que cuestiones legales cobran cuerpo (. . .) Entre el derecho y la literatura, no menos que en el teatro, pues muchas de sus obras han sido llevadas a la escena, se tejen líneas elaboradas con hilo procedente de la otra bovina.<sup>4</sup>

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2. Since the major works by Benjamin Cardozo, who was a pioneer in these issues, several authors have been dealing with this relationship, mainly through the examination of literary aspects in legal decisions. BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* (Littleton 1986) (1925); cf. Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 *CARDOZO L. REV.* 320-41 (1979); IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995) (describing the actual trends); GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000); PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000); KEVIN M. CROTTY, *LAW'S INTERIOR: LEGAL AND LITERARY CONSTRUCTIONS OF SELF* (2001); PHILIPPE GERARD ET AL., *LETTRES ET LOIS: LE DROIT AU MIROIR DE LA LITTÉRATURE* (2001) (all giving different approaches).

3. Enrique E. Marí, *Derecho y Literatura: algo de lo que sí se puede hablar, pero en voz baja*, 2 *DOXA, CUADERNOS DE FILOSOFÍA DEL DERECHO* 21, 251-87 (1999).

4.

Once we reach this point, a question becomes visible: can the pretended link between Law and Literature be a way to mitigate the bad impression that certain poets like Goethe or Shakespeare had on law and jurists, as a historical revenge against Plato's exclusion? A medicine may be against that negative view arising not only from these writers, but also from a widespread public opinion? I think, nevertheless, that there is much more around this proposal and that it has to do with certain theoretical questions I am announcing. In fact, literature is full of cases in which legal questions materialize [. . .] Between law and literature, as well as in theater — since many plays have been taken into stage — some elaborated lines are woven with wool taken from each other's tapestry.

Interdisciplinarity, frequently quoted, is a word which engages more than it seems. Trying to figure out how two historically independent worlds of knowledge might interact is difficult from the observer's examination and, in many opportunities, has been a vain experience.<sup>5</sup> If putting together different "wools" could be risky, it becomes much more complicated — once the fabric is finished — to discover how complex patterns were done and identify how weaving was achieved. It is the hard way back.

Attempts to throw light on this difficulty started almost a century ago, but only during these last decades has the phenomenon been studied in its most theoretical implications.<sup>6</sup> Systematization of partial conclusions is now being suggested. Through a structured analysis, Anthony Julius affirms that

the project of relating law to literature, as an interdisciplinary undertaking (or "activity") with institutional support is commonly taken to have four elements. There is the study of the law relating to literature (the law of literature).<sup>7</sup> There is the study of the literary properties of legal texts (law as literature — as a 'branch of literature'). There is the study of the method of interpretation of legal and literary texts (legal and literary hermeneutics).<sup>8</sup>

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*Id.* (author's translation).

5.

In summary, what has kept law and literature, and "law and" more generally, from having the impact that they otherwise might have had in the legal academy has been insufficient thoughtfulness about interdisciplinarity. Like other "law and," the law-and-literature enterprise purports to connect two disciplinary domains, but it has not questioned how those domains are defined and bounded. It has thus missed opportunities to raise and address important questions that would seem central to the "law and" project, that is, questions about how we distinguish "legal" from other sorts of knowledge and about our cultural investment in viewing law as an autonomous discipline.

Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 *YALE L.J.* 1059, 1082 (1999).

6. The "law and literature" perspectives have been profoundly examined in their historical and current trends by Arianna Sansone. ARIANNA SANSONE, *DIRITTO E LETTERATURA*, UN'INDRODUZIONE GENERALE (2001).

7. On the application of defamation law to fiction, see Eric Barendt, *Defamation and Fiction*, in 2 *CURRENT LEGAL ISSUES: LAW AND LITERATURE* 481-98 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

8. *Cf.* *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Steven Mailloux & Sanford Levinson eds., 1988).

Last, there is the study of the representation of law and legal processes in literature (law in literature).<sup>9</sup>

These four aspects of the question have been substantially — and almost unanimously — taken as unique possibilities.<sup>10</sup> It is our purpose here to introduce a fifth aspect we are going to define through the close examination of law and literature in ancient times.

If we have to summarize the major trends of law and literature critical approaches, we can see that most authors, probably interested in the interpretation of verdicts as a specific way of using language, have brought into the focus the study of literary aspects of legislative or judicial discourse.<sup>11</sup> After some foundational approaches by James Boyd White,<sup>12</sup> Richard A. Posner has centered his attention around the conception of rules as fictional texts.<sup>13</sup> The parallel with literature only becomes useful in order to understand and interpret decrees, statutes, or verdicts as the result of linguistic creation. However, if it is true that law rests within

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9. Anthony Julius, *Introduction*, in 2 CURRENT LEGAL ISSUES: LAW AND LITERATURE, *supra* note 6, at xi, xiii. The study of the law in literature is one of the oldest branches of the discipline. IRVING BROWNE, *LAW AND LAWYERS IN LITERATURE* (1883); JOHN MARSHALL GEST, *THE LAWYER IN LITERATURE* (1913). Despite these names, Michael Pantazakos considers John Wigmore and Cardozo to be the founders of the two main areas of the discipline:

With Wigmore thus focusing on the legal themes in works of literature, and Cardozo examining the literary stylistics of legal texts, the standard law and literature division — and make no mistake, judging from the work of both its pioneers and current proponents, it is a movement thriving on the recognition of subdivisions — came into being, namely, *Law in Literature* and *Law as Literature*, the former a direct outgrowth of Wigmore's preliminary study of the Great Books of Western literature, the latter born of Cardozo's interest in the modes of expression found in appellate opinions.

Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 *CARDOZO STUD. L. & LITERATURE* 31, 38 (1995); John H. Wigmore, *A List of Legal Novels*, 2 *THE BRIEF* 124-27 (1900); *CARDOZO*, *supra* note 2.

10. Philippe Malaurie, for example, also considers these same criteria of classification: *le droit de la littérature, le droit comme littérature, le droit comparé à la littérature, le droit dans la littérature*. PHILIPPE MAURIE, *DROIT ET LITTÉRATURE, UNE ANTHOLOGIE* 7 (1997).

11. *Cf.* *LITERATURE AND LEGAL PROBLEM SOLVING: LAW AND LITERATURE AS ETHICAL DISCOURSE* (Paul J. Heald ed., 1998).

12. JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1972); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

13. RICHARD A. POSNER, *LAW AND LITERATURE* (Revised & Enlarged ed., Cambridge 1998) (1988).

literature because it is naturally sustained in words,<sup>14</sup> and because they are both constructs of imagination,<sup>15</sup> there are considerable differences; according to Posner, whereas literature is a creative and unconscious product of aesthetics, law is a ruling technique.<sup>16</sup> In this sense, similarities remain useless to explain the social function of positive norms, the bureaucratic exercise of law, or its practical consequences in forensic proceedings.<sup>17</sup> The relationship is partially left aside, which should not surprise us if we recall that Posner is one of the founders of the “Law and Economics” movement, which sees in law more mathematical than literary properties.

Despite this distance, it is true that literature is frequently included in different legal courses, in order to improve legal thinking in students.<sup>18</sup>

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14. MARIA ARISTODEMOU, *LAW AND LITERATURE: JOURNEYS FROM HER TO ETERNITY* 1 (2000).

15. Ronald Dworkin, *How Law is Like Literature*, in *LAW AND LITERATURE: TEXT AND THEORY* 29-46 (Leona Ledwon ed., 1996) (finding certain points of connection between the judicial and literary interpretations, which philosophically complement each other); cf. IOANNIS PAPADOPOULOS, *PRATIQUES JURIDIQUES INTERPRÉTATIVES ET HERMÉNEUTIQUE LITTÉRAIRE: VARIATIONS AUTOUR D'UN THÈME DE RONALD DWORKIN* (1998); see also ROBERT COVER, *DERECHO, NARRACIÓN Y VIOLENCIA* (2002) (affirming that legal interpretation could suggest the social construction of reality through language, since law can serve as a bridge to unify the real world and imagination). On the importance of hermeneutics when suggesting a relationship between law and artistic representations, the influence of Hans-Georg Gadamer is undeniable. HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* (4th ed. 1974) (1960).

16. This opposition is interpreted in different ways. Thus, some authors are inclined to confirm that literature sees law as a rigid technical construction:

My belief is that when literature deals with law, it does so with a tendency to confirm its own superiority, which it achieves by means of a partial or distorting view of law's premises, operations and consequences . . . [Literature] tends to construct law as a clumsily inflexible system which is incapable of making the kinds of sensitive discrimination that are the province of literature alone.

