

# THE PLAY OF LAW: COMPARING PERFORMANCES IN LAW AND THEATRE

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*I am undertaking an investigation into the interrelationship between law and theatre. I shall explore the interrelationship between law and theatre by considering case studies in which legal performances have been re-presented or reproduced as theatre. Such case studies demonstrate that there are certain undeniable similarities between law and theatre. In both disciplines, performance and thus play, albeit very different forms of play, are central. Yet there are fundamental differences between legal and theatrical performances. I shall examine these differences, arriving, finally, at violence: legal performances are anchored in violence and theatrical performances are not.*

*A comparison between law and theatre is not a purely whimsical one. Increasingly, as Giorgio Agamben has asserted, modern Western societies resemble a Schmittian 'state of exception' in which the rule of law has become powerless in the face of arbitrary acts of violence on the part of the executive and the language of exceptionalism has become commonplace.<sup>1</sup> Contemporary legal performances in the form of highly mediatised terror trials are examples of state-orchestrated spectacle, in which the violence of the state is brought to bear upon the enemy: individuals who themselves have not yet committed acts of terrorism but who are easily identifiable as terrorists due to racial and/or religious characteristics. In such a context, the question of whether and, if so, how, legal performances can be uncoupled from state violence is worth exploring.*

*I shall argue that re-positioning the play of law in more playful contexts offers imaginative possibilities for such an uncoupling.*

## I LAW AND THE SPECTRUM OF PLAY

Theatre is commonly perceived as play but law is not, although some commentators have viewed law as play.<sup>2</sup> Generally law and play are perceived as opposite terms, as a dualism closely associated with the comparable dualism of work and play. Brian Sutton-Smith has pointed out that work is perceived as 'sober, serious and not fun' and play is its frivolous antithesis.<sup>3</sup> Law, which is aligned to work, can be similarly characterised.

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<sup>1</sup> See G Agamben, *State of Exception* (University of Chicago Press, Kevin Attrell trans, 2005) 2.

<sup>2</sup> J Huizinga, *Homo Ludens. A Study of the Play Element in Culture* (Beacon Press, 1<sup>st</sup> ed, 1950) 78.

<sup>3</sup> B Sutton-Smith, *The Ambiguity of Play* (Harvard University Press, 1997) 202.

Law is, in fact, a very particular form of play. In his classic work, Johan Huizinga identified the central role of play in all human culture, including in law, and coined the term *Homo Ludens*, or Man the Player.<sup>4</sup> According to Huizinga, culture was ‘played from the very beginning’;<sup>5</sup> he declared somewhat pompously that ‘for many years, the conviction has grown upon me that civilization arises and unfolds in and as play.’<sup>6</sup> Yet, as a number of commentators have observed,<sup>7</sup> Huizinga’s concept of play as rule-bound contest<sup>8</sup> was a limited agonistic one; his world of play could be shattered by ‘spoilsports’ who broke its rules.<sup>9</sup> Many Western philosophers similarly ascribe an orderly meaning to play, but for other thinkers, play can assume a different, more chaotic form.<sup>10</sup>

These thinkers draw a distinction between orderly, non-violent, rule-determined play such as law, and disorderly, arbitrary, free play such as carnival.<sup>11</sup> Roger Caillois calls these two forms of play *ludus* and *paedia*;<sup>12</sup> Spariosu calls them rational and pre-rational play and maintains that they have been engaged in an ongoing ‘contest for cultural authority’.<sup>13</sup> Similarly, Callois argues that *paedia* is distinguished by ‘diversion, turbulence, free improvisation and carefree gaiety’,<sup>14</sup> and maintains that the other principle, *ludus*, seeks to absorb and discipline *paedia*.<sup>15</sup>

Law, as a form of play, is a highly serious form of play which is subject to ‘the rules of the game’.<sup>16</sup> Law, orderly, predictable and rule-bound, must somehow absorb and discipline an ‘anarchic and capricious’<sup>17</sup> contrary form of play which, by its very nature, threatens the guiding principles in legal discourse and indeed, in Western rational thought.

The troubled relationship between law and play is revealed when law is transformed into play *outside* the courtroom. In exploring the interrelationship between law and theatre, I have chosen to focus upon the use of legal texts in theatrical performance, or the (re)presentation of legal performance as theatre. I have interpreted legal performances broadly, to include Parliamentary inquiries as well as courtroom proceedings. In the next section, I shall address the question of what happens to such performances when they are transformed into theatrical play, focusing specifically on case studies in the sub-genre of documentary theatre which faithfully reproduce legal performances and thus recast ritual as aesthetic performance.<sup>18</sup>

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<sup>4</sup> Huizinga, above n 2.

<sup>5</sup> Ibid 46.

<sup>6</sup> Ibid Foreword.

<sup>7</sup> See, for instance, Sutton-Smith, above n 3, 78–80.

<sup>8</sup> Huizinga, above n 2, 10–1, 13.

<sup>9</sup> Ibid 11.

<sup>10</sup> Sutton-Smith, above n 3, 81.

<sup>11</sup> M I Spariosu, *Dionysus Reborn. Play and the Aesthetic Dimension in Modern Philosophical and Scientific Discourse* (Cornell University Press, 1989) 6.

<sup>12</sup> R Callois, *Man, Play and Games* (Schocken Books, Meyer Barash trans, 1979) 13.

<sup>13</sup> Spariosu, above n 11, 6.

<sup>14</sup> Callois, above n 12, 13.

<sup>15</sup> Ibid.

<sup>16</sup> Huizinga, above n 2, 76–8.

<sup>17</sup> Callois, above n 12, 13.

<sup>18</sup> See R Schechner, *Performance Studies. An Introduction* (Routledge, 1<sup>st</sup> ed, 2002) 74–6.

## II LAW IN PLAY

Theatrical performances which (re)present law, and (re)situate law in a theatrical or playful context, are not unusual. In part, this is no doubt due to theatre's recognition and appreciation of law as a form of cultural performance.

