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ten rules of engagement  

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There are courtrooms, judges and lawyers. And then there is, or there was, as it often came first, the performance, or the memory of the actor’s performance, of that judge or lawyer. Sometimes our perceptions of the chronological relations between law and performance mislead us along these fault lines of recall. Harper Lee’s ‘courtroom classic’, *To Kill a Mockingbird* (1960) is perhaps better known as a courtroom classic because of the performance of Gregory Peck as the idealistic lawyer Atticus Finch in the film version of the book (1962). In the novel the trial of Tom Robinson takes barely a few pages, but it is the drama of the court that prevails in recollection. *Twelve Angry Men*, initially a TV play broadcast in the early 1950s, then a stage play, then a film directed by Sidney Lumet in 1957, is recalled by many people of a certain age as they take up jury service in the shadow of Henry Fonda’s ‘juryman’. For some, Arthur Miller’s classic dramatic
work *The Crucible* (1953) plays out parallels between the Salem witch trials and the McCarthy Communist purges of the US in the 1950s. For Norman Mailer it was ‘just a play about a bad marriage’ (Doughty, 2014).

I would guess that if you have picked up this book, you are less a Mailerite and more predisposed to thinking there is something ‘at stake’ when one speaks about the relations between theatre and law. Having just referred to *The Crucible*, it should not go without saying that as well as something ‘being at stake’ in the relations between theatre and law, *someone* might also be ‘at stake’, literally. The simple fact that such summary ‘justice’ is widespread in the form of genocides should alert us to our responsibility precisely to establish as rationally as we can where legal processes benefit from their relations with the public, the performative and the spectacular, and where they are complicated and sometimes diminished by their continuous relationship with theatricality. With respect to law, Jaques was not quite right when he said in Shakespeare’s *As You Like It*: ‘All the world’s a stage’ (Act II, Scene VII). There may well be affects that I experience, feelings that are responsive to theatrical things in the world. But there are certainly *effects* that decisively distance some acts from others, and not least of all in the realm of legal action. These effects, outcomes and judgments which constrain or secure liberties remind me that any ‘theatre real’, with its portrayal of such incarcerations and freedoms, is to be carefully distinguished from that worldly ‘real real’, if only for the sake of just action in and on that very world.
There are some obvious ways in which theatre and law are related, and there are some less obvious ways in which the operations of one depend upon the conduct of the other for what each can do. In the following pages I will explore these sometimes obvious and sometimes obscure relations. I will provide by way of opening a ‘simple to use’ guide to ten principles of performance within law to establish how law is, if it is anything, a performative mode of practice. In the second part of the book, I will examine a judgment in law and through that judgment ascertain how law is inscribed within everyday practices that effect a considerable proportion of my potential readership. I will offer a close reading of a canonical theatrical work from the perspective of law and anthropology and build that reading outwards from my own subject position, which is, I will argue, always contained within legal precedents. I will undertake an analysis of an internationally celebrated theatre production where law, performance and politics are codependent and witnessed in practice, and to conclude I will consider ways in which humans are ‘de-personed’ by law, and how artists have rendered such matters within their recent work. The book will end with some further reading in each of these, and other, areas where law and theatre relate.

So, let’s begin by returning to my first example in a more contemporary setting. Sometimes confusion between law and its performance does not need dramatically trained actors like Gregory Peck or Henry Fonda to complicate due process. To watch Johnnie Cochran, the defence lawyer for OJ Simpson, running rings around common sense
in the Superior Court of Los Angeles in 1994, or Lt Col. Vermeulen demonstrating for Oscar Pistorius’s defence lawyer, Barry Roux, to the Pretoria court in 2014 how a cricket bat was used to break down the bathroom door behind which Reeva Steenkamp lay dying, is to remind us that the relations between law and performance are already, without sanctioned ‘actors’, quite complicated enough by spectacle and rhetoric.