Tony Sharpe, *(Per)versions of Law in Literature*, in 2 *CURRENT LEGAL SERIES: LAW AND LITERATURE*, *supra* note 6, at 91.

17. The excessive positivist and technical vision of Posner was heavily criticized by White. James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 *HARV. L. REV.* 2014-47 (1989). To solve this problem, attention has been paid to the possibility of simulated moot trials involving literary characters. Alan R. Velie & Casey Davis, *Introducing Trials into Law and Literature Classes*, 26 *OKLA. CITY U. L. REV.* 447-70 (2001).

18. Cf. C.R.B. Dunlop, *Literature Studies in Law School*, 3 *CARDOZO STUD. L. & LITERATURE* 63-110 (1991). Nancy Cook considers that literature in the classroom might be useful to compensate a discipline which has become technical. Nancy Cook, *Shakespeare Comes to the Law School Classroom*, 68 *DENV. U. L. REV.* 387-411 (1988). It can also be welcomed as a tool to develop legal skills. Christine Bell, *Teaching Law as Kafkaesque*, in *TALL STORIES? READING LAW AND LITERATURE* 11-38 (John Morison & Christine Bell eds., 1996).

The importance of reading literary texts in law schools has usually been manifested. Different objectives have been utilized to justify this legal reflection on literature,<sup>19</sup> since — at the same time — it presents several advantages: it may show the lawyer or the legal system as they are reflected through the eyes of a writer, or be used to emphasize the literary characteristics of statutes and judicial opinions, to improve critical reflection,<sup>20</sup> to learn about the concept of rightness,<sup>21</sup> to teach lawyering and decision-making from an ethical perspective,<sup>22</sup> to enrich our understanding of legal interpretation, or to simply understand a lawyer's life from the way it is described in the fiction about lawyers written by lawyers.<sup>23</sup>

This relationship has proven to be fruitful in all these senses, because there are some underlying characteristics in common which can be identified in law and literature. In their resemblance, they are both conceived to be mainly based on language,<sup>24</sup> and are therefore stressed by an aesthetic value.<sup>25</sup> One could say that life of the law is thus a life of art, the art of making meaning in language with others.<sup>26</sup>

Sharing certain properties makes the two disciplines interrelate, and they thus both constitute *inter-texts*. Writing down law or literature, as

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19. Elizabeth Villiers Gemmette, *Law and Literature, Joining the Class Action*, 29 VAL. U. L. REV. 665-859 (1995).

20.

The inclusion of imaginative literature in a jurisprudence course produced at least one other significant value. This was our constant opportunity to engage in *reflection*, as one must when one engages in any reading, discussing or writing about imaginative literature. To understand characters, events or plot structures, we were continually pausing or regrouping, as it were, to reflect upon possible meanings, possible causes and possible relationships, and this reflective practice can only make us better lawyers. Reflections of these sorts are essential both to the imaginative and critical reading of legal texts and to effective legal writing.

Philip C. Kissam, *Disturbing Images: Literature in a Jurisprudence Course*, 22 LEGAL STUD. F. 329, 348 (1998) (emphasis added).

21. Richard H. Weisberg, *Coming of Age Some More: "Law and Literature" Beyond the Cradle*, 13 NOVA L. REV. 107-24 (1988).

22. Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787-816 (2000).

23. William Domnarski, *Law and Literature*, 27 LEGAL STUD. F. 109-29 (2003).

24. James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415-45 (1982); Michael L. Richmond, *The Cultural Milieu of Law*, 13 NOVA L. REV. 89, 89 (1988). "More than any other two disciplines, law and literature depend for their very existence on the word." *Id.*

25. LIEF H. CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS* (1985).

26. WHITE, *supra* note 10, at xii.

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At truly compositional activities,<sup>27</sup> means interweaving a *textum*. These processes, sustained on notions such as metaphor and fiction,<sup>28</sup> are able enough to describe the method of legal creation or sentence decision. Through this creative procedure, narrative in literature and law represents the exercising of social control and consecrates the discursive power of authorities.<sup>29</sup>

Writers and lawmakers — as well as judges, who also give origin to fictional narrative when issuing a verdict,<sup>30</sup> occupy positions which are respected in society. To the people in traditional communities, they occupy a place of significance, and they are entitled to a social privilege which becomes guaranteed by the social circuit of knowledge and power.

Apart from those in charge of writing, legislating, and judging, there are other persons involved in these practices who can also express the nature of this linkage. Those taking the action with their own bodies should be recognised as the real doers in the exercise of law and literature. Thus, actors in the theater can be seen as real contenders on stage, just as the plaintiffs and defendants can act out their conflict during the different instances of a trial. Despite the numerous court scenes available in all genres of literature,<sup>31</sup> it is appropriate to find a real connection between suits and literary fiction in the representation of characters: playing roles in a specific scenario in front of others constitutes their substance.

Martha C. Nussbaum,<sup>32</sup> even though heavily criticizing some hypotheses from Posner, dedicates her book to him. Although attacking a strict economicist perspective, she agrees with her predecessors' "law as a branch of literature" point of view. She sees law as narrative,<sup>33</sup> mainly emphasizing the corpus of novels, considering that literary fantasy can contribute to the rational construction of juridical arguments and enhance our moral sensitivities to social oppression and injustices by expanding our

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27. James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in *LAW AND LITERATURE: TEXT AND THEORY*, *supra* note 13, at 5. "In fact I think that a proper ground for judgment is implicit in the understanding of law and literature alike as compositional activities." *Id.*

28. On the notion of fiction in law, cf. LON L. FULLER, *LEGAL FICTIONS* (1967); ENRIQUE E. MARÍ, *TEORÍA DE LAS FICCIONES* (2002).

29. Robin L. West, *Communities, Texts and Law: Reflections on the Law and Literature Movement*, 1 *YALE J.L. & HUMAN.* 129-56 (1988); ROBIN L. WEST, *NARRATIVE AUTHORITY AND LAW* (1993).

30. On the relationship between literature and jurisprudence, in particular, see RICHARD H. WEISBERG, *POETICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992).

31. Cf. ANN M. ALGEO, *THE COURTROOM AS FORUM: HOMICIDE TRIALS BY DREISER, WRIGHT, COPOTE, AND MAILER* (1996).

32. MARTHA C. NUSSBAUM, *JUSTICIA POÉTICA, LA IMAGINACIÓN LITERARIA Y LA VIDA PÚBLICA* (2d ed. 1997).

33. MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* (1985).



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imagination. In her words, the study of law as literature could enrich our understanding of legal interpretation, legal rhetoric and legal narratives by drawing on the theories and practice of interpretation, rhetoric, and narrative in other academic disciplines and contrasting them with conventional legal theory and praxis. She considers that, if we wish to talk about contemporary public life and the way in which concrete circumstances give shape to emotions and human aspirations, it seems advisable to center on a genre which is still fruitful, and where the concrete circumstances described become relevant to our discussions.<sup>34</sup> Therefore, she consciously chooses the writing of *novels* because of their main features concerning the textual discovery of emotional backgrounds.

It is evident that law can only be understood within the context of its social origin: law is undeniably *historical*, since its nature and purpose is dependent on the moment in which it was born. Michael Richmond clarifies that

[m]ost of those involved in legal education acknowledge, whether tacitly or otherwise, the . . . inevitable intertwining of law and history. The development of common and statutory laws has not existed in a vacuum, but rather has symptomized the overall historical and cultural events in force at the time courts decide cases.<sup>35</sup>

In this sense, and without much effort, we could consider that the nature of novel today, its generalization and openness, as Nussbaum conceives it,<sup>36</sup> is a landmark of our time.

However, what is common now might have been rare in other times and, centuries ago, when the novel was absent, other genres could have

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34. *Id.* at 31.

35. Richmond, *supra* note 22, at 89.

36. NUSSBAUM, *supra* note 30.

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At occupied that literary space of fantasy and creation.<sup>37</sup> Studying literary demonstrations in antiquity, with their own reality, may well contribute to discovering a new context for the relationship between fiction and legal speech, especially since there is some evidence that many principles of the law and literature movement find their remote roots in ancient Greece;<sup>38</sup> in addition, moving backwards to classical history offers the advantage of dealing with the issue without facing the philosophical debate coloring our current discussions on the matter. As Ian Ward mentions,

In the light of the growing controversy over the “political” ambition of law and literature, perhaps the least controversial area in which it can be suggested that literature is of value in legal studies is that of legal history. I would suggest that the study of law in history is unarguable. Rather curiously, it is not an approach which has attracted much attention from the law and literature scholars . . . Possibly, this is precisely because of its relatively uncontroversial, and un-philosophical, perspective. This is not to say, of course, that historical literature has not already been used precisely as such a supplement. There are numerous examples of such usage.<sup>39</sup>

From this point of view, drama represents an interesting topic. My hypothesis here is that the historical and current importance of “theater

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37. In fact, the relationship between law and literature needs to be thought of as essentially dynamic in time. That is what Bruce Rockwood suggests when introducing the need of dealing with literary booms such as Sci-Fi:

The power of law and literature to “illuminate our way to the future,” however, is lessened by the present tendency to focus on canonical literature, rather than literature that is more widely read. Science Fiction, while referred to in some law and literature collections and criticism, remains a largely unmined mother-load for expanding our understanding of law.