Performance theorists recognise the ubiquity of cultural performances, and encourage the analysis of performances in many diverse fields and disciplines.<sup>19</sup> Some performance theorists have considered the nature of legal performance. For instance, Phillip Auslander, in his study of liveness in performance, has observed that 'live performance is, in fact, essential to legal procedure';<sup>20</sup> he concludes that 'in a mediatized culture, the legal arena may be one of the few sites left where liveness continues to be valued'.<sup>21</sup> Yet the invitation to look at performance in law has been largely ignored by legal theorists. Margaret Davies is one of few such theorists who has recognised and written on the nature of law as performance.

Davies describes the 'performative utterances of the monarch' and ongoing judicial performances as 'the performances which make law of the law'.<sup>22</sup> Positivists downplay the performative aspects of law, and prefer to think of a law as a set of norms and rules, or what Davies calls 'ideational creations'.<sup>23</sup> She contests this, arguing that there is, in fact, no law which exists 'in the realm of the ideal',<sup>24</sup> outside or prior to the performance of law. From this perspective, law is a verb rather than a noun.<sup>25</sup>

Davies comments on the originality of each legal performance; such performances are unique, 'never merely a rehearsal on a different stage'.<sup>26</sup> The originality of each performance derives from the distinctive characteristics of each case. While norms or legal precedents may be applied, they must be re-read, re-created or re-constructed for each new set of circumstances.<sup>27</sup> Yet Davies also observes that the original, live performances of law are 'imitable'.<sup>28</sup> In the theatrical imitation or reproduction of these live legal performances, we find the transformation of legal performance into play.

Law in play takes on two different forms. In one form of theatrical performance, the legal performance is partially reproduced and intermingled with fiction; in the other, the legal performance is edited but otherwise faithfully reproduced. There is disagreement over which form of performance is more effective, and also disagreement over whether historical and factual accuracy should take precedence over political impact and aesthetic criteria.

<sup>19</sup> See R Schechner, 'Performance Studies: The Broad Spectrum Approach' (1988) 32 *TDR: The Drama Review* 4.

<sup>20</sup> P Auslander, *Liveness. Performance in a Mediatized Culture* (Routledge, 1<sup>st</sup> ed, 1999) 113.

<sup>21</sup> *Ibid* 157.

<sup>22</sup> M Davies, *Delimiting the Law. 'Postmodernism' and the Politics of Law* (Pluto Press, 1996) 97–98.

<sup>23</sup> M Davies, 'Derrida and Law: Legitimate Fictions' in Tom Cohen (ed), *Jacques Derrida and the Humanities. A Critical Reader* (2001) 218.

<sup>24</sup> Davies, above n 22, 129.

<sup>25</sup> Dwight Conquergood has identified the contemplation of the conceptual consequences in thinking of culture as a verb rather than as a noun as one of the key tasks of the performance theorist. Dwight Conquergood, 'Rethinking Ethnography: Towards a Critical Cultural Politics' (1991) 58 *Communications Monograph* 179, 190.

<sup>26</sup> Davies, above n 22, 139.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

A *Dramatising Law: Law and Fiction in Theatre*

Examples of the first category of law in play include Arthur Miller's *The Crucible*<sup>29</sup> and Dario Fo's *Accidental Death of an Anarchist*.<sup>30</sup> *The Crucible* may have been 'the most influential and effective literary statement that was made about McCarthyism in the fifties',<sup>31</sup> but it described a much earlier historical event, the Salem witchcraft trials. Miller wrote the play after reading the historical records of the trials,<sup>32</sup> and tried to remain faithful to the real archaic language, which he compared to 'hard burnished wood'.<sup>33</sup> Parts of *The Crucible* literally reproduce these records. For instance, Reverend Hale's examination of Tituba closely resembles her testimony at the trial of Sarah Good.<sup>34</sup>

However, Miller clearly meddled with historical fact, most notoriously in raising Abigail Williams' age so that she could take on the role of a jilted woman, and inventing a relationship between Abigail and John Proctor. When accused of historical inaccuracies, Miller responded that 'a playwright has no debt of literalness to history',<sup>35</sup> he wrote that plays which are purely 'a kind of psychic journalism' become irrelevant.<sup>36</sup> Miller's creative re-working of the story of the Salem witchcraft changed the focus of the play. Thus, *The Crucible* does not simply document the tide of hysteria which held the Salem community in thrall and culminated in the legal performances of the witchcraft trials. Melinda Mawson points out that Miller, in centring the story around the jilted, vengeful woman, highlights 'the dangers of female sexuality' and the unreliability of women's evidence,<sup>37</sup> and Penelope Pether comments that it was Miller's 'imaginative engagement with the disruptive force of transgressive sexuality' which inspired him to write the play.<sup>38</sup> This tinkering with recorded facts is frowned on by practitioners of documentary theatre.

*Accidental Death of an Anarchist*, part of Dario Fo's 'throwaway, journalistic theatre of "counter-information"',<sup>39</sup> was written in 1971, after a terrorist attack in Milan. The authorities arrested socialists, communists and anarchists in their zeal to find the perpetrators of this crime; one of those arrested, an anarchist named Pinelli, was confined in police headquarters undergoing interrogation when he fell from a fourth floor window of the Milan police headquarters, and died. In Fo's play, performances within performances highlight the absurdity and self-protective farce of the state's multiple investigations into this event. Most of these performances are orchestrated by the central character, the Maniac, who has an irrepressible urge to 'impersonate [people]

<sup>29</sup> A Miller, *The Crucible* (Penguin, 1952)

<sup>30</sup> D Fo, *Accidental Death of an Anarchist* (Methuen, Simon Nye trans, 1987).

<sup>31</sup> B Murphy, *Congressional Theatre. Dramatizing McCarthyism on Stage, Film and Television* (Cambridge University Press, 1999) 158.

<sup>32</sup> R Martin, 'Arthur Miller's *The Crucible*: Background and Sources' (1977) 20 *Modern Drama* 279, 280.

<sup>33</sup> A Miller, *Timebends. A Life* (Grove Press, 1987) 336.

<sup>34</sup> Martin, above n 32, 286.

<sup>35</sup> Murphy, above n 31, 155.

