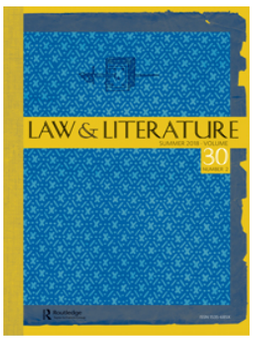

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Marett Leiboff

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Theatricalizing Law

Marett Leiboff

Abstract, To theatricalize law is to ask lawyers to be aware and responsive to the world that creates them and to be conscious of worlds beyond words. For the theatrical reminds us that law has to see as well as to interpret, and that seeing occurs through the body, even more so than the intellect. Reviewing the work of some of the key scholars whose work engages with the concept of theatricalizing law, this article challenges the presumption of dramatic verities and certainties as the mark of an effective critical form in law. Instead, to think law theatrically challenges knowledge, expectations, beliefs, certainties, assumptions, and prejudices, and this article concludes with an example of the challenge wrought by a simple theatricalization in which a set of images that could and did mean anything were played, allowing the audience to make their choices because they were unguided. And then the most exceptional and meaningless of the images were explained, and the horror imbricated in them revealed. This theatricalization did its job, and the text revealed in ways that law as drama could not, as this article reveals, as a theatricalization of its own.

Keywords, post-dramatic theater, Vel' d'Hiv, *The Empty Space*, Peter Brook, jurisography, Jerzy Grotowski, Hans-Thies Lehmann, Hannah Arendt, theatricality, theater, antitheatricality, theatrical jurisprudence, bodily responses, theatricalizing law, staging law and justice

TO BE ENRAGED

> "*theasthai* […] is to look with one's mouth wide open, i.e. 'to gape' or 'stare.'" One becomes nothing but an eye, raptly gazing more than distinguishing matters clearly […] the mode of seeing that underlies both *theoria* and the word "theatre" amounts, on a certain level, to marveling from a standpoint far from meaning – ecstatic vision, or gawking without understanding. Olga Taxidou has put it well: "the difference between philosophy and *theoria* is the body with all its senses. Possibly the difference between philosophy and *theoria* is that *theoria* needs to be experienced through the body – the senses, that is, the aesthetic."[1]

There could be nothing more damning for law than the mark of the theatrical,[2] as shaped through its classical Platonic, Christian, and Enlightenment inheritance

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which abnegates theater and the theatrical,[3] as a danger to reason and intellect, and thus a failure of the ideal of law.[4] Plato, Hans-Thies Lehmann suggests, is enraged by theater in the form of tragedy,[5] but regardless, the ideal that Plato expresses results in legal assumptions that treat the theatrical with contempt, as code for speciousness,[6] or as the mark of the histrionic,[7] as we see in the two instances, the first from argument by counsel in a 2015 Australian superior court case, and the second contained in a brief judgment, again from an Australian superior court, 15 years earlier:

> That means that without having to go through the utterly artificial, and we would submit unconvincing, notion of staging theatricals about who would have done what with increasing difficulties of assessing the probabilities of who would have done what, the matter raised by the non-disclosure is at the level of underwriting decision-making, raised in the forensic contest and it is the insurance decision-making, the underwriting decision which is at the heart of 28 (3), and the disappointed insured puts forward their best case.

> HIS HONOUR: I have listened to lengthy submissions, some of which have a degree of the theatrical, some at times hysterical, and nearly always irrelevant. The position has been reached where I must say that Mrs Von Risefer has not listened to what the Courts have told her on previous occasions and she is plainly abusing the process of the Courts. This application is an abuse of that process. It is only compassion for litigants who face eviction from their home that induces me to refuse the respondent's application for indemnity costs.

In each, submission and judgment, we are left in little doubt – we see the sneer, the smirk, the sigh of exasperation at play. Barrister and judge speak to the antitheatrical prejudice, the dismissal of theater as subaltern and dangerous but through the adoption of the language of theater, debased as it is, engages in the most theatrical gesture, as it were, in order to negative a witness, a submission or a proposed course of action. That the Platonic ideal of justice through word and reason, through law *contra* the theatrical, is found in this kind of everyday law, the law of insurance, the allocation of property rights, might seem surprising, for the image of the theatrical is rarely applied to law of this kind. The theatrical is seen to play out in the most visible forms of law: the criminal trial, the trial of high stakes that occurs in so-called "theatres of justice."[8] For Hannah Arendt, the "staging" of the trial of Adolf Eichmann in Israel in 1961 militated against law and justice,[9] made worse by the bodily reaction of witnesses as "show." Horsman writes that the trial as show appalled her, "not just the figure of Eichmann but also his Israeli prosecutors and

even the dramatic gestures of some of the holocaust survivors who took the witness stand during the trial."[10] But in spite of herself, Arendt was overcome by her own bodily responses – Plato might have been enraged, but Arendt laughed, which "caught her by surprise and overcame her," and permeated her writing about the 1961 trial.[11]

Arendt's *Eichmann in Jerusalem* (1963) might bear the mark of this laughter, but it is not a laughter of joy. Instead, this is a sneering laughter that points to the criticism of the modes of legality that occurred in the trial, and by extension, to the Israeli government. Despite her own treatment in Nazi Germany because of her Jewishness, Arendt adhered to forms of justice that accorded to Weberian perfection, and she could not abide the theatrical disruption she witnessed, and led to her sneering account of the trial. She despised what she saw as theater, and so too the Australian barrister and judge within the forms that law takes – submissions on the law and a decision on the law.

