KATHRYN TEMPLE’S OBSERVATIONS about legal ‘dysfluency’ raise a host of questions about legal performance in the courtroom and about the ways in which a printed text can serve as a legal performance. In this response, I propose to consider the meanings of legal fluency and dysfluency by inquiring into the occasion of the lawyer’s performance. This concept is most conventionally associated with the work of the trial lawyer, particularly as it involves the careful orchestration of facts and evidence so as to persuade a jury. The understanding of law as a rhetorical activity, however, also includes another sense of legal argumentation as performance, centring on the analysis and summation of doctrine. Criticisms of Blackstone’s courtroom presence, I will argue, conceive of performance as a persuasive activity aimed at jurors and the court of public opinion more generally. The commendation of Blackstone’s writing style, by contrast, speaks to a textual performance associated with doctrinal explication. Just as the prevailing styles of theatrical and public oratory may influence perceptions about a lawyer’s effectiveness in court, the conventions of doctrinal analysis also change over time—and indeed, Blackstone’s style of explanation in the Commentaries may have helped to alter them in the course of the eighteenth century, providing a model not only for legal writing but also for the forensic cadences of the figure whose expertise is the hallmark of the ‘consummate lawyer’.1

To understand the place of the natural and the artificial in legal performance, then, it is not enough to appeal to contemporaneous thinking about acting and oratory. In addition, we might ask: Who is speaking—a witness, a lawyer, a judge? Who is the audience—a jury, a judge, the public, the press? What is the subject—the prosecution’s motives, the defendant’s alibi, the plaintiff’s conduct, the majesty of the common law, an abstract

1 J Clitherow, ‘Preface’ to Reports of Cases ... Taken and Compiled by ... Sir William Blackstone (1781) vol 1, 1.
doctrinal point? A stammer prompted by amazement at an opponent’s insolence, a pause to ensure that the audience takes in the full implications of a new legal proposition, may be very different from a hesitant, halting, elliptical exposition of a doctrinal point. To be sure, legal doctrines can also evoke emotional responses from lawyers and judges. The question, however, is not simply about where emotion enters into legal argument, but where it is perceived to be appropriate in legal argument, when it is permissible to give explicit attention to emotional impulses.

In Blackstone’s time, the stammering lawyer was a common exemplar of legal ineptitude. English instances include the ironically named Counsellor Smooth in Charles Johnson’s *The Successful Pyrate* (1713), Serjeant Target in Richard Steele’s *The Conscious Lovers* (1722), Feignwell (who impersonates a lawyer) and Justice Lovelaw in Edward Phillips’s *The Mock Lawyer* (1733), the repeatedly self-interrupting ‘Counsellor’ in Samuel Foote’s *The Orators* (1762), and Stutter in *The Lawyer’s Panic* (1785).\(^2\) This character evidently enjoyed a certain degree of popularity, but one may doubt that he tells us much about contemporaneous perceptions of lawyers. Unlike the overly histrionic lawyers of the early nineteenth century, discussed below, this figure is mocked not because he has mastered the wrong skills, but because he has not mastered any. His plosive confusions would furnish just as much amusement if he were a politician or a hawker of quack medicines. While the stuttering lawyer is particularly eligible for ridicule because he is supposed to be nimble and alert, his profession merely supplies an additional excuse for laughing at a trait that was already regarded as hilarious by eighteenth-century audiences.\(^3\) The forms of legal fluency and dysfluency become clearer when we turn to instances that do not simply exhibit a speech impediment as an amusing spectacle in itself, but instead show how a particular use of language and diction may be effective even if the speaker’s presentation is studied and might be seen as artificial.

Numerous discussions of courtroom argumentation have considered the ways in which a lawyer’s presentation of facts, examination of witnesses, and summation of the applicable law should be modulated to influence the perceptions of the judge and jury.\(^4\) Because the lawyer’s choreography of

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\(^3\) Dickie (n 2) 62–63.

these details is so visibly driven by the aim of persuading an audience, ideas of natural and unnatural performance, of legal fluency and dysfluency, find a ready place in discussions of trial advocacy, and the emphasis on proper modulation makes the point that speed and smoothness do not always yield the most effective argument. A lawyer speechifying on behalf of an unpopular client might do well to seem passionate and extemporaneous, taken aback by powerful machinations conspiring to commit an injustice. That application of the Stanislavski method, in which the counsel strives almost literally to represent the client, is particularly appropriate when the venue is a jury trial, with public onlookers. Popular views about acting, oratory, and authenticity seem to have particular importance to this role, which requires the lawyer to understand what audiences expect from a performance. What sounds natural, compelling and accomplished in one era may seem stilted, dull or perplexing in another.