<sup>36</sup> A Miller, 'What Makes Plays Endure?' in R A Martin (ed), *The Theatre Essays of Arthur Miller* (2<sup>nd</sup> ed, 1994) 258.

<sup>37</sup> M Mawson, 'Whores, Witches and the Lore: Rape and Witchcraft, Legal and Literary Intersections' (1999) 12 *Australian Feminist Law Journal* 41, 51.

<sup>38</sup> P Pether, 'Jangling the Keys of the Kingdom' (1996) 7 *Australian Feminist Law Journal* 61, 74.

<sup>39</sup> T Mitchell, *Dario Fo. People's Court Jester* (Methuen, 1984) 65.

in “the theatre of reality”<sup>40</sup>. The Maniac is a ‘documentary clown’<sup>41</sup> who pokes fun at the police investigation by inventing confusing and increasingly ridiculous explanations for Pinelli’s death, and encouraging the police to adopt them. Fo emulates the state in creating different implausible scripts to account for Pinelli’s death. The final surreal touch appears in two possible endings. In the first, the Maniac uses violence to counter the violence of the state; in the second, devised because ‘we can’t have the ultra-left hooligan winning hands down like that’,<sup>42</sup> the agents of the state commit a final act of violence and the journalist who would otherwise have exposed them is undone by her own moral scruples.

Although the play is a fictitious creation with invented dialogue, it was based on legal documents. In his Author’s Note, Fo explains that he used ‘authentic documents – and complete transcripts of the investigations carried out by the various judges as well as police reports’ in order to ‘[turn] the logic and the truth of the facts on head.’<sup>43</sup> When the play was first performed, a lawsuit brought by one of the policeman against a newspaper was underway; Fo added and changed lines on a nightly basis as he received fresh material from the hearing.<sup>44</sup> In the end, there were three different editions of the play.<sup>45</sup> Mary Karen Dahl has explained Fo’s explicit appropriation and subversion of the official texts of law in the following way: ‘this then was the strategy – to use the texts created by the state in the process of conducting its business as usual to comment on and condemn that business and its associates’.<sup>46</sup>

## B *Documentary Theatre: Law without Fiction in Theatre*

By contrast with such hybrid works, in which the playwright incorporates authentic legal performances into a fictitious world, makers of documentary theatre eschew fiction. Within the genre of documentary theatre, we find a number of plays which reproduce legal inquiries and hearings. The tribunal documentary drama taps into the ‘rich dramatic potential’ in courtroom transcripts.<sup>47</sup> Eric Bentley, in his play *Are You Now or Have You Ever Been*, ‘abridged, edited and arranged’ the words of witnesses in the HUAC hearings in the 1950s;<sup>48</sup> he did not add to those words. The Tricycle Theatre in Kilburn, north London, under the direction of Nicolas Kent, has produced a number of highly regarded ‘tribunal plays’ which also draw all their lines from the legal performance of politically controversial inquiries. The 1994 production, *Half the Picture*, contained edited extracts from the Scott inquiry into arms for Iraq. *Sreberenica* in 1996 was based on evidence given to the United Nations war crimes tribunal about the murder of Muslims by the Serbs in 1995. *Nuremberg*, also in 1996, was somewhat of an anomaly in that the legal testimony came from the Nuremberg trials rather than from an inquiry; again, however, the audience experienced an ‘unmediated translation

<sup>40</sup> Fo, above n 30, 3.

<sup>41</sup> J Schechter, *Durov’s Pig. Clowns, Politics and Theatre* (Theatre Communications Group, 1st ed, 1985) 154.

<sup>42</sup> Fo, above n 30.

<sup>43</sup> Ibid, Author’s Note.

<sup>44</sup> Mitchell, above n 39, 59.

<sup>45</sup> Fo, above n 30, Author’s Note.

<sup>46</sup> M K Dahl, ‘State Terror and Dramatic Consequences’ in John Orr and Dragan Klaic (eds), *Terrorism and Modern Drama* (Edinburgh University Press, 1990) 114.

<sup>47</sup> G Mason, ‘Documentary Drama from the Revue to the Tribunal’ (1977) 20 *Modern Drama* 263, 269.

<sup>48</sup> Murphy, above n 31, 96.

of testimony from courtroom to stage'.<sup>49</sup> In this instance, the theatre contextualised the issue of genocide by putting on, at the same time, short plays which focused on war crimes in Bosnia, Rwanda and Haiti.<sup>50</sup>

The sequence of tribunal plays continued with *The Colour of Justice* in 1999, which re-enacted parts of an inquiry into a police investigation into the murder of a black youth. The play was subsequently televised and used for police training purposes. *Justifying War* in 2003 reproduced the Hutton inquiry into the British government's justifications for entering the Iraqi war. Most recently, in *Bloody Sunday: Scenes from the Saville Inquiry*, the edited transcripts from the Saville inquiry into the 1972 shooting of Irish protesters by British soldiers were shown on stage in 2005 before the inquiry handed down its report. One critic commented on the uncanny accuracy in the theatre's reproduction of London's Guildhall, where the inquiry was conducted; even a creaking door was included.<sup>51</sup>

In Australia, a theatrical production by Version 1.0, *CMI (A Certain Maritime Incident)*, similarly transformed the transcripts of the Senate Select Committee inquiry into the so-called 'children overboard' incident in 2001 into what Linda Jaivin has described as 'a startling, highly kinetic, bleakly comic and deeply provocative work of theatre'.<sup>52</sup> Again, the spoken text was extracted from the 'potentially soporific'<sup>53</sup> transcripts of the legal proceedings. The producer, David Williams, has commented that the 'verbatim-ness' of this performance project was critical, both politically and artistically.<sup>54</sup> However, this performance did not attempt to duplicate exactly the proceedings of the Senate Committee. There were obvious difficulties in 'replicating the durational performance', which had spanned 15 full days (and nights).<sup>55</sup> Furthermore, this was clearly theatre. There was no attempt on the part of the actors to assume the identities of the 'real' performers in the Senate Committee, although they spoke their words and called each other by their names.<sup>56</sup> Instead, Kubiak's truth of theatrical ontology, that everything which appears real is in fact a lie,<sup>57</sup> was deliberately exposed. For instance, the proceedings in the performance were interrupted by the following statement, displayed in a 'rusty old overhead projector':<sup>58</sup>

We know that you know that we are not really the senators who took part in the CMI Senate inquiry. Stephen is a lot shorter than Senator Cook and Deborah who plays Senator Faulkner is actually a woman. We found that out after the audition.<sup>59</sup>

<sup>49</sup> S McDonald, 'Nuremberg Retrials', *New Statesman and Society* (London, United Kingdom), 24 May 1996, 23.