It is in this register that I will be taking this essay. The theatrical, as it were, has been crowded out by the prominence of the meta-trial, of the Eichmann type, which can be all consuming of the field, that is, that they seem and are seen to represent law, and function as all law insofar as law might in some way speak to theater, and vice versa. Instead, my purpose here is to take us back to the less visible and more prosaic law that embeds the antitheatrical along with the physicality that resides in its alterity – the smirk, the laugh, the sigh of exasperation. For when I talk of law, I need to emphasize that it is *not* the popularly imagined trial, criminal or otherwise,[12] or the execution of judgment to which I refer, nor plays about law. Or, indeed, spectacle or performance or image, in Peter Goodrich's terms:

> The trial has been a focus of studies of the theatricality of law, usually framed within a literary argot and method […] law in film has become a significant focus of interdisciplinary legal study, but again the subject is usually law as acted out in entertainment dramas […] *the spectacle of law as relayed through the monumental, written, embodied, and enacted performances of lawyers themselves, gains little express recognition or examination*. Modern historians and humanists address certain features and moments of the legal spectacle with a wealth of erudition, specialism, and insight, but their focus is generally the spectacle and not the law […] the show trial, as historical act and filmic genre, rather than the legal *mise en scène*, the juristic import and expression […].[13]

This latter sentiment, which I will inevitably make less lyrical and more prosaic, touches on my concern here that it is through the work of law in its texts and their reading by lawyers – judgments that hold the law as case law – and the awareness of the stories of lives contained within and that are plugged into them. It is these

and the need for their reading to achieve justice,[14] what Goodrich calls the "theatrical arrangements that precede appearance and audition,"[15] that needs attention, in a world that seems to be ready-made, a law of Google, and a law of the self.[16] For justice requires lawyers to do more than read and apply law – it requires that they have an awareness that will enable them to seek justice, to counteract that image of law embedded through the logics that derive from Plato and Arendt and beyond, that enters the body, through the theatrical.

THEATER

> I can take any empty space and call it a bare stage. A man walks across this empty space whilst someone else is watching him, and this is all that is needed for an act of theatre to be engaged.[17]

> [Tragedy and theatre are] base *poiesis*, merely the result of artisanal "doing" and not real activity in the higher, intellectual sense. […] If artistic mimesis in general already proves deficient and involves only what is sensory, then matters stand even worse when it is concretely embodied in acting; inasmuch as it occurs through speaking as another, mimesis endangers the stability of the citizen's personal identity.[18]

It is not hard to see why the term "theater" and "the theatrical" as a concept can be conflated with related terms that are familiar to anyone who has experienced literary drama and plays at school or elsewhere. What we learn quickly enough is that the literary quality and characteristic of these forms becomes the prime site of attention, as literature. The idea of spectacle and staging and play and performance, the latter a word and concept I have been avoiding, not least the sense in which performance has become overborne by performatives of all varieties (as Alan Read remarks, "We are all performers now"[19]), and the means through which *being* is created or resisted.[20] The demand of expectation inbuilt in common parlance relating to accomplishment in a range of instances ("he performed well"; "she needs to improve her performance") are all bound up in the notion that there is a representable text that demands conformity. We find this meaning imbricated in the *Oxford English Dictionary*'s definition: where theatre can be 'staged,' 'performed,' and/or 'acted,' and through which drama becomes play, and play drama. Owing to its etymology, from the Latin for "play" and the Greek for "deed, action, play, especially tragedy, and to do, act, perform,"[21] the contemporary definitions of drama are fundamentally antitheatrical, or at best untheatrical:

> A composition in prose or verse, adapted to be acted upon a stage, in which a story is related by means of dialogue and action, and is

> represented with accompanying gesture, costume, and scenery, as in real life; a play, melodrama, the dramatic branch of literature; the dramatic art, and a series of actions or course of events having a unity like that of a drama.[22]

Drama, then, is storytelling, etymologically now far removed from its origins as doing and playing.[23] Drama, thus defined, is conceived as a work of the mind rather than the work of the body, the "artisanal" as mere cipher, who will stage, perform, or accomplish, that is, that which is theater and theatrical, as a central conceit of antitheatricality.

To negate the body is precisely Arendt's complaint of theatricality – as a debasement that occurs through unreasoning bodies that might be enraged or laugh. But as Lehmann makes clear, the theatrical body is something far more than mere cipher, or unreasoning: "Body, rhythm, breathing, the here and now of the unthinkable presence of the body, its eroticism, these undermind the Logos. This body is at the same time the place of suffering and pain, the mute body […]."[24] This mute body that thinks before the reasoning mind comes into play operates at a higher level of function that operates beyond the limitations of text-based drama,[25] and functions in a space "on the borderline of logic and reason, on the threshold between what is thinkable and beyond reasoning."[26] For reasons that are historically misplaced, Lehmann argues, European theater tradition has been dominated by text and word,[27] and "assigned the highest place in theatre."[28] The caesura marking a return to a theater beyond the text is traced at least to Antonin Artaud in the 1930s,[29] or indeed to earlier experiments at the end of the 19th century and into the early 20th century through the work of Vsevolod Meyerhold and others.[30] To be brief, as Peter Brook's famous epithet reminds us, all you need for theater is an empty space with two people, one to do and the other to watch or participate. To do this requires presence, attention, and awareness, not only in that place, but also in the preparation of the self so that the *theasthai* is rendered *beyond* a meaningless gawp.

Plays, drama, spectacle – none of these things is needed for theater. *Thea*, in all its manifestations, is the etymological starting point for theory, a way to see for theater and all its derivations.[31] But so too is *theasthai*. For as Lehmann reminds us in the opening epigraph with which I started this essay, and as we have seen with Arendt's accidental laughter, seeing occurs through the body as much as it does through the intellect, and each shapes the other. This is not spectacle or bare show, or mere entertainment. To be caught in the body is to be responsive and responsible. I will return to how this might be made manifest below, but I get ahead of myself.