Bruce L. Rockwood, *Law, Literature and Science Fiction: New Perspectives*, 23 *LEGAL STUD. F.* 267, 267 (1999).

38.

The example of the Sophists, therefore, if I may be excused for engaging in a typology, appears as the immediate precursor of our modern law and literature proponents. The concerns of the Sophists — the study of literature for moral edification and political empowerment, the formulation of reasoned hermeneutical methodologies, the zeal to awaken the communal conscience to persons shut out from social interaction and equality — seem to coincide exactly with those of the law and literature movement.

Pantazakos, *supra* note 8, at 46.

39. WARD, *supra* note 2, at 59.

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plays” among ancient civilizations, if analyzed within other contexts of production, might suggest new readings on the comparison of literature and law. If we concentrate on different legal systems and different literary models, adding the dimension of historical outlook, we could be driven to fresh assertions, and our traditional conclusions on this question might be expanded and improved. The study of antiquity will make us plunge into the example of classical Athens, which I will explain in relative detail, so as to put forward some facts that will lead afterwards to my final opinions.<sup>40</sup>

## II. LAW IN ANCIENT GREECE

Although it is true that law is one of those few areas of social practice in which the influence of ancient Greece over later society has not apparently been too notorious,<sup>41</sup> we cannot deny that during its time of splendor a legal system was established to deal with the punishment of improper acts. However, ancient Greek law now constitutes a fragmentary field of study,<sup>42</sup> since we do not have much information left on its functioning and since generalization is unattainable; the political organization of each state-city allowed internal rules for each autonomous unit.<sup>43</sup>

Athens has served as the foundation of most of our knowledge, especially if we consider the fourth and fifth centuries B.C.<sup>44</sup> In this sense, we use the name “Athenian law” to define the whole system of obligatory rules and judicial activities — taken in their formal aspects as well as in

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40. Interesting enough, it must be noted that Nussbaum, whom I have recently mentioned as one of the most qualified representatives of the law and literature movement, has thoroughly worked on Greek culture. NUSSBAUM, *supra* note 30.

41. STEPHEN C. TODD, *THE SHAPE OF ATHENIAN LAW* 3 (1993).

42. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS (ASPECTS OF GREEK AND ROMAN LIFE)* 8 (Cornell Univ. 1986) (1978).

43. The circulation of common institutions as a basis for the existence of a uniform Greek legal experience among different *poleis* is studied by Mario Talamanca. Mario Talamanca, *Il Diritto in Grecia*, in *IL DIRITTO IN GRECIA E A ROMA* 5-17 (Mario Bretone & Mario Talamanca eds., 1981).

44. “[D]as athenische Recht das bekannteste und ruhmvollste der griechischen Rechte ist. . . .” [“Athenian Law is the best known and most famous of all Greek legal systems.”]. JOHANNES TRIANTAPHYLLOPOULOS, *DAS RECHTSDENKEN DER GRIECHEN* 2 (1985); *cf.* Walter Selb, *Griechisches Recht*, in *ANTIKE RECHTE IM MITTELMEERRAUM* 89 (Walter Selb et al. eds., 1993); UGO ENRICO PAOLI, *Diritto Attico e Diritto Greco*, in *ALTRI STUDI DI DIRITTO GRECO E ROMANO* 4 (1976) (stating that the lack of enough information from other *pólis* makes the reconstruction of other Greek legal orders an impossible task).

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At their substantial considerations — which were applicable in Athens during the classical period.

When speaking of rules and activities, I am explicitly enlarging the scope in order to include, in addition to the abstract written material on laws and decrees, the details of its practical effects. Besides, when talking about “applicability” in specific cases, we must make clear that in Athenian society the ordinary logics of law did not consist in applying rules from a theoretical hypothesis to daily events, but in relating and arguing over its interpretation in every single controversy. It must be underlined that the notion of law was very different in ancient times, and that Greek law was particularly focused, as Stephen Todd demonstrated,<sup>45</sup> in procedure instead of than in substance. As a response to any crime committed, a wide number of public or private actions were available, and the choice between them corresponded to the interest of the applicant. Hence, Athenian law lived mostly in the pragmatics of public courts, and was not a binding tool to be mechanically quoted and “downloaded.” The debate, or *agon*, represented the axis of litigiousness.

An extensive definition such as the one just provided points to the existence of institutions and fairly straightforward rules which governed people’s attitudes and served as an impartial standard against which norms were established and disputes were settled.<sup>46</sup> If we develop a comparison based upon the amount of work undertaken during the last centuries on the characteristics of the classical world, it is surprising to remark that very little work has been done on Athenian law. Besides, some of the most influential commentaries on Greek justice have been connotated by previous knowledge on other ancient systems like Roman law, so readings are often anachronistically corrupted. It becomes obvious that Greek law has been highly ignored, and therefore underestimated.

Since the creation of the classical legal system by legislators such as Solon or Drako, the absence of lawyers in Athens remains an interesting fact; the whole order was built on “amateurism.” In front of the jury, litigants often introduced themselves as ignorant in legal matters, and they frequently denounced their enemies by qualifying them as clever and skilled speakers, trained in rhetorical devices and deceptive communication. Presenting oneself as free from litigiousness was a much appreciated rhetorical device.<sup>47</sup>

45. TODD, *supra* note 39.

46. Lin Foxhall, *The Law and the Lady: Women and Legal Proceedings in Classical Athens*, in GREEK LAW IN ITS POLITICAL SETTING: JUSTIFICATIONS NOT JUSTICE 133 (Lin Foxhall & Andrew D.E. Lewis eds., 1996).

47. Cf. JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY AND THE POWER OF THE PEOPLE (1989); Jon Hesk, *The Rhetoric of Anti-Rhetoric in Athenian Oratory*,

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Even judges were not professional, and the majority of them belonged to a social class of farmers, neither rich nor poor.<sup>48</sup> Large juries were selected on a periodic basis; the short time of office and the amazing size of the juries (which could run as high as six thousand members; an uneven number of judges was always chosen, in order to avoid ties during the verdict) — both conceived as ways to avoid corruption — made it almost impossible for a magistrate to acquire technical expertise.

Their work was paid. Jurors earned about three obols, which by that time was one-third of what a skilled artisan received for the work of a day.

The selecting process of jurors was well organized in classical Athens. Any *polites* (citizen) over thirty years old could report to one of the ten tribes in which the city was divided after the reforms by Kleisthenes. Magistrates were selected by lot.<sup>49</sup> An allotment machine decided — among all the fellow tribe members — if they would serve as judges and, in that case, in which court. The need of composing the juries and completing their number during the trial days had a practical consequence: every adult Athenian citizen would have to serve on the tribunals at least once in their life. In the fifth century B.C., each juror was allocated to one court for the year.

Two kinds of cases could be handled by the Athenian tribunals. In the first place, there were the *dikai* or private cases, arising from the existence of certain crimes that did not affect the entire society but only a number of individuals who claimed to have been personally abused. Only these persons could initiate this procedure. In the second place, Athenians had the *graphai* or public cases, arising whenever the community had been wronged. Among these cases, we could mention acts of treason, desertion, or embezzlement of state funds.

The whole system of justice in Athens was composed, in fact, of different courts. While the least important offenses could be dealt with by lesser tribunals, more important crimes such as murder fell under the jurisdiction of tribunals such as the Areopagos, the Palladion, the Delphinion, and the Prytaneion. Every tribunal was created to specialize in specific issues. The Areopagos, for instance, had the exclusive function of trying intentional homicides. The Palladion was reserved for cases of unintentional homicides, the Delphinion had the right to prosecute

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in PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY 201-30 (Simon Goldhill & Robin Osborne eds., 1999).

48. Stephen C. Todd, *Lady Chatterley's Lover and the Attic Orators: The Social Composition of the Athenian Jury*, 110 J. HELLENIC STUD. 146-73 (1990).