<sup>50</sup> Ibid.

<sup>51</sup> L Hoggard, 'Out of crises, a drama', *The Observer* (London, United Kingdom), 27 March 2005

<sup>52</sup> L Jaivin, 'Theatre of the Displaced', *The Bulletin* (Sydney), 14 April 2004

<sup>53</sup> M Hopkins, 'CMI: A Certain Maritime Incident, Version 1.0', *The Sydney Morning Herald* (Sydney), 29 March 2004

<sup>54</sup> D A Williams, 'Political Theatrics in the "Fog of War"' (2006) 48 *Australasian Drama Studies* 115, 125.

<sup>55</sup> P Dwyer, 'The Inner Lining of Political Discourse: Presenting the Version 1.0 Remix of the Senate Select Committee on a Certain Maritime Incident' (2006) 48 *Australasian Drama Studies* 130, 132.

<sup>56</sup> Ibid 131.

<sup>57</sup> A Kubiak, *Stages of Terror. Terrorism, Ideology and Coercion as Theatre History* (Indiana University Press, 1991) 64.

<sup>58</sup> Dwyer, above n 55, 131.

<sup>59</sup> 'CMI (A Certain Maritime Incident)' (2006) 48 *Australasian Drama Studies* 143, 149.

The original political performance was further theatricalised with spinning furniture, an office party and an aerobics session. Internal allusions to the play itself, ‘a great idea for a show, 2,200 pages of Hansard’,<sup>60</sup> also reminded the audience that this was not merely an accurate re-staging of the original political performance. This was, as Dwyer puts it, a ‘continuously self-referential performance’.<sup>61</sup> There was no attempt to strive for authenticity, for the semblance of the real; thus, the performance could be distinguished from the earlier performance on which it was based, the Parliamentary performance which purported to uncover the ‘truth’.<sup>62</sup>

The production in fact interrogated the processes for uncovering the truth.<sup>63</sup> The play opened with a child, hooked up to a lie detector, reading the words of the defence minister about the ‘veracity’ of claims that children have been thrown overboard. In this theatrical performance, it was clear that political performances are not about the truth. They supply only an incomplete record of events, and fail to address the ‘unspoken and unspeakable’ reality of human suffering.<sup>64</sup> Naked bodies which lay in the path of members of the audience as they entered the performance space<sup>65</sup> reminded the audience of the horrific deaths of 353 asylum seekers, in a related and contemporaneous incident involving the sabotage of the SIEV X. At the end of the performance, a machine-generated female voice described the experiences of survivors in their own words; simultaneously, another ‘corpse’ was washed and processed on stage.<sup>66</sup> Thus the audience was invited to reflect on the deficiencies in the earlier Parliamentary performance;<sup>67</sup> the Senate Committee’s inquiry into a ‘(non)incident’<sup>68</sup> was remarkable for its failure to grapple with the associated sequence of events which resulted in these deaths.

Version 1.0 continued to draw upon the genre of documentary theatre in two subsequent productions: *The Wages of Spin* in 2005 in which the phenomenon of political falsehoods was explored, and *Deeply Offensive and Utterly Untrue* in 2007. In the latter production, the performance text was the edited transcript from the Cole inquiry, in which a Royal Commission investigated the financial contributions by the Australian Wheat Board to Saddam Hussein’s government. The title of the play came from Alexander Downer; he had described suggestions that Australia’s concern for its wheat markets was a factor in its participation in the Iraqi war as ‘deeply offensive and utterly untrue’.<sup>69</sup>

The above examples of law in play are mostly reproductions of inquiries. The transcripts of trials have also been used in the creation of documentary theatre. Examples include: Donald Freed’s *Inquest: A Tale of Terror*, about the arrest, trial and

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<sup>60</sup> Ibid 166.

<sup>61</sup> Dwyer, above n 55, 138.

<sup>62</sup> J McCallum, ‘CMI (*A Certain Maritime Incident*): Introduction’ (2006) 48 *Australasian Drama Studies* 136, 139.

<sup>63</sup> Ibid.

<sup>64</sup> Williams, above n 54, 119.

<sup>65</sup> J McCallum, ‘Human drama lost in a sea of words’, *The Australian* (Sydney), 2 April 2004.

<sup>66</sup> McCallum, above n 62, 140.

<sup>67</sup> Williams, above n 54, 125.

<sup>68</sup> Dwyer, above n 55, 130.

<sup>69</sup> B di Fonzo, ‘Psst, Wanna Buy Some Wheat?’ *The Sydney Morning Herald* (Sydney), 24–30 August 2007, Metro 15.

execution of Julius and Ethel Rosenberg;<sup>70</sup> Rolf Schneider's *Prozess Richard Waverley*, drawn from the trial of Hiroshima pilot Claude Eatherly; Daniel Berrigan's *The Trial of the Catonsville Nine*, constructed from the transcript of anti-war activists who burnt records of draftees during the Vietnam War;<sup>71</sup> and Ron Sossi and Frank Condon's *The Chicago Conspiracy Trial*, based on the transcript of the trial of the Chicago Seven.<sup>72</sup>

Some commentators argue that documentary theatre, in its faithful adherence to the original words or original performances, is inferior to works of fiction. Edmund Morgan, who approved of Miller's integration of fact and fiction in *The Crucible*, predicted an 'aesthetic disaster' if an artist confined him or herself to known historical facts.<sup>73</sup> In his view, the historical record is not enough in itself to generate a work of art. Dominic Dromgoole has lamented the current emphasis on understanding at the expense of the imagination.<sup>74</sup> Playwright Steve Waters states that

the events docu-theatre precludes from its truths are often the most significant moments of private reflection, moments of immediate choice. Equally, verbatim theatre forgoes image and scene: its narrative unfolds in indeterminate space and time, it chooses to tell rather than show.<sup>75</sup>