If we consider the question of ‘natural’ courtroom performance in relation to James Burgh’s important treatise on oratory, *The Art of Speaking* (1761), it becomes apparent that his comments apply most readily to a trial lawyer arguing about the justice of his client’s case. Burgh explains:

> True eloquence does not wait for approbation. Like irresistible beauty, it transports, it ravishes, it commands the admiration of all, who are within its reach. If it allows time to criticize, it is not genuine ... The hearer finds himself ... unable to resist ... His passions are no longer his own. The orator has taken possession of them; and, with superior power, works them to whatever he pleases.5

Burgh describes the kind of trial oratory that attracted large audiences and served as a kind of public theatre in England and American in the late eighteenth century and early nineteenth century. Indeed, Burgh observes, a dozen pages later, that

> [t]he pleader at the bar, if he lays before the judges and jury, the true state of the case, so as they may be most likely to see where the right of it lies, and a just decision may be given, has done his duty.6

While the sweeping, all-absorbing declamation that takes possession of the audience, and allows no time to criticise, might have made for a stellar performance when arguing to a jury, it would hardly have suited the needs of an argument with the bench about doctrinal matters, in anticipation of the consequences for future cases. The aesthetic that Burgh advocates, though evidently popular at the time, would itself give way, in the legal context, to an aesthetic of calm, rational, coherent exposition, associated with the primacy of the book, and exemplified by the expository style we find in the *Commentaries*.

6 Ibid 40.
Similarly, when commentators drew on the language of theatricality to single out lawyers for praise, during this period, the reference was typically to the lawyers’ talents to move juries and other public observers, imagined as part of larger jury. Thomas Erskine, seen as ‘the exemplar of the ideally “patriotic” barrister’ near the end of the eighteenth century, was admired for his ability to ‘make the sympathies of his audience subservient to his purpose’ and for his use of body language to ‘enforce the passions which his language was exciting’, precisely insofar as those skills helped to ‘lead to the conviction of the jury in favour of his client’.7 William Garrow’s performances in jury trials garnered similar praise: a contemporary called him ‘an actor as well as an advocate’, noting that ‘when silent, he ceased not to address the jury by the change of his features’.8 In the proceedings against Warren Hastings, Sheridan won the applause of ‘The Gallery folk’ who ‘Conceived ’twas a Play-House’,9 precisely because the event took the form of a trial, revolving around matters that engaged the attention of a wide audience. James Epstein observes that at this time, ‘Trials possessed many of the attributes of theater’, in part because ‘There was an audience; indeed, there were a number of audiences ranged both within and outside the courtroom’.10 The significance of this point gains additional force when we note that ‘the court of public opinion’ (or ‘bar of public opinion’) was beginning to come into currency in the 1790s, as a way of talking about the wider audience outside the courtroom.11

7 PC Scarlett, A Memoir of the Right Honourable James, First Lord Abinger (London, 1877) 66; quoted in DF Lemmings, Professors of the Law (Oxford, 2000) 307. Similarly, according to JC Jeaffreson, ‘Erskine was a perfect master of dramatic effect, and much of his richly-deserved success was due to the theatrical artifices with which he played on the passions of juries’: A Book about Lawyers (London, 1867) vol 2, 47.


9 [Anon], Letters from Simpkin the Second … Containing an Humble Description of the Trial of Warren Hastings (1789) 33; for further discussion, see G Ridley, ‘Sheridan’s Courtroom Dramas: The Impeachment of Warren Hastings and the Trial of the Bounty Mutineers’, in JE DeRochi and DJ Ennis (ed), Richard Brinsley Sheridan: The Impresario in Political and Cultural Context (Lewisburg PA, 2013) 177–90, esp 185.