49. There are confusing testimonies on the moment in Athenian history in which jurors started to be selected by lot. Cf. Mogens Herman Hansen, *When Was Selection by Lot of Magistrated Introduced in Athens?*, 41 CLASSICA ET MEDIAEVALIA 55-61 (1990).

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At justifiable homicide, and the Prytaneion was the tribunal in charge of those homicide cases which involved the responsibility of animals, inanimate objects, or unknown persons.

After the reforms introduced by Ephialtes, the power and jurisdiction of the Areopagos was decreased, and several jury panels (*dikasteria*) which represented the people (*demos*) as a whole were introduced into the legal system.<sup>50</sup>

Procedures could be initiated either by a magistrate or, more frequently, by a private citizen, who had to start by having his opponents come before the jury so that he could deliver his accusation. An oral summons was issued and the defendant was notified when to go to court. Once that specific day arrived, and the appropriate fees were paid by the applicant, the magistrate who received the charge had to open a preliminary inquiry (*anakrisis*) before taking it to a court for trial. If the case was considered accepted, each party to the controversy had to collect all the evidence in order to make it public once they appeared before the jury. In ordinary tribunals, the litigants had to go to the court of the magistrate who had received the case, together with their witnesses and supporters.

The general public could be standing all around the borders of the space provided for the court proceedings so as to listen to the contenders. The affair immediately went on with the corresponding speeches, limited to a certain amount of time, which was the same for both sides; the length of both participations were measured by a water clock or *klepsydra*. Each litigant had to speak for himself and try to convince the unexperienced jurors; therefore, it was absolutely important to present simple explanations through non-technical vocabulary.

There was no public prosecutor, so the case had to be decided on the basis of speeches made by the involved parties. The opposition between the accuser and the defendant was built along a clear use of persuasive arguments and counterarguments specially conceived to assist those in charge of reaching a solution to the dispute. The authority of rhetoric was decisive for the results of the debate, and the speaker needed to convince his hearers in order to win the case.<sup>51</sup> This activity was so important that,

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50. MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS 47-77 (1986).

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In seeking to persuade the audience, speakers attempted to appear authoritative, yet the institutional context of litigation limited the intrusion of external, social sources of authority . . . When a litigant faced a jury, all but the most famous must have been largely unknown to most of the jurors. Minimizing possible sources of external authority and local knowledge made juries more impartial, but it left

if a participant would not be able to speak for himself in a persuasive style, others could join in to help him.<sup>52</sup> Although legally forbidden, a number of famous paid speech writers (*logographoi*) might be hired to prepare the speech in favor of a client.

The jurors were given two official ballots (*psephoi demosiai*), one with a hollow axle, the other with a full one. These wheel-shaped objects were used to indicate their vote. If the juror felt the defendant was innocent he cast the solid ballot; if he trusted the plaintiff, he cast the hollow ballot. In the fifth century, however, two urns were used to receive votes for the prosecutor or the defendant, respectively.<sup>53</sup> In both systems a simple majority indicated the result of the trial; four jurors — hazardously — were chosen to count these votes.

Yet the logical reasoning and persuasion were not only present during the proceedings or when a *litis* was settled; other situations existed in relation to the juridical arena which were constructed on an argumentative framework. Legislative discussions and proposals, for instance, were also rhetorical, since they were supported by strategies addressed to achieve consensus on the advantages of incorporating new rules to the system. Popular participation in Athens could be seen at different levels all along the steps of legislative procedure, and the Assembly or any citizen was granted an extended capacity to initiate legislation. If an Athenian citizen decided it suitable to propose the inclusion of a new law within the established set of norms, he defended his position in order to persuade others that this was the right way to proceed.

With some exceptions — especially in oligarchic or tyrannical periods — law in classical Greece was definitely linked in all its stages, to democratic speech in public debates or *agones*. During a trial, judges, litigants, and the public were all present at court, a typical place of discursive interaction. Aristotle himself tells us that the speeches in the tribunals offered the greatest scope for persuasive trickery since, he

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jurors with little basis on which to trust the words of a speaker other than those words themselves.

STEVEN JOHNSTONE, *DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS* 1-2 (1999).

52. LENE RUBINSTEIN, *LITIGATION AND COOPERATION: SUPPORTING SPEAKERS IN THE COURTS OF CLASSICAL ATHENS* (2000). We shall not underestimate here the role of political clubs in Athens, who played an important part in this legal system. The influence of these club activities in litigation was enormous, since it was common for a defendant to have someone from his club to prosecute the accuser so as to make him drop his case, or — conversely — to initiate a new suit against the defendant but with very little evidence, so as to weaken the previous case.

53. Alan L. Boegehold, *Toward a Study of Athenian Voting Procedure*, 32 *HESPERIA* 366-74 (1963).

claims, the jurors were likely to attend for the pure pleasure of hearing a good speech.<sup>54</sup>

Greek law, unlike most of our legal systems, was more practice than theory. This implies a methodological problem for those willing to study its characteristics. Since it was not codified, and evidence is scarce, the only way to examine the main aspects of Greek law is by appealing to nonlegal documents if one is interested in reconstructing how courts and assemblies worked at that time. We should pay attention to Gerhard Thür when he proposes to combine all relevant sources to attempt an exhaustive study of legal features in the Greek world:

one has to reconstruct both the details and the principles of Greek law by studying every available source: literature (including philosophy), inscriptions, papyri — evaluating every piece of evidence in its special local and temporal context. The so-called legal texts — laws (*nomoi*), contracts, judgement and forensic speeches — are no more significant than epic, lyric, tragic or historiographic writings.<sup>55</sup>

In this quotation of apposite sources of law, references to different literary genres, such as epics, poetry or tragedy, should be underlined. Literature, therefore, occupies a place of preference in the reconstruction of a former legal system; following these expressions by Thür, we could conceive this relationship as based upon a certain “law *through* literature” dimension.

In order to go beyond these observations on Athenian tribunals, and to suggest a possible “law and literature” *ensemble* in ancient Greece — something traditionally ignored<sup>56</sup> — we will focus on theater as one particular literary example and its proximity to judicial activities.

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54. DAVID WILES, *GREEK THEATER PERFORMANCE: AN INTRODUCTION* 56 (2000).

55. Gerhard Thür, *Oaths and Dispute Settlement in Ancient Greek Law*, in *GREEK LAW IN ITS POLITICAL SETTING: JUSTIFICATIONS NOT JUSTICE* 57 (Lin Foxhall & Andrew D.E. Lewis eds., 1996).

56. A true example of this ignorance is given by the recent and comprehensive two-volume book by Christine Alice Corcos. CHRISTINE ALICE CORCOS, *AN INTERNATIONAL GUIDE TO LAW AND LITERATURE STUDIES* (2000). Only three pages out of its almost 1300 deal with law and literature in ancient Greece, and most of them are not even directly related to the matter. *Id.* at 149-51.



### III. LITERATURE IN CLASSICAL *POLEIS*: DRAMATIC FESTIVALS

When discussing literary expressions, Mari included the idea that many written texts could be expected to eventually be taken on stage.<sup>57</sup> In this sense, the special nature of *mise en scène* makes theater nothing but a literary genre in its own sense and with its own profile. More attached to civic values in ancient society than today, Greek theater has always been a promising field for different studies related to its context of representation.<sup>58</sup>

The origins of Greek tragedy and comedy remain obscure and controversial, and are apparently related to religious rituals and former literary dithyrambic chorus and phallic compositions.<sup>59</sup> Despite this problem, the general characteristics of the genre can be traced. Greek plays were performed in an outdoor theater by a chorus and three actors — who play all the speaking characters — disguised in costumes and masks. Tragedy almost exclusively had to do with a mythic background, whereas ancient comedy was influenced by the satirical representation of contemporary figures and issues — in the fourth century B.C., New Comedy dealt with private controversies, which replaced the objective of attacking politicians or government officers.

The group of dramatic pieces that have actually survived oblivion and were transmitted through history until our days were prepared to be played in theaters of a very particular character, according to the sociocultural aspects of the Greeks. In its architectural features, the most typical area was the *orchestra* or dancing floor, which was a simple circular space in which the chorus performed. This design was probably related to some of the origins of theater that have been mentioned, which can be found in local festivals of song and dance. In the middle part of the orchestra there was the *Thymeli*, originally an altar and in classical times the place where the leader of the chorus (*koryphaios*) used to stand.

Peter Arnott explains that around “the limits of the orchestra, tiers of seats were built into the convenient hillside, so that the audience could look down onto the stage.”<sup>60</sup> This device allowed a huge number of

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57. Mari, *supra* note 3.

58. On Greek drama, see PETER D. ARNOTT, AN INTRODUCTION TO THE GREEK THEATRE (1967); GRAHAM LEY, A SHORT INTRODUCTION TO THE GREEK THEATRE (1991).