He explains why fiction is important: as 'an addition to the world, creating a parallel universe alongside, but not identical to, reality'.<sup>76</sup>

### C *In Pursuit of Authenticity*

The duplication of performances in this sub-genre of documentary theatre raises disturbing questions about our search for authenticity in a world of simulations. As Favorini has pointed out, it is difficult to ignore the work of Jean Baudrillard when contemplating the relationship between representation and reality in documentary theatre.<sup>77</sup> In Baudrillard's world of 'contagious hyperreality',<sup>78</sup> reality has become a meaningless concept. To (re)perform and (re)produce what is already performance and, arguably, a complete aesthetic event in itself, is to subject audiences to the 'endlessly reflected vision: all the games of duplication and reduplication' which create an 'indefinite refraction'. Ultimately, 'the real is no longer reflected; instead it feeds off itself till the point of emancipation.'<sup>79</sup> Reality 'has been confused with its own image'<sup>80</sup>

<sup>70</sup> Freed was criticised for the inclusion of various invented scenes called 'Reconstructions'; Gary Fisher Dawson, *Documentary Theatre in the United States. A Historical Survey and Analysis of its Content, Form, and Stagecraft* (Greenwood Publishing Group, 1999) 50–51.

<sup>71</sup> Ibid 140.

<sup>72</sup> See Schechter, above n 41, 197.

<sup>73</sup> E S Morgan, 'Arthur Miller's *The Crucible* and the Salem Witch Trials: A Historian's View' in John M Wallace (ed), *The Golden and the Brazen World. Papers in Literature and History, 1650–1800* (University of California Press, 1985) 172.

<sup>74</sup> D Dromgoole, 'Reality check', *The Guardian* (London, United Kingdom), 23 October 2004.

<sup>75</sup> S Waters, 'The Truth Behind the Facts', *The Guardian* (London, United Kingdom), 11 February 2004.

<sup>76</sup> Ibid.

<sup>77</sup> A Favorini, 'Representation and Reality: The Case of Documentary Theatre' (1994) 35(2) *Theatre Survey* 31.

<sup>78</sup> J Baudrillard, *Simulations* (Semiotext(e), Paul Foss, Paul Patton and Philip Beitchman trans, 1983) 43.

<sup>79</sup> Ibid 144.

<sup>80</sup> Ibid 152.



and art is both everywhere and virtually meaningless.<sup>81</sup> Victor Turner also finds the ‘endlessly reflected vision’ in the multiple genres of cultural performance and the proliferation of performances about performances.<sup>82</sup> Or, as Kubiak has written, we are fascinated by realism in theatre because it reinforces a ‘repressed understanding that the illusion of real life constructed upon the stage [is] a reproduction of life’s own seeming unreality’.<sup>83</sup>

Such theorists would suggest that, paradoxically, despite the proud claim of documentary theatre to authenticity, the phenomenon generates a disturbing vision of multiple performances, and the ‘real’ remains elusive. We crave authenticity but remain uncertain as to which performance has the status of the ‘real’; in a ‘culture of the copy’,<sup>84</sup> ‘an era of redoubled events’, we believe that repetition will uncover the truth.<sup>85</sup> The popularity of documentary theatre reflects our fascination with the ‘real’, and our determination to capture the real through representation. Peggy Phelan reminds us that ‘the danger in staking all on representation is that one gains only re-presentation’.<sup>86</sup> Is it possible, as one commentator asked after viewing *Nuremberg*, to distinguish between such ‘staged reanimations’ and a televised documentary or current affairs show?<sup>87</sup>

Documentary theatre involves live (re)presentations of live performances but most (re)presentations in the culture of the copy rely on ‘technologies of reproduction’.<sup>88</sup> Nicolas Kent, director of the Tricycle theatre, agrees with Auslander<sup>89</sup> that live performance should not necessarily be privileged over mediated forms. He has explained that he created the Tribunal plays because the relevant inquiries were not televised, and anticipates that there will no longer be a need for his plays if this changes.<sup>90</sup> Such reasoning suggests that the Tribunal plays are not intended as enduring works of art. Rather, they partake in our culture’s endless engagement in ‘repetition, replication, simulation’<sup>91</sup> as we search desperately, and fruitlessly, for the real and the true. Documentary theatre is intended to expose the truth, and in so doing, to change the course of history by educating, inspiring and galvanising the populace into taking action.

### III DISTINGUISHING LAW FROM PLAY

In this confusing interplay of performances, what distinguishes law from play? There does not appear to be any agreement on the important question of which, if either, mode of cultural performance was the *original* performance, from which other modes of performance developed and evolved.

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<sup>81</sup> Ibid 151–2.

<sup>82</sup> See V Turner, *The Anthropology of Performance* (PAJ Publications, 1987) 107.

<sup>83</sup> A Kubiak, *Agitated States: Performance in the American Theater of Cruelty* (University of Michigan Press, 2002) 103.

<sup>84</sup> H Schwartz, *The Culture of the Copy. Striking Likenesses, Unreasonable Facsimiles* (MIT Press, 1998).

<sup>85</sup> Ibid 296.

<sup>86</sup> P Phelan, *Unmarked. The Politics of Performance* (Routledge, 1993) 10.

<sup>87</sup> McDonald, above n 49, 23.

<sup>88</sup> See Auslander, above n 20, 13.

<sup>89</sup> Ibid 43.

<sup>90</sup> Hoggard, above n 51.

<sup>91</sup> Schwartz, above n 84, 297.

Anthropologist Victor Turner found similarities between legal and theatrical performance because all performative genres develop from the social drama.<sup>92</sup> However, legal performances are functional performances *within* the social drama, and are the ‘generative source’ of theatrical and other forms of cultural performance.<sup>93</sup> Theatre is ‘a hypertrophy, an exaggeration of jural and ritual processes’.<sup>94</sup> Whereas re-enactments as part of legal rituals are performances, theatrical re-enactments of social dramas are ‘a meta performance, a performance about a performance’.<sup>95</sup> Turner compares ‘the ensemble of performative and narrative genres’ to ‘a hall of mirrors’,<sup>96</sup> but in the endless cycle of performance and performative commentary on performance, legal performance clearly precedes, and is encompassed by, theatrical performance.