I have moved to accounting for the difference between the forms of theater and drama, before considering the meaning of theater, for a very good reason. Frans-Willem Korsten, for instance, has begun to use the term "theatre proper" when

referring to its meaning,[32] that is, the etymologically perfect form of theater used in the *OED*: the "Latin *theātrum*, the Greek place for viewing, especially a theatre, to behold or sight, view, a spectator."[33] This is why I intervened with Lehmann's more expansive accounting of *theasthai*, and the difference between the theatrical and dramatic, and for reasons that are reiterate Goodrich's concern that "Law is a theater that denies its theatricality, an order of images that claims invisibility, a series of performances that desire to be taken as the dead letter of prose and so the dead hand of the law."[34] This is far from surprising, though, for to think in terms of Korsten's "theatre proper" is to limit the thing that the theatrical can do for law and for lawyers (and judges). Without having a real sense in theater and theatrical function, it is necessary to move beyond the limits of etymology into theater as I have already sketched – a place of the body, a place of responsibility, and a place in which response is shared.

This means returning the theatrical to its place within theater, with the position of theater scholars as a term of art *within* theater,[35] that has sought to re-orient Goffman's idea of a theater (as drama, it must be said),[36] and Richard Schechner's performance theory, which have opened theater and its concepts wide, beyond theater.[37] To narrow theater and the shape of theatricality, returning it from the world at large, is to think beyond the idea of "showing doing" that is embedded within Schechner,[38] and asking that we try not to think about our conduct as dramatic scripts in the world (they are nothing of the sort). I use theater concepts to reorient in order to think about the productive capacity of theater to help us think in law about *ways to see*, and how we might train our bodies to use theater beyond sneering and sighing and laughing, to become more responsive lawyers and legal interpreters, to think in terms of a *postdramatic law*.

This also means I will be asking that we are skeptical of the *OED*'s "theatre" definitions which are still mired in a late 19th-century imaginary. We are told of most of the definitions that "This entry has not yet been fully updated (first published 1912)." That is not to say that there have not been inclusions since 1912, but the definition holds onto meanings that were shaped in the 19th century and have not moved on. "Theatricality," contrary to its usage noted above, is confined to "A tendency to theatricality and effusiveness" (1880); and "The absurd theatricalities with which the […] campaign is now mainly carried on" (1889). It is not hard to see where a judge or member of the bar would get their own image of the theatrical, but these definitions also defer to an idea of theater within a narrow dimension, that is, that it is a place, a building, that constitutes a theater, and so, too, the audience that watches.

But the *OED* also synonyms theater with drama to mean: "Dramatic works collectively" and "theatrical or dramatic entertainment […] an action or work of art that has the quality of (good, etc.) drama or theatrical technique […] dramatic effect or sensation, spectacle, outward show without serious inward intent." And this is telling, because the words "theater" and "drama" are

constantly misapplied, treated as being synonymous, but most importantly result in misconceptions and errors that turn "drama into theatre." The most extraordinary of these errors is found in the entry for Artaud's "theatre of cruelty" that strips it of theater and reinstantiates it as drama: "a collective term for plays in which the dramatist seeks to communicate a sense of pain, suffering, and evil through the portrayal of extreme physical violence."[39] That is a profound misconception and misdescription of the theatre of cruelty – it is theater (not drama) that seeks to penetrate or pierce our complacency, to make us respond, into the unconscious, *through* the body. Artaud warned against such a literal reading: "as soon as I said 'cruelty' everyone took it to mean 'blood.' But a '*theatre of cruelty*' means theater that is difficult and cruel for myself first of all."[40] Moreover, the theater of cruelty requires no "drama" at all. As the exemplary mode of theater, it is capable of functioning within Brook's empty space: "Theatre can reinstruct those who have forgotten the communicative power or magic mimicry of gesture, because a gesture contains its own energy, and there are still human beings in theatre to reveal the power of those gestures."[41] The conflation of terms, along with the inaccuracies built into the definition, do precisely what Goodrich notes is wrong about legal interpreters – that in law we believe words always to be correct (acknowledging the rule of statutory construction, that dictionary definitions are only opinions of words), but this definition of theater of cruelty in the *OED* demands conformity with expectation – drama as literature, and theater as excess and unacceptable, as a body that has gone too far.

This definition, as in law, is remade to conform to expectations, in which the bodily cannot be comprehended. The theater of cruelty is the exemplary form through which the theatrical occurs – not perhaps the "theatre proper" of Korsten, but the theatrical as it was remade, through Artaud. As Lehmann points out, it is the theatrical (not drama) that makes self-awareness manifest through *anagnorisis*, that is, that moment of awareness or realization. Rather than operating as a dramatic self-awareness, in the postdramatic theater, this point of perception is meant to disrupt expectations:

> We stand [now] before a theatre that seeks less to "serve up" a work than to provoke renewed critical engagement and to elicit judgment and discussion of its relation to performance […] *anagnorisis* often does not occur in a dramaturgical capacity in contemporary theatre; rather, it takes place as a caesura that regularly punctuates our understanding of the theatrical process.[42]

> Theatre is not to be defined as a dramatic process, but as one that is corporeal, scenic, musical, auditory and visual – in space and time: a material process that implies its own being – seen or participation,

> even as it displays a certain opacity that resists full perceptive penetration [*wahrnehmende Durchdringung*] just as much as it refuses complete rationalization.[43]

This, of course, is precisely the thing that law is afraid of, what Arendt feared, and that our imagined belief in the ability of words to armor and defend against this kind of rupture that this kind of *anagnorisis* requires of us. As Christian Biet remarks, in its intervention in politics and the *polis*, theater:

> complexifies the data it introduces in an ephemeral presence, or an ephemeral present, before and with co-present individuals. In doing that, it brings life to these judgements, gives them a body and flesh of a different kind than that of images.[44]

The belief in a perceptual possibility is bound up within law, but of course it is something that normally is imagined as a form of the unconscious or the invisible. Theater, through our bodies, makes this present in ways that are both dangerous and misunderstood. It is this kind of theater and its practices that has something to tell us in law, but one which has been largely overlooked in favor of the literary as drama, the political as theater, the theoretical as drama, though there has been a lively engagement with theater through Alain Badiou,[45] Artaud, via Jacques Derrida,[46] or the immensely significant work that has derived through Pierre Legendre,[47] through Goodrich's work,[48] and the spectacle,[49] the unconscious,[50] and the mask.[51] But there is theater too, theater of the kind I have been playing out in this essay. There are limited instances of the theatrical at play. Peter Rush creates the exemplary theater experience,[52] while my theatricalizations are sometimes read as stories, as a reframing as drama, in ways I did not expect.[53] That is not to say that the dramatic and the play as sites of law and as critical interventions as justice are inconsequential. On the contrary. From the immense literature spawned by Georg W. H. Hegel's reading of Antigone and Walter Benjamin's *Trauerspiel*,[54] from Maria Aristodemou to Julen Extabe, Paul Raffield's readings of law within William Shakespeare as drama and theater,[55] and the critical readings of law through the play as text, such as Honni van Rijskijk's readings of Sarah Kane's play *Blasted* (1995),[56] or the transcript of trials and judgments reinscribed as play – testimonial or tribunal theater – amply reveals the play and place of play and drama as a critical account of law and concerns of justice. Along with political theater, Augusto Boal's *spect-actor* and his legislative theater,[57] this theater all tells us something about law, as too its filmic double; the move into theatrocracy important as a political challenge, but it is the theatrical *anagnorisis* that largely been overlooked in thinking about law,[58] and that to my mind provides that thing to challenge. To think law theatrically, then, is to think it as a means

through which we are challenged in our beliefs, certainties, assumptions, and prejudices, to be challenged to think what we are and who we are.

READING

> During a talk to a group at a university I once tried to illustrate how an audience affects actors by the quality of its attention. I asked for a volunteer. A man came forward, and I gave him a sheet of paper on which was typed a speech from Peter Weiss's play about Auschwitz, The Investigation. […] The volunteer was too struck and too appalled by what he was reading [and …] something of his seriousness and concentration reached the audience and it fell silent. Then at my request he began to read out loud. […] Immediately the audience understood.[59]
>
> The Theatre Lab seeks a spectator-witness, but the spectator's testimony is only possible if the actor achieves an authentic act. If there is no authentic act, what is there to testify to?[60]

The Frankfurt Auschwitz trials are barely remembered now, but when Brook got his student to read the text of Peter Weiss' play (that would now be called testimonial theater), the events in Germany were fresh in people's minds. In the early to mid-1960s, along with the Eichmann trial, the conduct of life and death in Nazi Germany and beyond was raw and live. Brook had no trouble getting his volunteer student to read the text, with no acting or hamming, and the audience deeply responding. In this epigraph, we also notice that something happened in silence, too, that is, before any words were read. The student, whose silent read had already said enough, changed the atmosphere, which caused an attentiveness and a response – in the sense of forming a responsibility – in those present. In Jerzy Grotowski's terms, the young reader's authenticity created a form of testimony in those who spectate, whose responsibility is shaped through that encounter. Let me now break the spell, for Brook did the same thing with another student, giving him the names of the French and English from Shakespeare's *Henry V*. It was terrible. The second student hammed, putting on posh and declaiming, not reading. The audience, needless to say, did not respond. In attempting to unpick the problem, the answer of the students was simple. Auschwitz was in a near past, Agincourt aeons before. Brook then got the student actor to read and audience to respond with the Shakespearean text, as names as lived individuals, "as if the butchery had occurred in living memory."[61] Brook describes a situation where the reader now read the names as if they were live, and the audience concentrated hard. Now the names hung with a heavy silence after each was read out, the reader responding to the lives that had been lost, and the audience responded – as spectator-witnesses. It

was now authentic, and marked a profound *anagnorisis*, not in any didactic or lyrical sense, but through the bodies of those who read and responded. But these bodies were not empty vessels; the *theasthai* of their silent responses were shaped through another body, whose silence (or laughter or enragement), demanded a response. The precise neurobiological basis for this response is now understood, but in the 1960s was yet to be uncovered. For I stress, this is a response of the body, first and foremost, despite the involvement of words. In the first instance, there was silence that drew in the audience, just as the words repelled in a vacuum but were redeemed with a sense of being.

Of course, the 1960s are now 50 years ago, and the events of Nazi Germany that were still so horrifically fresh at the time now bear a stronger resemblance to Agincourt in terms of time, place, and distance, at an intellectual level. New horrors have taken over. Brook would tell actors to reach into what they know to make Weiss' play speak now, or Shakespeare's. Without that point of connection, which dramaturg Hana Worthen calls a nodal knot, there can be no ability for connections between actors and audience to be made.[62] In other work, I have shown how easily the texts of law become something different once a generation or two loses sight of the events of a past that are imbricated within law, reordering texts accordingly. Without that point of connection, there is a tin ear. But of course, this is serious when texts are altered to suit, when the point of an *anagnorisis* is misplaced and reordered to suit politics or purpose. What this suggests is that the point of the theatrical is that the way we read is a two-way street, one that demands an active and conscious response or responsiveness.[63]