59. According to Aristotle's *Poetics* III-IV, these compositions are to be held — respectively — at the basis of tragedy and comedy. ARISTOTLE, POETICS III-IV. In his view, tragedy seems to derive from ancient epic writings, and comedy finds its source in iambic texts. *Id.* On the disputable origins of Greek drama, see SIR ARTHUR W. PICKARD-CAMBRIDGE, DITHYRAMB, TRAGEDY AND COMEDY (1927); Walter Burkert, *Greek Tragedy and Sacrificial Ritual*, 7 GREEK, ROMAN, & BYZANTINE STUD. 87-121 (1966).

60. PETER D. ARNOTT, PUBLIC AND PERFORMANCE IN THE GREEK THEATRE 3 (1991).

spectators around the center of the theater. The *skene*, hanging or standing beyond the dancing floor, was considered to be the actors' location; this was the place where they could change their costumes. In classical times, playwrights began using a stone scene wall (the *paraskenia*) with projecting sides. To its right and left, there were two processional entranceways, called the *parodoi*, that led directly into the *orchestra*.<sup>61</sup>

The actors positioned themselves either in the *orchestra* with the chorus or on the steps leading to the doors of the *skene*. The protagonist, deuteragonist, and tritagonist — which were chosen and hired by the state — played the multiple roles of the play, although some extra non-speaking figures could stand on stage for the purpose of the plot. All actors were male, and the use of masks helped the spectators learn the age, sex, and social status of the characters they represented. Masks were also designed with open mouths to allow intelligible speech.

The twelve (later, fifteen) members of the chorus were trained by the poet for the performance. Once these *khoreutai* had entered though the *parodoi*, the chorus interacted with the characters through the *koryphaios* and sang and danced the *stasima*. In the examination of the typical patterns of Greek drama, and the way they answered the demands of a theater concerned primarily with the spoken word, the importance of debate on stage — between the protagonist and the chorus, or between characters themselves — must be regarded as one of its most fascinating properties. In both tragedy and comedy, debate plays a prominent part, since it usually replaces action. The argumentative instinct, which we found in courtrooms, is also strong in theatrical pieces.

The audience occupied an essential part of the dramatic setting, and in the *theatron* seating was carefully assigned in accordance with social ranks. The main wedge was reserved for members of the Council and young men in military training; citizens used to occupy the middle rows, and noncitizens and women (if it is true they attended the representations, which is still in doubt) may have been given the two last wedges.<sup>62</sup> There is an agreement among historians that attendance was open to all citizens, although in practice it might be suggested that not all of them would have been able to afford the tickets.<sup>63</sup> Nevertheless, the occasions for dramatic representations were very few, so it is possible that the spectacle was

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61. *Id.*

62. K.J. DOVER, *ARISTOPHANIC COMEDY* 17 (1972) (“when the adult male citizens had seated themselves women, children, foreigners and slaves saw as much of the plays as they could”).

63. Despite the existence of discussions, there is evidence that in the classical period the price never exceeded two obols. ERIC CSAPO & WILLIAM J. SLATER, *THE CONTEXT OF ANCIENT DRAMA* 288 (1994). However, by the late fourth century B.C. the amount was heavily increased up to five drachmas (almost thirty obols).

essentially democratic. Evidence reveals that plays were performed in Athens at only two moments in the year.<sup>64</sup> Both were festivals in honor of the god Dionysos: the Great Dionysia, which occupied six days in Elaphebolion (corresponding *grosso modo* to our month of March)<sup>65</sup> and the Leneia, which lasted four days in Gamelion (roughly January).<sup>66</sup> It seems that both religious festivals were celebrated in the theater of Dionysos beside the Akropolis,<sup>67</sup> and dramas participated in competitions. After a day of religious parades and two days of dithyrambic dancing, dramatic contests were put into action as part of the feasting program.

Tragic poets were selected by an *arkhon* — the magistrate in charge of the festival — to put their plays on stage. Each one of the playwrights presented a tetralogy of three tragedies and a satyr play; only three were finally chosen. Wealthy Athenians acted as sponsors of the festivities, and covered all expenses of the contest through the payment of taxes. Among these public services or “liturgies” done for the benefit of the community, some Athenians were even chosen by the *arkhon* to supervise and finance the dramatic presentation. These *khoregoi* had the duty of getting costumes and masks, paying for the actors and musicians, hiring a director or *didaskalos* and giving all necessary support for the training of the chorus.

Authors would participate in these contests in order to be granted the prize for winning. A number of judges were appointed for the competitions a few days before the representations. First, a long list of judges (*kritai*) had to be agreed in the Council (*Boule*). All the names were written separately in little spheres and kept sealed in special jars. This list was afterwards shortcut during the competition, to avoid bribery, and only ten judges were finally elected out of the urns; these judges were called to write their individual verdicts on a tablet after all plays were acted. Randomly, the *arkhon* used to draw out five tablets, and votes were counted to rank the poets and award the prizes.

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64. DOUGLAS M. MACDOWELL, *ARISTOPHANES AND ATHENS: AN INTRODUCTION TO THE PLAYS* 7 (1995); see SIR ARTHUR W. PICKARD-CAMBRIDGE, *THE DRAMATIC FESTIVALS OF ATHENS* (revised by John Gould & D.M. Lewis, 1968) (regarding festivals in Athens); H.W. PARKE, *FESTIVALS OF THE ATHENIANS* (1977).

65. On the civic importance of this festival, see W.R. Connor, *City Dionysia and Athenian Democracy*, 40 *CLASSICA ET MEDIAVALIA* 7-32 (1989); Simon Goldhill, *The Great Dionysia and Civic Ideology*, in *NOTHING TO DO WITH DIONYSOS? ATHENIAN DRAMA IN ITS SOCIAL CONTEXT* 97-129 (John J. Winkler & Froma I. Zeitlin eds., 1990).

66. MACDOWELL, *supra* note 62, at 7. Two other festivals in honor of the god were also organized: the *Small Dionysia* in December and the *Anthesteria* in February. Apparently, no tragic competitions were consistently held during these celebrations. PICKARD-CAMBRIDGE, *supra* note 62, at 10, 42-45.

67. See SIR ARTHUR W. PICKARD-CAMBRIDGE, *THE THEATRE OF DIONYSUS IN ATHENS* (1946).

As it can be seen, these festivals were essentially involved with competition, and therefore constituted an active manifestation of political training and democratic discussions, where citizenship was clearly acted out in public and put into practice.<sup>68</sup> In this sense, there are several similarities that can connect the administration of justice and dramatic contests in Athens; all of these particular aspects of theater are interesting paths to pursue the close attachment between law and literature within the context of democracy.

#### IV. LAW AND DRAMA IN ATHENS (AND ELSEWHERE)

It is clear that Shakespeare's theater was always buzzing with litigiousness,<sup>69</sup> and Cervantes' *Quixote* was permanently dealing with some legal issues.<sup>70</sup> These references often become an interesting source of discovering some practical dimensions of ancient law.

As it is my aim to show here, the representations of justice within literary texts can be especially traced much earlier, in fifth-century Athenian theater, where many pieces were also distinguished by frequent references to legal allusions, sometimes even at the very heart of the plot.<sup>71</sup> Aiskhylos's *Eumenides*, for instance, is set around the homicide of Klytemnaistra and Aigistos, who had murdered king Agamemnon. As a natural outcome of the action, the Areopagos court is created and a trial is arranged on stage by the goddess Athena in order to decide Orestes's punishment for killing his mother and her lover. Through a protagonist claiming for the right to perform her brother's death rites within the limits

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68. "As festivals were a stage for the performance of citizenship, so that performance becomes restaged as a factor in the contestation of status and the politics of self-representation that constitutes public life in democracy." Simon Goldhill, *Programme Notes*, in *PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY*, *supra* note 45, at 23; *cf.* Robin Osborne, *Competitive Festivals and the Polis: A Context for Dramatic Festivals in Athens*, in *TRAGEDY, COMEDY, AND THE POLIS: PAPERS FROM THE GREEK DRAMA CONFERENCE 21-38* (Alan H. Sommerstein et al. eds., 1993).

69. *See, e.g.*, D.C. Ramsey, *Summum Ius — Summa Iniuria: El Imperio de la ley Ante los Reclamos de la Justicia en El Mercader de Venecia de William Shakespeare*, 60 *REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO* 407-18 (1991); IAN WARD, *SHAKESPEARE AND THE LEGAL IMAGINATION* (1999).