Some contemporaries, however, objected the theatrical analogy; thus, for example, Henry Crabb Robinson observed that ‘the Barrister, tho’ he acts before the public, does not act for the public’ and should not be classified with ‘Actors [and] public performers’.\(^{12}\) By the 1830s the assumption that juries were to be swayed by histrionics had evidently become so widespread, and so unthinkingly adopted, that one commentator could criticise ‘young and inexperienced barristers’ who stormed about the courtroom, ‘making outrageous demands on the sympathy of a jury’, only to find their efforts ‘successfully met and opposed by the adverse party casting ridicule on their extravagance’.\(^{13}\) The enthusiasm for high-flown courtroom oratory seems to have diminished by the mid-century, requiring lawyers to develop other skills if they wanted to cultivate an impressive courtroom presence.

Predominant among these skills were the orderly and enumerative methods of the lawyer who is well versed in precedent and can bring it to bear at a moment’s notice. The lawyer who studies oratory textbooks to learn about new trends in acting styles will misunderstand what is required to exhibit this kind of fluency. A strict set of conventions about ordering and relevant detail govern the tempo and structure of a lawyerly presentation of doctrine, and although for laypersons the effect might seem stilted, observing these conventions is the only way to demonstrate fluency among professionals. Robert Ferguson, describing an argument before the US Supreme Court in the 1840s, observes that Daniel Webster, a ‘master orator’ in the style of the early nineteenth century, ‘evok[ed] applause and even tears from [his] immediate audience but [not] from the bench’, whereas his opponent, Horace Binney, prevailed with an argument resembling ‘a modern legal brief’.\(^ {14}\) Nor were the judges the only observers to prefer Binney’s citation-heavy mode of presentation: a contemporary also characterised his oral performance as a kind of text, saying that he ‘unfolded [a] masterly treatise on charitable uses’, and a journalist who found the argument ‘as dry as the African deserts’ nevertheless acknowledged that Binney had given a ‘slow, cautious, logical analysis … a perfectly well constructed, highly polished law argument, calculated to rivet a lawyer … but rather caviare to the multitude’.\(^ {15}\) Webster’s mistake was to persist in an oratorical mode that could impress jurors, but would not sway a bench focused on doctrinal matters.

\(^{12}\) HC Robinson, diary entry for 17 October 1818 (commenting on Collier, Criticisms (n 8)) quoted in A Freeman and JI Freeman, John Payne Collier: Scholarship and Forgery in the Nineteenth Century (London, 2004) vol 1, 82.

\(^{13}\) [Anon], ‘Expression’, The Athenæum, 21 September 1833, 635–36. Perry Miller observes that Joseph Story was similarly unimpressed with a style of advocacy prevalent around this time among American lawyers, who ‘played shamelessly to the galleries’ when ‘putting on exhibitions of forensic melodrama which rivaled the splendiferous performances of the theater’: P Miller, The Life of the Mind in America (New York NY, 1965) 151.

\(^{14}\) R Ferguson, Reading the Early Republic (Cambridge MA, 2004) 246, 243. The case was Vidal v. Girard’s Executors, 43 U.S. 127 (1844).

\(^{15}\) Ibid 244, quoting HA Wise, Seven Decades of the Union (Philadelphia PA, 1872) 218 and ‘The Great Girard Will Case’, New York Herald, 10 February 1844, 2.
The distinction also appears in commentaries on advocacy from the late eighteenth century. An account of prominent lawyers and jurists published in 1790 could praise Sir John Scott in terms that make him sound like the oral edition of treatise:

His Speaking, is of that subtle, correct, and deliberate kind, that has more the appearance of written than of oral Eloquence. He branches forth his Arguments into different Heads and Divisions; and pursues the respects Parts through all their various Ramifications, with such methodical Accuracy, that Argument seems to rise out of Argument, and Conclusion from Conclusion, in the most regular and natural Progression.16

Here is a speaker who might, one imagines, have developed his style through extensive study of the Commentaries. Scott’s speciality, the authors noted, was in Chancery pleading: ‘Mr. Scott is little known out of the Metropolis, or in it, but as a Chancery pleader—The Subtlety of his Metaphysical Reasonings are admirably adapted to the Practice of this Court’.17

William Garrow, mentioned earlier as a brilliant trial lawyer, was also praised by Collier for his talent in adopting a meticulous and disciplined mode when explaining legal doctrine: ‘he never ventures upon a point of law, of which he himself is not only completely master, but of which he does not make his hearers completely master’.18 Again, in describing the abilities of Sir Arthur Piggott, Collier remarked that in the equity courts, where there was no jury,

all that is very important to an advocate is a knowledge of his business, a distinct mode of detailing facts, and a perspicuous manner of stating arguments founded upon them: eloquence, or any attempts beyond a clear uninterrupted flow of words and thoughts, would … be wasted. The counsel do not address a jury of twelve men upon matter with which their individual feelings may be connected.19