But for lawyers, the idea of the theatrical can be so easily misunderstood. In 2006, Sir Alan Moses, then a judge, presented a lecture entitled "The Mask and the Judge" at Trinity College, Oxford, that was later published in Australia. The purpose of the mask was to shield the court, the judge, from their own personal response to injustice, for the law to be applied.[64] In 2014, he left the Court of Appeal, moving to a press complaints role. In *The Guardian*'s view, "He is the court of appeal judge who showed too much personality to advance to the very summit of the judiciary."[65] As Connal Parsley reminds us (along with the critical position of the mask and persona in law), the mask and persona, in the Ciceronian sense, was to ensure a conformity and expectation of being,[66] and more recent work on the personhood in law turns us away from the theatrical of the kind that is productive in law – that is, for lawyers to move beyond the theatrical as a negative and the body of the interpreter as a negative, and move towards the body as positive.

We can look to the work that Ann Genovese, Shaun McVeigh, and Peter Rush have carried out on office, responsibility, and the forms of training that a jurisprudent should carry out for a more responsive exercise of writing through jurisography. Their recommendation is to undertake training in

responsibility through Pierre Hadot's training in philosophy through the practice of writing:

> Since the nineteen eighties, law and humanities scholarship and its various institutions have developed a number of distinct modes of investigating forms of law and the ways in which we might conduct lawful relations or belong to law. One way centres on the question of how might a life be lived and lived well. This question, which has links to the Greeks, and since, sits at the centre of particular traditions of philosophy, history, and jurisprudence. We call this the conduct of life tradition, and following the historian Pierre Hadot, we are interested in how these disciplines – especially philosophy – treat their daily tasks as "spiritual exercises" or forms of training in how to live and meet the obligations of their disciplinary, or later institutional, office. At least in part, jurisprudence, we argue, can be treated as a training in *persona* and office. For us, jurisography is a way to train ourselves, as a form of discipline or exercise, to explain how we think and act with the writing of jurisprudence. It is not so much conceptually programmatic as a studied acknowledgement of the relational duties of the writer and the jurisprudent, and of the experiences of a life lived with law. The duties that attach to the persona of jurisographer, we suggest, are to take care of the many forms and sources of the material expression and styles of jurisprudence that the jurisographer inherits, and, to be clear, that they are not only inherited from jurists, judges and jurisprudents. It is also to understand how the fragmentary sources and forms of jurisprudence that people live with everyday (the official, and the unofficial) condition and contour the conduct of their lawful relations in our own time (references omitted).[67]

But one thing is missing here, in the forms of writing and the conduct of office they recommend. There is an assumption that responsibility will come through writing. I suggest, instead, that it has to come through the body and to acknowledge that a trained body will not laugh when they ought not, will not be outraged when they ought not, and that the body will respond carefully – so long as the body (of lawyer, judge, reader) is made responsive and responsible beyond the self. Olivia Barr's movement,[68] and Andreas Philippopoulos-Mihalopoulos,[69] in the places and spaces of movement, ask us to notice how we walk and what that walk entails,[70] and what materialities afford, and through that the responsibilities that the jurist holds and

enacts. Thus, law is a call to response and responsibility, to a form of training in life and lifeworld to be an active lawyer.[71]

TRAINING THE BODY TO TAKE RESPONSIBILITY

> In Poland there is a small company led by a visionary, Jerzy Grotowski, that also has a sacred aim. The theatre, he believes, cannot be an end in itself [… it] is a vehicle, a means for self-study, self-exploration, a possibility of salvation. The actor has himself as his field of work [… and] does not hesitate to show himself exactly as he is, for he realizes that the secret of the role demands his opening up […] so that the act of performance is an act of sacrifice […] his gift to the spectator.[72]
>
> The core of theatre is encounter. The man who makes an act of self-revelation is one who establishes contact with himself.[73]

I will now end with a series of epigraphs and a small story of a presentation. I am in the process of finalizing the writing of a long-overdue book, *Towards a Theatrical Jurisprudence*, and am indebted to Grotowski, the title of my book referencing the one theater theorist who I took far too long to understand, including his seminal book of writings. I leave you with a small sense of the Grotowskian encounter, and the demands it makes on the spectator.

It is December 2015, and I present a piece at the Law Literature Humanities conference at University of Technology (UTS), Sydney. My piece has been placed in a law and literature panel. Theater is a hard nut to crack. I play a series of images, prefaced by a few references from Lehmann and one or other of these remarks of Grotowski. I play images that might be read, or misread, that have no text, and very little to do with what I am saying. I refer to a brand-new defamation decision, and the way that counsel in the case was able to remind the court of the Holocaust, in the face of a defamation claim by a self-declared Holocaust denier. The court had no trouble understanding this argument of counsel for the defense, which spoke to a time before. The images flowed, some making immediate sense, the Nazi's entering Paris, and others that seemed to make no sense at all. I asked a French colleague to attend, as I knew she would know and immediately comprehend the images that otherwise made no sense to a contemporary audience. These were of the Vel' d'Hiv, an infamous moment in French history (a roundup of Jews in Paris on 16–17 July 1942), that were recently denied as a French obligation by Marine Le Pen in 2017. I write these final words just as she was defeated as candidate for President of the Republic. Despite her interventions, these images did not lie, and most of France did not forget The Great Stain. Law, too, thinks that it is fine to know rules, without knowing, or understanding how to know something that Madame La Pen was

relying on. We can look to theater to be reminded that an unknowing self has the potential in law to do harm.