70. *Cf.* L. BENITO, *EL SENTIMIENTO DE LA JUSTICIA EN DON QUIJOTE Y SANCHO* (1905); J.E. Castañeda, *El Derecho en el Quijote*, 37 *REVISTA DE DERECHO Y CIENCIAS POLÍTICAS* 199-250 (1974); RAFAEL ÁLVAREZ VIGARAY, *EL DERECHO CIVIL EN LAS OBRAS DE CERVANTES* (1987); ANTONIO JOSÉ URIBE PRADA, *DON QUIJOTE, ABOGADO DE LA MANCHA* (1991).

71. *Cf.* GIOVANNI CERRI, *LEGISLAZIONE ORALE E TRAGEDIA GRECA* (1979).

of Thebes, Sophokles's *Antigone*<sup>72</sup> addresses the tragic opposition between human law and the superior principles of justice.<sup>73</sup> Aristophanes's *Wasps* comically represents contemporary judicial activity by presenting a maniac character suffering from the terrible disease of litigiousness.<sup>74</sup> These are not isolated examples: there are a number of plays in which no legal trial is involved, and where the forms of debate seem not merely gratuitous but highly inappropriate to us as contemporary readers.

We must take into consideration that the Athenians were litigious and that rhetoric was a landmark of the time: the influence of forensic *agones* in theater is only understood if taken as part of a real "*esprit de l'époque*" (spirit of the time). In democratic times, it is clear that civic action was mainly exercised through the staging of public speeches in open spaces of participation. Theater and courtrooms, in this sense, are two fields which can be clearly connected within the territory of political activity.<sup>75</sup> The

72. *Eumenides* and *Antigone*, according to Elizabeth Villiers Gemmette are "the two Greek plays chosen most often to be taught by Law and Literature professors . . ." Cf. ELIZABETH VILLIERS GEMMETTE, *LAW IN LITERATURE: LEGAL THEMES IN DRAMA* (1995), pt. 1.

73. On this play, Mark S. Howenstein has said:

The aura of *Antigone* envelops law as no other work of art in the history of Western civilization. In no other work of art are so many divergent understandings of law to be found in such direct, dynamic opposition to one another. In no other work of art are the mysterious depths of law probed more deeply, passionately or reverently—leaving the spectator in awe and wonder, and in complete bewilderment regarding the meaning of it all. In no other work of art is law treated with such clarity and precision in such a profoundly mystical way.

Mark S. Howenstein, *The Tragedy of Law and the Law of Tragedy in Sophocles' Antigone*, 24 *LEGAL STUD. F.* 493 (2000).

74. The stage trial against the dog Laches in this play may have inaugurated a long list of courtroom satiric compositions, such as Racine's *Les Plaideurs*. Cf. A. Borowitz, *The Wasps and the Litigants: Courtroom Satires of Aristophanes and Racine*, 25 *LEGAL STUD. F.* 247-62 (2001).

75. This relationship does not only occur in antiquity. In fact, several points can be discovered if theater is put in contact with the practice of law: "drama itself is a vital part of the tissue of experience that develops our ideas and expectations of justice." Daniel Lerner, *Justice and Drama: Historical Ties and "Thick" Relationships*, 22 *LEGAL STUD. F.* 3, 17 (1998); KATHY LASTER, *THE DRAMA OF THE COURTROOM* (2000). Whereas tragedy is probably the dramatic experience that is most often attached to the exercise of justice, comedy cannot be left aside when drawing this parallel: "The action of a civil society is what on stage is known as comedy — that form of drama which displays how individuals grow and learn, and how societies integrate youth and age, the conventional and the rebellious, the ordinary and the odd, into community." Daniel Lerner, *Teaching Justice: The Idea of Justice in the Structure of Drama*, 23 *LEGAL STUD. F.* 201, 209-10 (1999).

[W]e see how integral the development of cultural conceptions of justice are to the very fabric and essence of the drama, and how, for more than two thousand years,

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At judgment is understood as a tragic show, and this is always crossed by a political message which is indirectly addressed to the spectators.

In classical Greece, as Richard Garner understood, “[t]hese legal and dramatic verbal contests shared various details of procedure and administration which suggested their equivalence to democratic audiences. Some of the resemblances were elaborately specific.”<sup>76</sup> They both became social instances of representation: a dramatic text, or a legal argument, is meant to be taken from the written paper to the acting studio, in order to be performed in front of others. In the core of the debate, litigants/actors are playing their roles.<sup>77</sup> In these agonistic games of characters,<sup>78</sup> a public dimension is achieved: theater and courts are means to represent both collective and symbolic events in a public sphere.<sup>79</sup> Both spectacles are, thus, social rituals.<sup>80</sup> Certain conventional elements that they share turn them into formal and deeply structured ceremonies,<sup>81</sup> which at a point remain close to their religious origin.

A *ritual* is a codified complex of systematic and repetitive behaviors.<sup>82</sup> The rules which give rise to rituals are meant to create and promote a number of essential values in a specific society. The judicial procedure is a secular ritual *par excellence*, since it is intended to consecrate a conservative order, to impose the traditional scheme of power and to

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we have found the essential forms of those ideas in the tissues of our drama where its tragic and comic sensibilities collide, conflict, and connect.

Daniel Lerner, *Justice and Drama: Conflict and Advocacy*, 23 LEGAL STUD. F. 417, 429 (1999).

76. RICHARD GARNER, LAW AND SOCIETY IN CLASSICAL ATHENS 97 (1987).

77. It is interesting to notice that the Latin word for actor, *persona*, is the term used in justice to express that a certain person is invested with legal personality. In this sense, a litigant is representing an established role in front of the jurors, just like an actor represents a character disguised with a mask in front of the audience.

78. “The significance of storytelling in the courtroom is grounded in an important parallel between our system of jurisprudence and fables: both are driven by a personal and thematic ‘protagonist vs. antagonist’ structure. The common law system is adversarial; parties square off against one another seeking victory, not compromise.” Avi J. Stachenfeld & Christopher M. Nicholson, *Blurred Boundaries: An Analysis of the Close Relationship Between Popular Culture and the Practice of Law*, 30 U.S.F. L. REV. 903, 904 (1996).

79. G. Soulier, *Le Théâtre et le Procès*, 1999 DROIT ET SOCIÉTÉ: REVUE INTERNATIONALE DE THÉORIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE 17.

80. See Oddone Longo, *The Theater of the Polis*, in NOTHING TO DO WITH DIONYSOS? ATHENIAN DRAMA IN ITS SOCIAL CONTEXT, *supra* note 63, at 12-19 (stating the importance of the “community” and theater as “a public event par excellence”).

81. Cf. C. Dedoussi, *Greek Drama and Its Spectators: Conventions and Relationships*, in STAGE DIRECTIONS: ESSAYS IN ANCIENT DRAMA IN HONOUR OF E.W. HANDLEY 123-32 (BICS Suppl. 66, 1995) (regarding theatrical conventions).

82. DAVID I. KERTZER, RITUAL, POLITICS AND POWER 9 (1988).

Florida Journal of International Law, Vol. 16, Iss. 3 [2004], Art. 12 reaffirm the official ideology.<sup>83</sup> Dramatic representations are also ritual instances, ceremonies where everyone has his or her place, where actors and audience are clearly discernible in a prepared scenario of solemnity.<sup>84</sup> In this sense, ritual is basically a performative activity.<sup>85</sup>

Therefore, what seems more interesting to me is to expand the traditional — and maybe too strictly philological — “law in literature” perspective (which only deals with the discovery of legal references within the plays), to see if a more representative link in Athens between legal practice and the literary phenomenon of drama can be discovered. We have been able to identify a suitable parameter of comparison under the cross-examination of *argumentative devices*, *structural organization*, and *performance*.

Law and theater have clearly become in Athens privileged areas for democratic argumentation. Both in court and on stage, Athenians made use of their persuasive skills to convince the audience and jurors.

The notion of *argumentativity* is basically related to this aspect. Born as a concept linked in its origins to lexical and structural patterns,<sup>86</sup> the idea became soon afterwards attached to the development of studies in pragmatics.<sup>87</sup> If argumentation could be understood as the study of discourse techniques intending to provoke or increase the adhesion of the spirit of others to one’s own thesis,<sup>88</sup> “argumentativity” stands for a property of every speech act leaning towards the production, reproduction and transformation of those social representations of others.<sup>89</sup> From this point of view, then, it has to be considered next to the idea of *persuasion*.<sup>90</sup>

Argumentation is a verbal and social activity mainly concerned with different efficacious ways oriented towards the peaceful resolution of a

83. Cf. MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* (1975); ANTOINE GARAPON, *L’ÂNE PORTANT DES RELIQUES: ESSAI SUR LE RITUEL JUDICIAIRE* (1985); DAVID W. GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990).