But while complicated, these divides and relations are not indecipherable. It is performance studies rather than jurisprudence, the word coined to articulate the philosophy of the law in the early 1600s, that has given us some helpful vocabulary to unravel these relations. For instance Gregory Peck and Henry Fonda are conducting what I would like to call ‘meta-performances’. They relate to the performances of the second group (Cochran and Roux) by means of a secondary order of mimetic behaviours. This symbiotic relationship between the law and its image, legal process and its performance, reaches back from the ‘Nordic Noir’ legal series of today’s television media, in series such as The Killing and The Bridge, 2500 years to the Greek agora of 5th century BCE Athens. It is a relationship presented in Aristophanes’ The Wasps (422 BCE), staged as part of the Lenaia festival, in which a son attempts to cure his court-obsessed father, a ‘trialophile’, with a staging of a court case between two household dogs. And it is a relationship presented in Arguendo by Elevator Repair Service (2013) at New York’s Public Theatre, in which a verbatim version of a 1991 Supreme Court case, Barnes v Glen Theatre, involving the
right to ‘dance nude’, is played out. And, I would propose, it is these acts that also rhetorically fashion and frame our experiences of what stands for legal behaviours in the first place. To say that law has been ubiquitous to the repertoire of theatre since its inception might be obvious, but if so, it is well worth considering why.

The first group of practitioners I have just been discussing, you could call them ‘actor lawyers’, including those in *The Wasps* and *Arguendo*, ‘perform-perform’ their roles; the second group, ‘lawyers’, you could say, simply (if legal process could ever be simple) ‘perform’ those roles. Simple or not, they *are* performing those roles and are symbolically invested as such, as lawyers, to do so. What we often recall when we say the word ‘law’ in English, first used at the time of Ethelred in around 1000, is somebody performing (whom I might call an actor), ‘somebody who is performing legal process’ (whom I could call a lawyer). It is this *secondary* rendition of the act of the prosecution or defence that has become the common model for our understanding of the law. And this is for the obvious reason that statistically speaking most people have never set foot in a courtroom or been involved in a criminal inquiry, yet the majority of those with access to electricity and a TV signal have witnessed such things over and over again.

When I walk with my students the short distance over the Strand in central London from their university to the Royal Courts of Justice to witness an appeal hearing from the well of the courtroom, very few of them have ever been inside this building despite the fact there is a prominent
and surprisingly welcoming sign outside: OPEN TO THE PUBLIC. Why is the second highest court in the land open to the public? That is perhaps one of the key reference points of this book, and the publication of this book in 2015 marks an anniversary that shapes everything it is about. For it is the necessary openness of the law, at least in its Common Law version in the Anglo-American tradition, that distinguishes its practice over 800 years, since the signing of the Magna Carta of 1215.

I will concentrate in this book on Common Law (as distinct to the codified structure of Civil Law or Islamic ‘Sharia’ Law), not because it is without robust critique; quite the contrary, as since Hobbes’ *Leviathan* (1651), Common Law has been almost continuously under scrutiny for its often unspoken affirmation of a seamless continuity between past and present, for its customary and unwritten form and for its apparently ‘immemorial nature’. The international reach of Common Law systems has always been cognizant, through successive moderations, from Hobbes’ *Dialogue* (1681, 1971), via Jeremy Bentham’s *Introduction to Principles of Morals and Legislation* (1789), to John Austin’s *The Province of Jurisprudence Determined* (1832), of the rhetorical flair upon which its operations depended. Successive commentators sustained the idea, if not the reality, that the proliferation of Common Law and its perceived success was predicated on its unique ability to present innovation as the ‘continuity of tradition’. Indeed, even Ronald Dworkin’s relatively recent *Law’s Empire* (1986) perpetuated this principle of perceived ‘continuity’ over the
temporary reversals of ‘case-based law’ central to the Civil Law tradition, as Philippe Raynaud has made clear (Cassin, 2014, pp. 550–558).

My deployment of Common Law as the legal ground of this book does profit from these rhetorical traditions and their inherent theatricality, but it really has more to do with the potential readership of *Theatre & Law* and the book’s reach amongst, primarily, English-speaking readers. Without for a moment having to endorse Fernanda Pirie’s Anglo-centric view in *The Anthropology of Law* that law is ‘a category of the English-speaking world’ (2013, pp. 4–5), it is Common Law systems that for good or ill (and the British Empire is as much to blame for this as anything) preside over and through a third of the world’s populations, 2.5 billion people and counting. So what I am discussing in this book may not be a human universal, indeed its adherents number less than those circumscribed by Civil Law, but it does have historically related links to the peoples of India, Pakistan, Nigeria, Ghana, Bangladesh, the United Kingdom, South Africa, New Zealand, Ireland, North America, Israel and Australia, amongst many others. To give a concrete example of how such ‘openness’ – an openness, I suggest, secured through the means of performances of various kinds – was embedded in the development of Common Law in particular, one might consider the centrality of the writ of *habeas corpus* in anglophone legal culture from the early 1600s. Simply put, as Paul Halliday lays out in his comprehensive history of the idea, *habeas corpus* describes the process, ‘to bring a prisoner before a judge in order “to signify the
crimes laid against him” and thereby to ensure that law is honored in holding or releasing him’ (2010, p. 2). *Habeas corpus* enshrined the principle in law that for a trial to take place the defendant had to be ‘made to appear’, a theatrical manifestation if ever there was one. Accused persons had to be present in order to be able to defend themselves.