THE PRESENT

> The cinema flashed on to a screen images from the past. As this is what the mind does to itself all through life, the cinema seems intimately real. Of course, it is nothing of the sort. […] The theatre, on the other hand, always asserts itself in the present. This is what can make it more real than the normal stream of consciousness. This is also what can make it so disturbing.[74]

These were not the only images I showed. There was a moment of confusion, where I placed images of May 1968 as a link between those of Nazi Germany and what was to come, and because that was the year in which Brook, Grotowski, and Schechner published or contributed to publications inaugurating profound changes in the understanding of theater in the West. But there was another reason, because these images could be and were hard to read, seemingly speaking to World War II images of Paris that had just ended. These images meant nothing for a reason. Some people in the room knew, but I wanted the confusion to be palpable, to obtain that momentary realization of being out of one's depth, where a confusion of images appeared that did not make sense. I felt fright and anticipation in the room. But then comfort – of the worst kind – new and familiar horrors were restored as the images moved again into the present. They became familiar. Charlie Hebdo, the Bataclan, raw and alive, then and there. The images started to make sense, and those earlier unfamiliar images had the potential to mean something that might have something to do with the horrors unfolding in Europe in 2015. The other images, of May 1968, could now be read, to an extent. The audience was silent. It was present. It was alive.

IT WAS DISTURBING

I then explained the most disturbing images of all. They were not from the present, or May 1968, but of those events that animated those men and women who developed theater in the 1960s. Here it was. A few images of men in the street and at a train station. And of the Vel' d'Hiv; images that looked so ordinary and everyday. But they were not silent, for Jewish men were being arrested in the street and deported, and the buses outside the Vel' d'Hiv were waiting to deport those entrapped there – to be deported from France. The words I spoke of the Vel' d'Hiv mattered. They probably will not be recalled by those there, and I will not repeat them here, but they made the *anagnorisis* I sought manifest, in that experience and encounter that make us notice injustice, and how to keep reminding ourselves how law, without experience, creates the conditions of injustice.

> At these rare moments, the theatre of joy, of catharsis, of celebration, the theatre of exploration, the theatre of shared meaning are one. But once gone, the moment is gone and it cannot be recaptured slavishly by imitation – the deadly creeps back, the search beings again.[75]
>
> Here then, on the brink of an unwritten history, on the edge of the positive unconscious of law, similar in kind to the encryption, is a synecdoche, a mark of a hidden history of the juridical. We have literally to look behind the scenes, into the emptiness that is filled by images and imaginings, to apprehend the staging of law as a theatrical and present drama.[76]

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ORCID

Marett Leiboff http://orcid.org/0000-0003-1723-9870

1. Hans-Thies Lehmann, *Tragedy and Dramatic Theatre*, trans. Erik Butler (Abingdon: Routledge, 2016), 27 (references excluded from the quotation).
2. Jonas Barish, *The Antitheatrical Prejudice* (Berkeley: University of California Press, 1981); Martin Puchner, *Stage Fright: Modernism, Anti-Theatricality, and Drama* (Baltimore: Johns Hopkins University Press, 2002); cf. David Kornhaber, "Introduction: Drama and Philosophy 2.0," *Modern Drama* 56, no. 4 (2013): 419–33; cf. David Kornhaber, *The Birth of Theater from the Spirit of Philosophy: Nietzsche and the Modern Drama* (Evanston: Northwestern University Press, 2016).
3. Samuel Weber, *Theatricality as Medium* (New York: Fordham University Press, 2004), ix–xi; Julie Stone Peters, "Legal Performance Good and Bad," *Law, Culture & the Humanities* 4, no. 2 (2008): 179–200; cf. Martin Puchner, *The Drama of Ideas: Platonic Provocations in Theater and Philosophy* (Oxford: Oxford University Press, 2010).
4. Martin Puchner, "Afterword: Please Mind the Gap between Theatre and Philosophy," *Modern Drama* 56, no. 4 (2013): 540–53, at 542: "Philosophy […] is not an object of study, like theatre, but an intellectual practice."
5. Lehmann, *Tragedy and Dramatic Theatre*, 24: "Plato's rage against (more than his critique of) tragedy."
6. Bret Walker SC (Senior Counsel) in argument in *Atradius Credit Insurance N.V. v Prepaid Services Pty Limited & Ors; Prepaid Services Pty Ltd v Optus Mobile Pty Ltd & Ors* [2015] HCATrans 155 (June 19, 2015). The Australian High Court is the ultimate court of appeal, and not to be confused with the lower level British courts.
7. *Von Risefer & Anor v Permanent Trustee Company* [2000] QCA 374 (September 13, 2000), Thomas J.
8. For example, "Theaters of Justice and Fictions of Law" [Special Issue], *Cardozo Studies in Law and Literature* 11, no. 2 (1999); Leslie J. Moran, Gary Watt, Linda J. Mulcahy, and David J. Isaac, "A Review of Ruth Herz, *The Art of Justice: The Judge's Perspective*," *Law and Humanities* 7, no. 1 (2013): 113–28, at 116; Yasco Horsman, *Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo* (Stanford: Stanford University Press, 2010).
9. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* [1963], intro. Amos Elon (New York: Penguin, 2006); Horsman, *Theaters of Justice*, 135; cf., e.g., Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust," *Critical Inquiry* 27, no. 2 (2001): 201–38; Michael Bachmann, "Theatre and the Drama of