84. JEAN DUVIGNAUD, *SOCIOLOGIE DUE THÉÂTRE: ESSAI SUR LES OMBRES COLLECTIVES* (1965).

85. ROY A. RAPPAPORT, *ECOLOGY, MEANING, AND RELIGION* 175-76 (1976); CHRISTINE BELL, *RITUAL THEORY, RITUAL PRACTICE* 37-46 (1992); Michael H. Jameson, *The Spectacular and the Obscure in Athenian Religion*, in *PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY*, *supra* note 45, at 321.

86. Jean-Claude Anscombe & Oswald Ducrot, *Argumentativité et Informativité*, in *DE LA MÉTAPHYSIQUE À LA RHÉTORIQUE* 79-94 (1980).

87. Beatriz Lavandera, *Argumentatividad y Discurso*, 1992 *SEPARATA DE LA REVISTA DE FILOLOGÍA*.

88. CHAÏM PERELMAN, *RHÉTORIQUES* 243 (1989).

89. Sebastián Sayago, *Sociosemiótica y Argumentatividad*, 3 *REVISTA IBEROAMERICANA DE DISCURSO Y SOCIEDAD* 91-116 (2001).

90. Argumentation, rhetoric and persuasion have always been related to each other since ancient times. Cf. PLATO, *GORGAS* 454e; ARISTOTLE, *RHETORIC* 1355a-b.

Buis: How to Play Justice and Drama in Antiquity: Law and Theater in At controversy of opinion,<sup>91</sup> and therefore, it proposes the defense of a certain perspective.<sup>92</sup> Since it is necessary to persuade others about a disputable issue in a context of dialogue, argumentative devices — especially antithesis, logical syllogism, and the exploitation of dialogical interaction<sup>93</sup> — should be addressed to a specific audience, and cannot be examined without reference to the unique moment in which the speech is pronounced.<sup>94</sup>

In courtrooms and on stages, imposing a certain social representation leads to the execution of deliberate actions to convince, *id est*, to motivate interlocutors to adopt a particular behavior. It is understood from this that the forensic interaction of legal speeches and the agonistic discussions of characters in front of an audience, built over an organized presentation of incompatible views, are equally undermined by argumentative resources.<sup>95</sup>

The organization of both spectacles can also offer similarities, since tragedies derive part of their formal structure from the law court. Regularly we find two individuals pitted against each other, and each makes a speech of approximately equal length. As David Wiles points out,<sup>96</sup> “speakers in the law court could use precious time to interrogate their opponent, and a short intense interchange at the end of a pair of speeches is a common feature in drama.”<sup>97</sup>

What is more, we could consider that many other interesting similarities between public hearings in the legal sphere and those that were staged before citizens in the theatre have often been acknowledged.<sup>98</sup> Both trials and dramatic festivals were seen and heard by huge audiences of

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91. FRANS H. VAN EEMEREN ET AL., HANDBOOK OF ARGUMENTATION THEORY (1987).

92. On efficacy as the principal argumentative norm, see CHARLES PLANTIN, L'ARGUMENTATION (1996).

93. These are the main characteristics of argumentation, according to Cuenca. María Josep Cuenca, *Los Mecanismos Lingüísticos y Discursivos de la Argumentación*, 25 LENGUAJE Y EDUCACIÓN 23-40 (1995).

94. This is mainly affirmed by the constructivist approach of Jean Blaise Grize. JEAN BLAISE GRIZE, L'ARGUMENTATION (1981); cf. HELENA CALSAMIGLIA BLANCAFLOR & AMPARO TUSÓN VALLS, LAS COSAS DEL DECIS: MANUAL DE ANÁLISIS DEL DISCURSO (1999).

95. MARIA LAURA PARDO, DERECHO Y LINGÜÍSTICA: CÓMO SE JUZGA CON PALABRAS 117 (Nueva Vision 1996) (1992); OSWALD DUCROT, DECIR Y NO DECIR: PRINCIPIOS DE SEMÁNTICA LINGÜÍSTICA (1972). On the nature of argumentation, its function and limits within the legal discourse, see KARYN C. RYBACKI & DONALD J. RYBACKI, ADVOCACY AND OPPOSITION: AN INTRODUCTION TO ARGUMENTATION (4th ed. 2000), ch. I.

96. WILES, *supra* note 52.

97. *Id.*

98. *Id.* at 131; Josiah Ober & Barry Strauss, *Drama, Political Rhetoric and the Discourse of Athenian Democracy*, in NOTHING TO DO WITH DIONYSOS? ATHENIAN DRAMA IN ITS SOCIAL CONTEXT, *supra* note 63, at 237.



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 watchers/listeners,<sup>99</sup> which become involved with the action,<sup>100</sup> and in both  
 of them agonistic performances aimed toward a majority decision by the  
 jury about the winner.<sup>101</sup>

Speeches in law courts were essentially *dramatic* because they were represented as a spectacle: actors and orators had to rehearse in advance, memorizing the speech and pretending afterwards to improvise. Plaintiff and defendant, standing on two platforms facing the audience, were engaged in a process of self-dramatization.<sup>102</sup> In this sense, the relationship between law and literature can be seen as twofold: if we can say that tribunals worked as real dramatic spectacles, tragedies and comedies may also be considered, apart from literary fictions, a democratic space — open to anyone — where opinions are presented in mutual contradiction and disputes are settled. Democratic power is exercised, as well as the political authority of the *demos*:

Above all, both institutions [law-courts and theatre] were means of gaining status and authority within the political realm of the city, and thus such performances became key instruments of power. The political subject is constituted in and by performance, and citizens require self-conscious manipulation of performance; in the pursuit of power.<sup>103</sup>

A strong connection between legal and theatrical spaces is, thus, notorious: actors-litigants in a bilateral debate or *agon*, facing the jury

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99. Robert W. Wallace, *Poet, Public, and "Theatocracy": Audience Performance in Classical Athens*, in POET, PUBLIC, AND PERFORMANCE IN ANCIENT GREECE (Lowell Edmunds & Robert W. Wallace eds., 1997) (speaking of a real "theatocracy" in Athens, so as to lead an interpretation on the cultural importance of public in social performances such as drama).

100. In theater, spectators become identified with the chorus, as they become involved with the dramatic fiction through the civic performance of the *khoreutai*. Claude Calame, *Performative Aspects of the Choral Voice in Greek Tragedy: Civic Identity in Performance*, in PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY, *supra* note 45, at 149.

101. Apart from all this, actors may be compared to court witnesses:

Attorneys sum up the whole story in their closing arguments before the court, after having called witnesses of their own choosing to testify in behalf of their client's case . . . Witnesses are akin to actors in a staged drama, and adversary lawyers match their witnesses against each other. We can see why playwrights find the courtroom a congenial *mise-en-scène* or why lawyers ham it up when they can.

JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 41 (2002).

102. WILES, *supra* note 52, at 57.

103. Goldhill, *supra* note 66, at 25. In these ideas, he takes Ober as one of his main sources of thought. OBER, *supra* note 45.

under the cautious and interested look of the audience sitting around the stage-courtroom. These popular activities represent the nature of *performance*. As part of the institutional system, attitudes and practices which are integral to the society of classical Athens, they illuminate the culture of democracy.<sup>104</sup>

I cannot agree with Jennifer Wise when she argues that in Athens theatrical problems and limitations perverted the original text of the drama.<sup>105</sup> Even if the original form of drama is writing, it must not be forgotten that theater is — in itself — what becomes represented on stage. In classical Athens, where the passage from an oral community to a literary culture has been slow, a play is not composed to be read, but to be acted out. The use of extra-verbal communication in the experience of tribunals and dramatic scenarios, as part of a spoken and acted spectacle, can also be read as performative signs in common.<sup>106</sup> The aesthetic activity of a judge composing a verdict can also be seen as the work of a dramatist.<sup>107</sup>

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104. Goldhill, *supra* note 66, at 1.

105. See JENNIFER WISE, *DIONYSUS WRITES: THE INVENTION OF THEATRE IN ANCIENT GREECE* (1998).

106.

As in the court-room, the clustering of signs in the theatre challenges the centrality of the word with signs other than the text contributing to the making of meaning. Although academically we read law as a text, in the court-room law is also a collection of images, performances, signs that influence if not determine the outcome. In this *con-text*, rather than *text*, the “word” may be made to mean something different through the intervention and disruption by other linguistic and non-linguistic signs. In the theatre as in the court-room, musical, pictorial and gesticular forms, the choice of actors, the choice of audience, stage-sets, costumes, lightings, not only illustrate, decorate or accompany the written text but can disrupt the text, reveal its fragility, and deliver a different message. The performance of the text can explore, exceed, and even explode the text, and even dislocate the meanings suggested by any reading. It can explore the margins and limits of the text and of classical theatre, and in the process demystify, even kill the text and the author and his authority.