Kubiak, on the other hand, claims for theatre ‘a certain priority ... which precedes power’.<sup>97</sup> He suggests that the structures of socio-political power, including legal structures, could not have come into being ‘without some implied and already recognized structure of performance’.<sup>98</sup> Thus, the ‘theatre of state’<sup>99</sup> with all its varied political and legal performances was inspired by the theatre itself and, furthermore, theatre expresses ‘the very instant of perception that exists before culture and its laws can appear’.<sup>100</sup>

#### A *Performative Utterances in Law and Theatre*

We could indeed lose ourselves in Turner’s hall of mirrors, with theatrical performances endlessly reflecting legal performances and legal performances faithfully reproducing theatre. In this intimate, endless recycling of mirrored images, can we separate law from play? When the text or record of a legal performance is (re)performed without embellishments or narrative augmentation, the words or utterances of the characters do not change. Clearly, however, the performance recurs in a different context, and context and function determine whether a specific performance is legal ritual or theatre.<sup>101</sup> Could it be argued that legal performances have a performative quality, in Austin’s sense of the word, whereas theatrical utterances, performed without the authority and force conferred by law, lack this quality?

It is instructive to consider, here, the distinction between trials and pseudo trials, between tribunals and pseudo tribunals. The findings of legitimate tribunals, the verdict in a trial, are authoritative and will be implemented with, if necessary, a full and impressive display of force. However pseudo courts and tribunals which lack legitimacy and authority may find it difficult to gain publicity, and carry out prescribed punishments or implement findings. Aida Hozic describes the ‘public trials’ which were conducted by Italian terrorists in the 1970s; the state clearly did not endorse these trials and they remained ‘theatre’. As theatre, such pseudo trials were reasonably effective; the guilty parties, often managers who exploited their workers, had their heads shaved,

<sup>92</sup> V Turner, *From Ritual to Theatre. The Human Seriousness of Play* (PAJ Publications, 1982) 110.

<sup>93</sup> Turner, above n 82, 93.

<sup>94</sup> Turner, above n 92, 12.

<sup>95</sup> Turner, above n 82, 107.

<sup>96</sup> Turner, above n 92, 104.

<sup>97</sup> Kubiak, above n 83, 5.

<sup>98</sup> *Ibid* 5.

<sup>99</sup> *Ibid* 162.

<sup>100</sup> *Ibid* 15.

<sup>101</sup> See Schechner, above n 18, 71.

were tied to trees, and even crawled around a factory with a pot instead of a crown on their heads.<sup>102</sup> However, Orr has described the ‘people’s court’ set up by the Red Brigades to try Italian politician Aldo Moro<sup>103</sup> as ‘a masquerade which failed’.<sup>104</sup> Jean-Paul Sartre and Bertrand Russell’s 1967 War Crimes Tribunal, established to determine whether the United States government had committed acts of aggression and whether other governments had been complicit in these acts,<sup>105</sup> clearly lacked legitimacy and Russell and Sartre conceded this from the outset. Similarly, the mock court in Times Square which conducted the trial of the President of the United States Ronald Reagan and his associates in 1984,<sup>106</sup> and the 1983 war crimes tribunal which was set up by the German Greens as a theatrical exploration of the crimes of the nuclear powers in preparing for nuclear war,<sup>107</sup> had no power to enforce a verdict or to ensure that particular recommendations were carried out. Contemporary examples of pseudo tribunals and trials, such as the World Tribunal on Iraq and the Tricycle Theatre’s staging of a trial of Prime Minister Blair for the crime of aggression against Iraq, also lack state legitimacy and hence power.

Similarly, utterances in a theatrical performance, unlike utterances in a legal performance, have no binding legal force. According to J L Austin, performative utterances, spoken out of context or by a speaker not authorised to speak, lose their performative quality. Austin famously described theatrical utterances as ‘infelicitous’ or ‘hollow’; they could not be performative as they were uttered in inappropriate circumstances.<sup>108</sup>

Worthen, however, points out that in a theatrical performance, the conventions of theatre, which Worthen also calls ‘the citational practices of the stage’, convert such utterances into ‘something with performative force’.<sup>109</sup> Clearly, if the utterances are originally derived from another performance, they have quite a different performative force to that which they originally possessed. Every theatrical performance, according to Worthen, involves ‘an ongoing negotiation of the meaning of artworks in culture’.<sup>110</sup> Theatrical performances may be pure entertainment; on the other hand, they may galvanise audiences, insult the sovereign, incite disaffection. In documentary theatre, the (re)presentation of legal performances in the specific citational environment of the theatre creates a performance which has been shaped by theatrical conventions into something quite different to the original performance, but which still has its own performative quality. In this sense, the utterances in such theatrical performances are neither ‘infelicitous’ nor ‘hollow’.

<sup>102</sup> A Hozic ‘The Inverted World of Spectacle: Social and Political Responses to Terrorism’ in John Orr and Dragan Klaic (eds), *Terrorism and Modern Drama* (1990) 64, 72–3.

<sup>103</sup> J Orr ‘Terrorism as Social Drama and Dramatic Form’ in J Orr and D Klaic (eds), *Terrorism and Modern Drama* (1990) 48, 53–4.

<sup>104</sup> Ibid 54.

<sup>105</sup> R Cover, ‘The Folktales of Justice: Tales of Jurisdiction’ in M Minnow, M Ryan and A Sarat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (1992) 173, 199; originally published in (University of Michigan Press, 1985) 14 *Capital University Law Review* 179.

<sup>106</sup> Schechter, above n 41, 200–1.

<sup>107</sup> Ibid 206–7.

<sup>108</sup> See discussion in Schechner, above n 18, 110, and in W B Worthen, ‘Drama, Performativity and Performance’ (1998) 113 *Publications of the Modern Language Association of America*, 1093.