Law: A 'Theatrical History' of the Eichmann Trial," *Law Text Culture* 14 (2010): 94–116.
10. Horsman, *Theaters of Justice*, 16.
11. Ibid., 17.
12. Kirsty Duncanson and Emma Henderson, "Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials," *Feminist Legal Studies* 22, no. 2 (2014): 155–74, who rely on Goffman's concept of dramaturgy, theater, and drama; Frans-Willem Korsten, "*Öffentlichkeit* and the Law's Behind the Scenes: Theatrical and Dramatic Appearance in European and U.S. American Criminal Law," *German Law Journal* 18, no. 2 (2017): 399–422.
13. Peter Goodrich, "Specters of Law: Why the History of the Legal Spectacle has Not been Written," *UC Irvine Law Review* 1, no. 3 (2011): 773–812, at 779–80 (references have been omitted; emphasis added).
14. But see Nicole Rogers, "The Play of Law: Comparing Performance in Law and Theatre," *QUT Law Review* 8, no. 2 (2008): 429–43.
15. Goodrich, "Specters of Law," 808.
16. Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices*, 2nd ed. (Sydney: Thomson Reuters, 2014): 17–20.
17. Peter Brook, *The Empty Space* (Harmondsworth: Penguin, 1968), 11.
18. Lehmann, *Tragedy and Dramatic Theatre*, 24.
19. Alan Read, *Theatre & Law* (London: Palgrave, 2016), 40.
20. Ibid., 41. I do not intend to consider the overly worn path of J. L. Austin's performatives here.
21. "theatre, n.," *OED Online* (Oxford: Oxford University Press, March 2017).
22. "drama, n.," ibid.
23. Cf. Korsten, "*Öffentlichkeit* and the Law's Behind the Scenes," 404.
24. Hans-Thies Lehmann, "From Logos to Landscape: Text in Contemporary Dramaturgy," *Performance Research* 2, no. 1 (1997): 55–60, at 57; also Hans-Thies Lehmann, *Postdramatic Theatre*, trans. and intro. Karen Jürs-Munby (Abingdon: Routledge, 2006).
25. Marett Leiboff, "Law, Muteness and the Theatrical," *Law Text Culture* 14 (2010): 384–91; Marett Leiboff, "Towards a Jurisprudence of the Embodied Mind – Sarah Lund, Forbrydelsen and the Mindful Body," *Navein Reet: Nordic Journal of Law and Social Research* 6, no. 2 (2015): 77–92.
26. Lehmann, "From Logos to Landscape," 56.
27. Ibid.
28. Ibid.
29. Ibid., 57.
30. For example, Robert Leach, *Vsevolod Meyerhold* (Cambridge: Cambridge University Press, 1989).
31. Weber, *Theatricality as Medium*, 2–3.
32. Korsten, "*Öffentlichkeit* and the Law's Behind the Scenes."
33. For an instance of the confusion of definitions, see Francis Bacon's complaint of the idol of the theater. The direction of his complaint was drama; Jürgen Klein, "Francis Bacon," in *The Stanford Encyclopedia of Philosophy* (Winter 2016 ed.), ed. Edward N. Zalta, https://plato.stanford.edu/archives/win2016/entries/francis-bacon/: , 3.1.4; cf. Ragnhild Tronstad, "Could the World become a Stage? Theatricality and Metaphorical Structures," *SubStance* #98/99 31, nos. 2–3 (2002): 216–24.
34. Goodrich, "Specters of Law," 808.
35. Erika Fischer Lichte, "From Theatre to Theatricality – How to Construct Reality," *Theatre Research International* 20, no. 2 (1995): 97–105; Josette Féral, "Theatricality: The Specificity of Theatrical Language," *SubStance* #98/99 31, nos. 2–3 (2002): 94–108; Janelle Reinelt, "The Politics of Discourse: Performativity Meets Theatricality," *SubStance* #98/99 31, nos. 2–3 (2002): 201–15; cf. Stone Peters, "Legal Performance Good and Bad," 182.
36. Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Doubleday, 1959), draws on a "staging" image of theater to make claims about the self in society, as sociology: "Scripts even in the hands of unpracticed players can come to life because life itself is a dramatically enacted thing. All the world is not, of course, a stage, but the crucial ways in which it isn't are not easy to specify," 72. But see Greta Bird and Nicole Rogers, "Talking to Judges about the Art of Judging: An Annotated Performance Text," *Public Space: Journal of Law and Social Justice* 3 (2009): art. 4, 1–18, and the accompanying multimedia performance.
37. Schechner is the founder of performance studies, which takes the concept of the lived encounter, within and beyond a theater space, that is, into the myriad forms of lived experience. Among his work in the field, see, for example, Richard Schechner: *Performed Imaginaries* (Abingdon: Routledge, 2015); *Performance Theory: Essays on Performance Theory, 1970–1976* (London: Routledge, 2003); *The Future of Ritual: Writings on Culture and Performance* (London: Routledge, 1993); and *Between Theater & Anthropology*, foreword Victor Turner (Philadelphia: University of Pennsylvania Press, *c.*1985).
38. "'Showing doing' is performing: pointing to, underlining, and displaying doing"; Richard Schechner, *Performance Studies: An Introduction* (New York: Routledge, 2002), 22.