ARISTODEMOU, *supra* note 12, at 77.

107. See James A. McKenna, III, *The Judge as Dramatist*, 5(3) AM. LEGAL STUD. ASS'N F. 40, 46 (1981).

Thus, if combining the dynamics and dramatics of the jury trial with the general structure and progression of the sonnet, an aesthetic approach is suggested whereby a judge, no matter what his personal philosophic persuasion, might treat in a persuasive, educational way both the legal dispute and its moral implications. . . . The importance of this suggested structure is that it offers the judge an aesthetic form which can accommodate statements of the more dramatic, sympathetic, facts in the case, especially one in which the litigants are poor.

As Bernard Hibbits affirms:

In performance cultures, the basic communicative idiom is very different. Instead of suppressing certain media or keeping them separate, members of preliterate or marginally literate societies continually combine media. In their highest forms of cultural and intellectual expression, speech routinely gives voice to gesture and gesture gives shape to speech; music gives sound to sculpture, while sculpture gives substance to music. Law is simultaneously heard, seen, and sometimes even felt and savored. Ultimately, the meaning of significant cultural and legal messages resides less in the individual components of communication (although these must be recognized) than in their synthesis, performance.<sup>108</sup>

Law and literature are domains of speech. But if they are limited to verbal language, much of their nature is lost. Performance is essentially visual.<sup>109</sup> Several physical indicators in the location of performance help the spectators identify participants and judges. The disposition of space creates different roles. According to their placing, defendants and accusers are visible and distinguished, actors and chorus are separated in a *mise-en-scène* organized to be heard and seen.<sup>110</sup>

A tragic or comic play is nothing but the live interaction of words and gestures; a trial is not only a procedure held in a courtroom, but the *image* and *sound* of that procedure. This visual character makes the situation of

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*Id.*

108. Bernard J. Hibbits, *Coming to Our Senses: Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873, 943 (1992).

109. Athena Kavoulaki, *Processional Performance and the Democratic Polis*, in PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY, *supra* note 45, at 293, 294 (“processional ritual shares with theatrical performances — performances *par excellence* — an explicitly declared emphasis on viewing.”).

110. Seeing and hearing are the two essential aspects of the dramatic experience. RICHARD GREEN & ERIC HANDLEY, *IMAGES OF THE GREEK THEATRE* 11-13 (1995). Voice was a main factor: “A performer, whether actor or orator, with an outstanding, professionally trained voice could give intense pleasure to large audiences in open-air theatres and places of assembly . . .” Pat Easterling, *Acts and Voices: Reading Between the Lines in Aeschines and Demosthenes*, in PERFORMANCE CULTURE AND ATHENIAN DEMOCRACY, *supra* note 45, at 154, 160.

judging a common landscape in TV shows<sup>111</sup> or films,<sup>112</sup> where tribunals are frequently represented through the use of conventional patterns shared by the audience. Law is performance in all its senses, and so is drama.<sup>113</sup>

This comparative outlook shows that law has much more to do with literature than we think, because they are both ruled — as activities organized within the community — by cultural conditions which affect and impose their social meaning and purpose at a certain moment in time.

## V. CONCLUSION: LAW AND THEATER AS PERFORMATIVE RITUALS

The deep symbiosis of stage activities and civic life in Athens during the fourth and fifth centuries demands a new explanation of some of the basic notions in law and literature studies. Throughout this Article, we have tried to focus on this particular relationship in ancient drama, discussing the insufficient scope of some well-known assumptions on “Law in Literature” or “Law as Literature” and suggesting certain changes in our critical perspective, so as to rethink the ways in which literary texts, juridical phenomena, and social factors may coexist in a specific community.

As we have seen, both contests at law and in the theater should be analyzed as instances of performance. Theatrical spectacles are structured like a jury trial, where a written accusation (the text) is judged by a mass audience in performance.<sup>114</sup> What is more, as Jerome Bruner has shown, it is possible to see that “law stories are narrative in structure, adversarial in spirit, inherently rhetorical in aim, and justifiably open to suspicion.”<sup>115</sup>

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111. On law and television, see Charles Winick & Myron Winick, *Courtroom Drama on Television*, 24 J. COMM. 67-73 (1974); Ethan Katsh, *Is Television Anti-Law? An Inquiry into the Relationship Between Law and Media*, 7 AM. LEGAL STUD. ASS'N F. 26-40 (1983); Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1 (1995); PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE (Robert M. Jarvis & Paul R. Joseph eds., 1998).

112. Francis M. Nevins, *Law Lawyers, and Justice in Popular Fiction and Film*, 2 HUMAN. EDUC. 3-12 (1984); THOMAS J. HARRIS, *COURTROOM'S FINEST HOUR IN AMERICAN CINEMA* (1987); Philip N. Meyer, *Visual Literacy and the Legal Culture: Reading Film as Text in the Law School Setting*, 17 LEGAL STUD. F. 73-92 (1993); Philip N. Meyer, *Why a Jury Trial is More Like a Movie Than a Novel*, 28 J.L. SOC'Y. 133-46 (2001); JOHN DENVER, *LEGAL REELISM: MOVIES AS LEGAL TEXTS* (1996); DAVID A. BLACK, *LAW IN FILM: RESONANCE AND REPRESENTATION* (1999); STEFAN MACHURA & PETER ROBSON, *LAW AND FILM* (2001); STEVE GREENFIELD & GUY OSBORN, *FILM AND THE LAW* (2001).

113. Edith Hall, *Lawcourt Dramas: The Power of Performance in Greek Forensic Oratory*, 40 BULL. INST. CLASSICAL STUD. 39-58 (1995).

114. WILES, *supra* note 52, at 135.

115. BRUNER, *supra* note 101, at 43.

The historical and cultural frame becomes an essential implement to deal with this nexus. To Julius's initial quotation, we could add now a fifth element, which complements and expands the others: the study of law *and* literature as *cultural spaces of performative rituals*. This last element would help to reaffirm the relationship between forensic actions and literary principles through the advantages of a simultaneous and interdependent evaluation and under chronological and cultural starting points. Even beyond dramas, literature is settled by a tridimensional scheme of performative communication, as Jack Balkin & Sanford Levinson observe: "legal practice features a triangular relationship between the institutions that create law, the institutions that interpret law, and the persons affected by the interpretation . . . In the performing arts, there is also a triangular relationship between the creator of the text, the performer and the audience."<sup>116</sup>

Performance, in its recent theorization,<sup>117</sup> has been seen as a cultural value; it becomes a central term to explain how subjects are related to social norms within a community. The acknowledgment of this subjective dimension in Athens makes us realize that both literature and law should be read as socially dynamic and public creations; drama, festivals, rites and spectacles are all cultural instances which are performed on their scenes in front of a democratic audience sharing a common ideology on the power of the *demos*.<sup>118</sup> Performative rituals are aimed at the reproduction and discussion of those values by the citizens themselves, updating in the interaction of voices their consciousness and reflections as *politai*.

Even if this new level of analysis cannot bring solution nor simplify the problems of a long-debated issue, I am convinced that it can at least propose the inclusion of another significant variable which would enrich

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116. Jack M. Balkin & Sanford Levinson, *Law as Performance*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES, *supra* note 6, at 729-51.

117. See Jill Dolan, *Geographies of Learning: Theatre Studies, Performance and the "Performative"*, 45 THEATRE STUD. 417-41 (1993) (stating that the theory of performance is a new field of study); RICHARD SCHECHNER, *PERFORMANCE THEORY* (1977); Phillip Zarilli, *Towards a Definition of Performance Studies*, 38 THEATRE J. 372-76, 493-96 (1986); ELIN DIAMOND, *PERFORMANCE AND CULTURAL POLITICS* (1996); MARVIN CARLSON, *PERFORMANCE: A CRITICAL INTRODUCTION* (1996).

118. Cf. JAMES MACALOON, *RITE, DRAMA, FESTIVAL, SPECTACLE: REHEARSALS TOWARD A THEORY OF CULTURAL PERFORMANCE* (1984).

**the complexity of the subject and encourage further discussions among literary critics and jurists.<sup>119</sup>**

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119. I want to thank all those participants at the LatCrit Colloquium in Buenos Aires who suggested some ideas and collaborated in my previous drafts. The possibility of exchanging opinions has been one of the main landmarks of the event, and I am therefore grateful to the organizers.