<sup>109</sup> Worthen, above n 108, 1098.

<sup>110</sup> Ibid 1101.

## B *Separating Theatre from Reality*

Furthermore, the distinction between felicitous and infelicitous utterances, between the real and the acted, is problematic in a culture in which fiction and the 'real' collide and are, seemingly, mutually co-dependent.<sup>111</sup> In the instances of documentary theatre analysed thus far, we find an extraordinary degree of cross-fertilisation between such theatre and the 'real' proceedings in inquiries and courts. The programme for *CMI: A Certain Maritime Incident* included an extract from the Senate Hansard, in which two Senators discuss in jovial terms their roles in the theatrical (re)performance of what, according to one of them, was 'such a surreal inquiry'<sup>112</sup> and partly a piece of theatre.<sup>113</sup> Some months before the performance of *Justifying War*, barrister Geoffrey Robertson, appearing in the Hutton inquiry, argued that the inquiry should be televised because nothing could stop its 'dramatic re-enactment' in the Tricycle theatre.<sup>114</sup> When the trial of Slobodan Milosevic was about to commence, Nicolas Kent was asked by the administrator of the United Nations International Criminal Tribunal if he could lend the tribunal the desks used as stage props in *Srebrenica*. The desks were reproductions of the actual desks used in the earlier hearings by the tribunal.<sup>115</sup> *Guantanamo* was staged in February 2006 in a committee room in the British Parliament before parliamentarians, lawyers and human rights organisations, with one of the characters, Clive Stafford-Smith, playing himself.<sup>116</sup> In fact, the re-appearance of participants in legal performances in theatrical performances makes it difficult to differentiate 'actors' from 'real' people. Schechter discusses the proposal of the founder of the San Francisco Mime Troupe in 1970 to perform Ron Sossi and Frank Condon's *The Chicago Conspiracy Trial*, which was based on the transcripts of the Chicago Seven trial, with the defendants playing themselves. The original judge was invited to appear, but predictably turned down this offer.<sup>117</sup>

Fiction and the 'real' thus collide, and theatrical utterances (and stage props) influence the conduct of legal and parliamentary proceedings. Austin's distinction between theatrical utterances and felicitous utterances may well be inappropriate in such a context. There is, however, a critical distinction between legal and theatrical performances, which may assist us in distinguishing between their mirrored, misleading reflections.

## C *Law, Theatre and Violence*

Legal performance is anchored in violence, and theatre is not. Theatrical performance can depict or represent violence quite graphically and shockingly;<sup>118</sup> theatrical

<sup>111</sup> See Schechner, above n 18, 111.

<sup>112</sup> Extract from the Commonwealth, *Senate Hansard*, 25 March 2004, 21995.

<sup>113</sup> *Ibid* 21996.

<sup>114</sup> Accessed on the website of the Tricycle Theatre <<http://www.tricycle.co.uk>> at April 2006.

<sup>115</sup> N Wroe, 'Courtroom Dramas', *The Guardian* (London, United Kingdom), 24 July 2004.

<sup>116</sup> P Majendie, 'Guantanamo Drama Turns Parliament into Main Stage', *The Sydney Morning Herald* (Sydney), 8 February 2006, 16.

<sup>117</sup> Schechter, above n 41, 198.

<sup>118</sup> This occurs, for instance, in Griselda Gambaro's play *Information for Foreigners*, discussed in D Taylor, 'Theater and Terrorism: Griselda Gambaro's *Information for Foreigners*' in J Reinelt (ed), *Crucibles of Crisis. Performing Social Change* (University of Michigan Press, 1996) 207.

performance can even incorporate *real* violence,<sup>119</sup> although Kubiak contends that real violence performed on stage is less ‘efficient’ and effective than ‘its mimetic representations’.<sup>120</sup> However, theatrical performance is not anchored in violence in the same way in which legal performance is.

Kubiak, interested in ‘the performative history of terror’,<sup>121</sup> has explored theatre’s connections with terror. In Kubiak’s bleak vision, the history of theatre *is* the history of terror,<sup>122</sup> and theatre is intimately implicated in violence. He describes theatre as ‘the *site* of violence, the locus of terror’s emergence as myth, law, religion, gender, class or race’,<sup>123</sup> and thus contends that theatre was familiar with terror before law was established. Despite this close relationship between theatre and terror, Kubiak maintains that there is still a clear distinction between state acts of violence, whether filtered through the legal system or administered more directly by the executive, and the representation of violence in theatrical performance. He has written that:

It seems a kind of obscenity, once again, to equate what goes on in the interrogation cells of South Korea and South Africa with what happens, no matter how violent, on a SoHo stage. In the final analysis, we are still faced with a theatre whose violence, no matter how ‘real’, still exists primarily as a sign of itself, while the violence of the interrogation cell is precisely that which is unrecognisable.<sup>124</sup>

He also distinguishes between the experience of a theatrical performance, which is voluntary, and the experience of torture, which is not. Similarly, victims of state acts of violence administered through the legal system do not have a choice about their participation in a legal performance and its aftermath.

Hans Mayer writes that ‘when it comes to giving rise to the reality of dead people and not just stage corpses, the inviolable limits of the play are reached.’<sup>125</sup> He continues: ‘there is playing in reality, the playing of reality, reality playfully presented; but one cannot play around with reality.’<sup>126</sup> I have discussed examples of the ‘playing of reality’, or playful (re)presentation of reality, in the form of documentary theatre. However, this point of intersection between play and law does not involve ‘dead people’. At the end of a theatrical production, the dead will rise and take a bow. At the end of a legal performance, the dead remain dead. In the realm of violence and death, the distinction between play and reality, between theatrical performances of law and legal performances, is quite stark.

Thus, in interrogating the differences between law and theatre, the most obvious conclusion is that one necessarily takes place in a context of violence and the violent consequences endure, sometimes forever; the other takes place in a context of play. To

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<sup>119</sup> In Roman society, for instance, representational plays were replaced by real violence; Kubiak, above n 57, 40. Some modern performance artists use ‘physical mutilation, pain and peril’ in their work; Kubiak, above n 57, 144.

<sup>120</sup> Ibid 160.