39. "Theatre of cruelty" as defined in "theatre, n," *OED Online*. *Antonin Artaud: Collected Works*, trans. Victor Corti (London: Calder & Boyars, 1974), reveals Artaud's struggle to explain precisely what the term meant in the 1930s against the existing image of theater in France at the time.
40. Artaud, *Antonin Artaud*, 60.
41. Ibid., 61.
42. Lehmann, *Tragedy and Dramatic Theatre*, 163.
43. Ibid., 424.
44. Christian Biet, "Towards a Dramaturgy of Appearance: An Aesthetic and Political Understanding of the Theatrical Event as Session," *Performance Research: Journal of the Performing Arts* 14, no. 3 (2009), 102–09, at 109.
45. Alain Badiou, *Rhapsody for the Theatre*, ed. and trans. Bruno Bosteels (London: Verso, 2013); Alain Badiou with Nicolas Truong, *In Praise of Theatre* (London: Polity, 2015); Martin Puchner, "The Theatre of Alain Badiou," *Theatre Research International* 34, no. 3(2009): 256–66.
46. Jacques Derrida, "The Theater of Cruelty and the Closure of Representation," *Theater* 9 no. 3 (1978): 6–19.
47. Cornelia Vismann, "'*Rejouer les crimes*' – Theater vs. Video," *Cardozo Studies in Law and Literature* 11, no. 2 (1999): 161–77; Julie Stone Peters, "Theatricality, Legalism, and the Scenography of Suffering," *Law and Literature* 18, no. 1 (2006): 15–45.
48. From an immense literature of Goodrich's work, see, for example: Pierre Legendre, *Law and the Unconscious: A Legendre Reader*, trans. and ed. Peter Goodrich (London: Palgrave, 1997); as well as: Goodrich, "Specters of Law"; "Screening Law," *Law and Literature* 21, no. 1 (2009): 1–23; "Rhetoric and Somatics: Training the Body to Do the Work of Law," *Law Text Culture* 5 (2000): 241–70; and "The Theatre of Emblems: On the Optical Apparatus and the Investiture of Persons," *Law, Culture & the Humanities* 8, no. 1 (2012): 47–67.
49. For example, Christian Biet, "Law, Literature, Theatre: The Fiction of Common Judgment," *Law and Humanities* 5, no. 2 (2011): 281–92.
50. Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (Oxford: Oxford University Press, 2000), esp. "Theatre as Woman Re-Playing the Word: Towards the Triumph of the Flesh in Aeschylus' Oresteia," 58–80.
51. Connal Parsley, "The Mask and Agamben: The Transitional Juridical Technics of Legal Relation," *Law Text Culture* 14 (2010): 12–39; Richard Mohr, "Flesh and the Person," *Australian Feminist Law Journal* 29 (2008): 31–52.
52. Peter Rush, "Killing Me Softly with His Words: Hunting the Law Student," *Law and Critique* 1, no. 1 (1990): 21–37.
53. Marett Leiboff, "Theatricalising Law in Three, 1929–1939 (Brisbane)," *Law Text Culture* 20 (2016): 93–135; Leiboff, "Towards a Jurisprudence of the Embodied Mind"; Leiboff, "Law, Muteness and the Theatrical."
54. Julen Extabe, *The Experience of Tragic Judgment* (Abingdon: Routledge, 2013).
55. Including Paul Raffield, *Shakespeare's Imaginary Constitution: Late-Elizabethan Politics and the Theatre of Law* (Oxford: Hart, 2010).
56. Honni van Rijswijk, "Towards a Feminist Aesthetic of Justice: Sarah Kane's *Blasted* as Theorisation of the Representation of Sexual Violence in International Law," *Australian Feminist Law Journal* 29 (2008): 107–24.
57. Augusto Boal, *Theatre of the Oppressed*, trans. Charles A. and Maria-Odilia Leal McBride and Emily Fryer (London: Pluto, 2008); Augusto Boal, *Legislative Theatre: Using Performance to Make Politics*, trans. Adrian Jackson (Abingdon: Routledge, 1998).
58. I will be bypassing the recent work on theatrocracy, which speaks more to politics than to theater.
59. Brook, *Empty Space*, 27–28.
60. Marc Fumaroli, Jerzy Grotowski, and George Reavey, "External Order, Internal Intimacy: An Interview with Jerzy Grotowski," *TDR – The Drama Review* 14, no. 1 (1969): 172–77.
61. Brook, *Empty Space*, 27–29.
62. Hana Worthen, "For a Skeptical Dramaturgy," *Theatre Topics* 24 no. 3 (2014): 175–86.
63. Leiboff, "Theatricalising Law in Three."
64. Alan Moses, "The Mask and the Judge" [Special Issue: "The Art of Judging"], *Southern Cross University Law Review* 12 (2008): 1–24.
65. Owen Bowcott and Roy Greenslade, "Here Comes the Judge – The Maverick Aiming to Tame Britain's Raucous Press," *The Guardian* May 16, 2014, https://www.theguardian.com/theguardian/2014/may/16/sir-alan-moses-ipso-profile/./.
66. Parsley, "Mask and Agamben," 16, 30–31.
67. Ann Genovese, Shaun McVeigh, and Peter D. Rush, "Introduction," *Law Text Culture* 20 (2016): 1–13, at 2.
68. Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016).
69. Andreas Philippopoulos-Mihalopoulos, *Spatial Justice Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2015).

70. Barr, *Jurisprudence of Movement*, 7.
71. Also James E. K. Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford: Oxford University Press, 2015).
72. Brook, *Empty Space*, 66–67.
73. Jerzy Grotowski, *Towards a Poor Theatre*, ed. Eugenio Barba, preface Peter Brook (London: Methuen, 1969).
74. Brook, *Empty Space*, 111.
75. Ibid., 151. Earlier in his account of the deadly theater, Brook describes faithful productions that had been kept alive for 40 or more years, but "none of these had more than antiquarian interest, none had the vitality of new invention," ibid., 18.
76. Goodrich, "Specters of Law," 811.

Marett Leiboff is Associate Professor at the School of Law, University of Wollongong, New South Wales, Australia. Her research and scholarship center on the legal theories of cultural legal studies, law, and humanities and theatrical jurisprudence, with a particular focus on how the nonlegal formation of the lawyer affects and influences practices of legal interpretation. She holds a postgraduate degree in theater studies, undertaken long before she became a lawyer, and, without realizing it, theatricalizes just about everything she does. She is in the process of finalizing the writing of a long-overdue book, *Towards a Theatrical Jurisprudence* (Routledge, 2018).