The words ‘*habeas corpus*’ do not appear as such in the Magna Carta. That concept was to develop from the 17th century onwards, but its origins appear in the many ‘liberties’ awarded by the Magna Carta, including number 39 of the 63 that made up the charter that reads: ‘No free man shall be arrested or imprisoned … except by the lawful judgment of his peers or by the law of the land’ (2010, p. 15). This ‘openness’, partly represented through *habeas corpus* but also through other processes of publicity, is critical to the conduct of law because despite the fact very few of us statistically will ever conduct ourselves in relation to the legal process, we are all, as the French philosopher and historian of ideas Michel Foucault pointed out, circumscribed by the law (*Discipline and Punish*, 1975). It is not that we will require the services of the courts in our lives, as we almost certainly will not, it is that we might. And this ‘might’ requires us to be cognizant of what the law could do for us, or to us. It might discipline or punish us. It will certainly determine us, as my consideration of the anthropology of law will lay out in the second part of this book.

As my first rule of engagement between performance and law I will suggest that law has to be seen to be done. It is
not adequate nor indeed technically ‘legal’ in Common Law cultures for a legal system to do its work in private (though the continued scandal of Camp X Ray at Guantanamo Bay at the time of writing immediately introduces a note of caution to any such claim). Yes, cases can be declared in the Common Law system as ‘in camera’ (literally ‘in a chamber’, from the Latin root), but otherwise the law must show itself, must reveal itself in action. In so doing, it is of course showing doing, one of the prerequisites that the performance theorist Richard Schechner demands for something to be called performance in the first place (Essays on Performance Theory, 1976). Performances are precisely constituted through a conscious act of ‘showing doing’ involving some form of agent and some form of audience.

Secondly, law presents a workable narrative for drama as it commonly involves a beginning, a middle and an end. While Charles Dickens in his novel Bleak House (1852/2003) and Franz Kafka in his parable Before the Law (1915/2005) emphasize the longevity of the law, its intractability, the vast majority of cases that are brought to trial come to judgment. For law to function, decisions have to be made. This should not go without saying. While practices I will consider under the rubric of theatre in this book range from the conventional Brechtian structure of The Caucasian Chalk Circle to the less conformist performance practices of the Palestinian theatre company ShiberHur, each of these forms seems to have drawn at least some of its specifically theatrical energy, as we shall see, from the structure offered it by the urgency of legal narratives.
The ‘drama’ of probate, the ‘reading of the will’, and its pictorial representation in 19th-century English painting traditions, provides just such a history of narrative urgency, with its overriding dynamics of ‘beginning’, the gathering of the family, ‘middle’, the reading of the will, and ‘end’, the fallout from the declaration. As Daniel Monk suggests, the will is the most represented of legal texts amongst legal documents, despite the simple fact that wills were, and are, very rarely ‘read’ in such an obviously dramatic way. In the 19th century the place of probate in literature reached its height with readings of wills amongst assembled families and claimants commonplace in the work of Charles Dickens, Anthony Trollope, Emile Zola and Walter Scott. George Elliot’s Middlemarch (1874) features no less than three wills which braid with the shifting concerns of capital and property explored in that work. But these readings disappear as quickly as they appeared, by the 20th century almost completely. By the time Joan Crawford’s will was read to her family in May 1977, including the notorious tenth codicil, ‘It is my intention to make no provision herein for my son Christopher or my daughter Christina for reasons which are well known to them’ (Chandler, 2008), the prominence of the dramatic reading had all but gone from film and theatrical representation.