<sup>121</sup> Ibid 2.

<sup>122</sup> Ibid 54.

<sup>123</sup> Ibid 4–5.

<sup>124</sup> Ibid 158.

<sup>125</sup> H Mayer, ‘Culture, Property and Theatre’ in L Baxandall (ed), *Radical Perspectives in the Arts* (1972) 320.

<sup>126</sup> Ibid.

return again to Kubiak and his reflections on theatrical ontology: ‘theatre always seems to leave real violence behind because this is precisely theatre’s function – to conceal real violence even when (or especially when) it is seemingly exposing it in the violent spectacle.’<sup>127</sup>

By contrast, as Robert Cover has told us unequivocally, the performance of law results directly in violence, pain and death.<sup>128</sup> Cover’s work has been described as an ‘admonition in the world of law-and-literature scholarship’;<sup>129</sup> he repeatedly distinguished between the real violence of legal interpretation and ‘the metaphoric characterizations of literary critics and philosophers’.<sup>130</sup> Judges, as dispensers of violence, have quite a different role to poets, critics and artists,<sup>131</sup> and presumably can also be differentiated from playwrights, actors and theatre directors.

Cover’s observation that law is anchored in violence appeared to have the force of a revelation for legal theorists who clearly had no first-hand experience of the violence administered through the legal system, unlike Cover himself. As an activist, Cover had often appeared on picket lines, and had been imprisoned for his activities.<sup>132</sup> Sarat and Kearns have described his work as ‘a crucial, conceptual breakthrough’<sup>133</sup> and argued that he ‘reinvented the subject of violence and its relationship to law’.<sup>134</sup> His work triggered a wide-ranging discussion about law and violence.

Cover emphasised that the violence administered by judges may be shared, cooperative, delegated and even domesticated,<sup>135</sup> but it is still unmistakably violence. On the other hand, he was not necessarily critical of the administration of this sort of violence. Indeed, some commentators have referred to him as an apologist for the violence of the state,<sup>136</sup> in his attempt to ‘make peace with violence’<sup>137</sup> or what has also been described as ‘his mournful embrace of the violence of law’.<sup>138</sup> Yet the administration of violence affects the operation of the legal system; it must remain inflexible and intolerant of difference.<sup>139</sup>

In focusing on the violence of the law, Cover was clearly cognisant of law as performance, anchored in real deeds of violence carried out in real time.<sup>140</sup> McVeigh, Rush and Young make this clear in their description of Cover’s narrative of law as a

<sup>127</sup> Kubiak, above n 57, 160.

<sup>128</sup> R M Cover, ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601, 1606–7.

<sup>129</sup> R Weisberg, ‘Private Violence as Moral Action: The Law as Inspiration and Example’ in A Sarat and T R Kearns (eds), *Law’s Violence* (University of Michigan Press, 1995) 175, 178.

<sup>130</sup> Cover, above n 128, 1610.

<sup>131</sup> *Ibid* 1609.

<sup>132</sup> A Saifer, ‘Preface’ in M Minnow, M Ryan and A Sarat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (University of Michigan Press, 1992) vii, x.

<sup>133</sup> A Sarat and T R Kearns, ‘Making Peace with Violence: Robert Cover on Law and Legal Theory’ in A Sarat (ed), *Law, Violence and the Possibility of Justice* (Princeton University Press, 2001) 49, 53.

<sup>134</sup> *Ibid* 51.

<sup>135</sup> Cover, above n 128, 1628.

<sup>136</sup> See J Simon, ‘The Vicissitudes of Law’s Violence’ in A Sarat (ed), *Law, Violence and the Possibility of Justice* (Princeton University Press, 2001) 17, 37.

<sup>137</sup> Simon, above n 136, 42.

<sup>138</sup> A Sarat, ‘Robert Cover on Law and Violence’ in M Minnow, M Ryan and A Sarat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (University of Michigan Press, 1992) 255, 265.

<sup>139</sup> Sarat and Kearns, above n 133, 71.

<sup>140</sup> See C Greenhouse, ‘Reading Violence’ in Sarat and Kearns, above n 129, 125.

performance: ‘judges, jailers, executioners, guards, criminals, protesters, citizens, political officials, the condemned – all appear in Cover’s law as so many speaking and acting parts in the institutional “drama of law”.’<sup>141</sup> Essentially, Cover was challenging the focus of poststructuralist theorists and others on legal texts with his reminder that the *performance* of law, rather than the text of law, has immediate significance for the human bodies caught up in the remorseless dispensation of legalised violence. The distinction between the dramatic performances of law, and those of theatre, is thus clear. As a real time performance, law has real time violent consequences.

#### IV CONCLUSION

So where does playing with the law leave us? Are we left wandering aimlessly in Victor Turner’s ‘hall of mirrors’, watching legal performances morph into theatre and theatrical performances assume the guise of law?

Giorgio Agamben offers some guidance on the possible outcomes of playing with the law. Although Agamben has been accused of failing to provide a theoretical position from which we can challenge state acts of terror,<sup>142</sup> he does consider the possibility of ‘a passage toward justice’.<sup>143</sup> This possibility arises only when the nexus between law and violence is broken, and can be explored through play. His preferred form of play is ‘studious play’ and it is this form of play which guides us towards justice.<sup>144</sup>

Law in theatre may thus offer possibilities for a new apprehension of law. Transforming law into theatrical play and in so doing, stripping law of its association with force and violence, may create a ‘new use’ for law, and new possibilities for justice.

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<sup>141</sup> S McVeigh, P Rush and A Young, ‘A Judgment Dwelling in Law. Violence and the Relations of Legal Thought’ in A Sarat (ed), *Law, Violence and the Possibility of Justice* (Princeton University Press, 2001)101, 125.

<sup>142</sup> See, for instance, M Sharpe, “Thinking of the Extreme Situation ...” On the New Anti-Terrorism Laws or Against a Recent (Theoretical and Legal) Return to Carl Schmitt’ (2006) 24 *Australian Feminist Law Journal* 95, 112.

<sup>143</sup> Agamben, above n 1, 64.

<sup>144</sup> Ibid.