The same distinction explained why Sir Francis Buller excelled as a judge, though not as a trial lawyer. Because he had not sufficiently ‘direct[ed] his attentions to the embellishments of oratory’, and ‘had little success in his address to the passions’, he ‘could not … be eminent in his appeal to a Jury’. On the bench, however, his rhetorical talents found their natural place:

It is the general, as it is the just professional character of this great lawyer, that he states his arguments with the utmost accuracy and precision, reasoning logically, and in a style, which may be deemed the true eloquence of law.20

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17 Rede and Wynne (n 16) 205.
18 [Anon], ‘The Law Student’ (1811) 1 The Reflector 374, 377.
19 Collier (n 8 above) 87. Again, Collier could write (ibid 133–34) that Serjeant John Lens was ‘most impressive’ even though ‘his voice is rather too monotonous’—a trait that made his ‘stile … much better adapted to a continued legal argument, than to an address to a jury’.
20 Rede and Wynne (n 16) 106, 108.
The declamatory mode was not the preferred means of explaining legal doctrines and concepts in Blackstone’s time, and while passion would continue to have a place in legal advocacy, the measured cadences of the legal expert would become increasingly pronounced, even in trial courts, as the nineteenth century wore on. Just as perceptions about ‘natural’ styles of acting vary from one era to the next, the conventions of doctrinal analysis also change over time, as we may see by studying judgments and legal texts from the early eighteenth century, which rarely exhibit the attributes for which Buller was praised. These attributes are, however, abundantly visible throughout Blackstone’s Commentaries, and while he can hardly be hailed as a pioneer for using stylistic techniques that appear in the works of writers such as Samuel Johnson, Edmund Burke and Adam Smith, nevertheless Blackstone was among the first to attempt a sustained exposition of legal doctrine in language (and a more general structure) organised by features such as the use of balance, antithesis and enumeration. These are the features that explain why his style was so widely praised, not only for being ‘correct’ and ‘elegant’, but also for being ‘easy’ and ‘intelligible’—that is, for presenting legal concepts in a way that made them easily comprehensible for readers. Blackstone’s writing style, of course, may have been very different from the manner of speech he used as a judge. Perhaps the mode of delivery Bentham characterised as ‘formal, precise, and affected’ was the sound of Buller’s ‘accuracy and precision’ to an ear unreceptive to this style, or perhaps Blackstone’s oral efforts at precision took on a pedantic and laboured tone that is not apparent to the reader of the Commentaries. If his courtroom delivery was irritating and hard to follow, however, these effects are not apparent from Joseph Gurney’s transcript of trial arguments in Onslow v Horne.

Gurney’s shorthand report shows no sign of the hesitations, stutters or other interruptions that supposedly punctuated Blackstone’s speech. Perhaps Gurney simply did not bother to record such details. But whether or not those paralinguistic elements were originally part of the interchange, the point of contention in the arguments between counsel and bench—and the issue that has been highlighted as evidence of Blackstone’s dysfluency—turned on a dispute about the way in which the defendant’s statement was recorded in the plaintiff’s evidence. Onslow proffered a document purporting to give a

21 For a helpful discussion of this trend, as evidenced by changing assumptions about linguistic precision in judgment writing, see P Tiersma, ‘The Textualization of Precedent’ (2007) 82 Notre Dame Law Review 1187.

22 [J Touchet], Review of Reports of Cases ... Taken and Compiled by ... Sir William Blackstone (1782) 67 Monthly Review 1, 5; JB Trotter, Memoirs of the Latter Years of ... Charles James Fox, 3rd edn (London, 1811) 512 (letter of 28 October 1802); 23 Hansard 1083 (Lord Ellenborough, Lords, 17 July 1812); T Ruggles, The Barrister, Or, Strictures on the Education Proper for the Bar, 2nd edn (London, 1818) 199.