This rather literal narrative symmetry between the dramatic urgency of legal processes such as these and performance should immediately be complicated by a third idea proposed by Aoife Monks in response to a speaker at the Performing the Law conference that took place at the French
Institute in London in 2014. There Monks asked whether perhaps the law acted as a form of *surrogate*, and in so doing she wondered whether the point of representations of the law might be a means through which audiences reach for something else. I am attracted to this idea as I do not for a moment think that watching plays about legal matters, such as *The Colour of Justice* (1999), concerning the Stephen Lawrence Inquiry, in which the appalling narrative of a racist murder on the streets of London in 1993 was replayed from court testimonies, work as *theatre* because they are about legal matters per se. I think they work theatrically because they are about human animals in a very precise form of representational crisis which connects this experience, the one in the theatre, with others elsewhere we have had or wish to imagine, where power and its contestation are at stake. In the case of *The Colour of Justice* it was the entire criminal justice system that was really on trial for its institutional failure to pursue even the rudiments of justice for the victim’s family.

A fourth association between theatre and law might be drawn from Victor Turner, the Catholic anthropologist, who reminds us quite simply that performance needs experience to do what it does (*From Ritual to Theatre*, 1982). The most obvious level of association between performance and law might be the rendering of such experience in the form of storytelling. For Turner the ‘rendering of experience’ requires us to ‘try something’, to test something out, and it is in such playing that we give ourselves the opportunity to understand experience, and in a sense, to ‘experience experience’.
Turner’s concept of ‘working through’ would appear to be shared by performance and the law, allowing people to work through something they have just become aware of. And, importantly, both performance and law allow us to process that thing we call experience. Not all practices mobilize or facilitate the processing of experience. Indeed some seem precisely to have been invented and sponsored by governments and multinational corporations because of their bromide-like, perennial anti-processural quality. Think of mass spectator sports, and especially football, which in the UK at least in its annual cycle of predictable moneyed outcomes operates to efface its cyclical nature. The quarter-century scandal that denied justice to the families of Liverpool football supporters suffocated at the Hillsborough Stadium on 15 April 1989, one of the world’s worst football disasters, would be one measure of where the most extreme experience could not (was not allowed to) be ‘processed’ with any fidelity to the truth. The sober truth was that up until this time football supporters were treated to all intents and purposes as nascent criminals by the authorities responsible for their care.

A fifth association between theatre and the law is the means by which a judicial spectacle operates simultaneously as a ‘reality’ and a ‘fiction’. For a spectacular event to occur, ‘something has to happen’. We have established above that the law is a place where something certainly happens. It operates through action, not just a mental operation. It is made up of performing and spectating. It occurs in a specific time and place. And it is defined by the intersubjectivity of
its participants. In other words, both parties have to agree to the status of the event for it to be viable and function. So, as Guy Spielmann proposed at the Performing the Law conference at the French Institute referred to earlier, in each of these senses at least, a court trial meets all the criteria one might wish for in a spectacular event. As Spielmann is quick to point out though, all this is very well but has little to do with justice, which after all one would have thought was the raison d’être of the law. We have the law ‘as it should function’ in the interests of justice, and we have the ‘law as it does function’. And importantly we have a critical valence of the law, which relates to this book especially, and provides us with the sixth point of contact between theatre and law, that is we have the law as it is perceived to function. The phrase ‘justice has been served’ suggests that such justice was once breached but has now been remedied, but such easy pieties obscure a complex of problematic performances.

Justice at all times remains to be defined and enforced; it is not only an ontological aspect of the natural world, despite what I will argue in the second section of this book in defining the legal identity of the human, ‘Homo Juridicus’. You could say it requires something the legal writer Gary Watt names with a neologism, ‘Perforcemance’, to establish itself, a force that Walter Benjamin, Michel Foucault and Louis Althusser all subscribe to in their writing. Just think of the variety of means of ‘summary justice’ that you have come across to put into question such a condition of natural or inevitable justice. A Kangaroo Court, a ‘mock
court’ in every sense of that phrase, would be an obvious example. Or think of the laws that ‘we’ all believe do not serve justice, such as the widespread homophobic laws of the 20th century or racist laws that persist into the 21st. Or, concomitantly, the number of times that we hear of ‘justice’ being served, or at least someone else’s idea of justice, without any recourse to law courts, or legal processes, of any kind. Many of us might not be attracted to Charles Bronson’s gun-toting character in the 1974 film Death Wish, or Judge Dredd’s mantra ‘I am the Law’, but there are some who are, and we ignore these forms of ‘justice’ at our peril.