verbatim transcript of a letter by Howe, with a small variation in the written form of the date (‘11’ versus ‘11th’).24 Blackstone concluded that any variation, no matter how minor, precluded the use of the transcript as evidence, and on that ground he non-suited the plaintiff. When the plaintiff moved for a new trial, Blackstone’s position was rejected, and the case proceeded on the merits.25

Nevertheless, Blackstone’s objections are well considered and forceful. He does not grope feebly for rationales; he supplies them immediately. He sets out a bright-line rule: ‘If I admit the variation of a single letter, I don’t know where to stop’.26 Though not the only plausible view to take, this represents a cogent position, which he defends ably. When offered the case of R v Drake in rebuttal, Blackstone parries it rapidly, observing that the plaintiffs have ‘undertaken to prove the tenor’—that is, that it is not just a question of meaning, but of the precise form in which the meaning is conveyed.27 When answered with a distinction between civil and criminal law, he does not take the blandly obstructionist route of simply failing to see the significance, but instead responds with a legal observation that dismantles the distinction: ‘This is an action founded upon a supposed crime’.28 When the counsel give their version of a bright-line rule (‘The true line is, where there is an alteration of the sense’), he has an immediate answer: ‘That would let in a hundred altercations, whether the sense is or is not altered, and leave too much in the discretion of the judge: tenor and purport would then signify exactly the same’.29 Again, his rationale may be timorous and over-precise, but it reflects a plausible view that he defends according to a well-accepted mode of argument.

Indeed, even if Blackstone were merely seeking to test the argument, rather than taking a certain position, his objections would be readily familiar to most lawyers as the kind of devil’s advocacy that judges often pursue to clarify their own thoughts—and far from registering as awkward or impaired, the practice is typically seen as a sign of agility. According to the judicial philosophy implicit in his comments, it is possible to eradicate judicial discretion and as a result the law will gain more predictive value. This view may be misguided, or may be misapplied here, but if so, that does nothing to alter the fluency of Blackstone’s responses.

26 [Gurney] (n 24) 45.
27 Ibid 47. See R v Drake (1706) 2 Salk 660, 91 ER 563.
28 [Gurney] (n 24) 47.
29 Ibid.
If we consider the question of legal dysfluency as a matter of argumentative and analytical facility, rather than as a question of diction, then binaries such as closed/open, formal/informal, and antagonistic/receptive are unlikely to map readily on the contrast between fluency and dysfluency, because the first term in each pair may comport with a legally agile performance. What makes for an effective legal argument is a question of the occasion and the subject, and in Onslow v Horne, the subject is a legal point, not a factual point. The question is not whether the transcript has ‘11’ or ‘11th’, but whether that difference matters legally. Turning the positions around, if Blackstone had favoured a more discretionary approach and it had been the defendant’s counsel who argued for the bright-line rule (that any variation in a single letter misstates the alleged libel), Blackstone would have appeared no less obstructionist and resistant from their perspective.

Gurney’s transcript, of course, cannot prove that lawyers and spectators did not find Blackstone’s courtroom manner grating and cumbersome. Perhaps Blackstone was unable to produce spontaneously the kind of tidy analysis for which Buller was admired, or the ‘methodical accuracy’ that Scott displayed in following arguments out to their conclusions. But as Wilfrid Prest notes, whatever failings Blackstone may have had as an orator at the bar, he proved ‘highly effective when speaking from a prepared text, presenting his carefully arranged material in an accessible and polished fashion’.30 Indeed, given that the Commentaries reflected and facilitated a shift towards an orderly and methodical style of legal explication that would become an essential feature of lawyers’ oral arguments, it is notable that on one occasion, Blackstone’s speech was literally displaced by his text. When the great copyright case of Donaldson v Beckett came before the House of Lords in 1774, 10 judges read their views from the bench, but Blackstone, who was that day ‘confined by the gout’, sent in a very brief set of answers to the questions put to the bench, and the published reports of the judgments opted instead to ‘substitute his printed Opinion’—that is, to reprint, nearly verbatim, two paragraphs from the second volume of the Commentaries.31 It is appropriate that in a decision about the legality of reprinting, Blackstone’s own text should be taken as the preferable expression of his views. The episode might serve as an emblem of the process by which the written word, with all its deliberation and formality, came increasingly to provide the paradigmatic form of legal expression and to define the basis of legal elegance.

30 Prest, William Blackstone 114.
31 The Cases of the Appellants and Respondents in the Cause of Literary Property (London, 1774) 36.