If I think theatre, performance and especially live art have privileged the special and defining characteristic of present-ness, the ‘ontology’ of its liveness over the last four decades, then for my seventh reflection on theatre and law I would like to recall that the performance field has nothing on the legal system when it comes to foregrounding the palpable, and necessarily ‘open’, present of its workings. Here the importance, indeed the fetishization of public-ness of law, has at least equalled that of the theatrical domain, and here the value of ‘liveness’ at all costs is upheld to the extent that one might think of the law itself as the privileged site of the ‘live’ in the 21st century. The long-running debate about televising court proceedings (as has long been the case in the US) has returned the UK judicial system to an argument over intricacies of ‘liveness’ that Peggy Phelan and Philip Auslander prepared us for in their disagreements over the relations between the live and the mediatized in performance in the 1990s.
When I talk of experience ‘working something through’ I would want also to recognize in my eighth association the time of this working through in law, and what such duration introduces to the process by way of opportunity and entropy. The avalanche of procedural papers that opens Charles Dickens’s novel Bleak House figures this cumulative threat to justice as one bound by glacial time. Here the rhythm of the effective (the really happening) of the legal process, in all its real-time frailty, and the virtual version of that effective practice (the performance) in all its brushed-up and brushed-out niceties, become starkly contrasted. If I say at the conclusion of a performance, ‘You are free to go’, it is meaningless in anything but theatrical effect. Because I have no authority to say this, but also because no ‘serious’ time, or rather not the right ‘real’ time, has been spent on providing the conditions for such a statement, despite the theatrical time it has passed. If a judge says it, then ‘you go free’, but only after an acknowledged time of appropriate conduct has been committed to it. But why exactly is this?

We have J. L. Austin to thank for a primer, a taxonomy of these kinds of utterance that distinguish certain uses of language from what are called ‘propositional utterances’, mere statements of fact. He is interested in examples in which to say something is to ‘do’ something, and he outlined these conditions of utterance in a lecture series written up and published as How to Do Things With Words (1962). Here he described three valences where to say something is to do something. I am particularly interested in the third of these to explain the conundrum posed above,
but the first two need distinguishing. To ‘say something’ is of course to ‘do something’ at the basic level of sonic production, to perform a locutionary act through noise-making that corresponds to an accepted and understood vocabulary and grammar. Secondly, to say something on occasions is to perform an illocutionary act, it is a ‘performative’ in the sense that a phrase like ‘I object’ performs one’s intentions in a court of law or a debate. But most interestingly there are also, thirdly, phrases, when used in certain circumstances, that carry a particular ritual and social force that effects a further action, beyond the thing being uttered. The officiating court clerk announcing the phrase ‘The court is sitting’ does not just mean the legal process is underway, it corroborates the validity of those decisions made therein. An utterance that passes judgment is also just such a phrase of doing as much as saying. ‘You are guilty of murder’ will, if spoken in an agreed and legitimate context of law-making and procedure, in all but the most anarchic of circumstances, mobilize secondary effects of incarceration or even execution.

Notoriously and problematically (for theatre specialists at least), Austin precisely excluded the contexts of theatre and staged performance from those in which such performatives could operate felicitously. But John Searle in his follow up work Speech Acts: An Essay in the Philosophy of Language (1969) further formalizes these ‘felicitous’ conditions of utterances while foregrounding the successful communication of the speaker’s intention against a complex and contingent background. In this context speech directly
precipitates action on the story level (such as through promises, threats or wooing), whether in courtrooms or dramatic dialogue. This finessing of the relations between what I would like to call the ‘effective’ and the ‘virtual’ domains of the relations between the primary performance of law, and its secondary rendering through theatre, is thus here further complicated, and this idea is something I will return to when I discuss the fascinating, legally inspired installation artwork of Carey Young.

While the discussions of performatives has over the last four decades rambled, often unhelpfully, far and wide from Austin and Searle’s forensic clarity in their foundational work, there is one specific modality of the performative that demands attention in a book considering the relations between theatre and law, and it provides the ninth relation between their operations. That is the oath – a statement that often begins something like, ‘I swear by …’ and describes a solemn vow. An oath does not concern a statement, as such, but is the guarantee of the statement’s efficacy, within a court and other contexts. An oath ‘guarantees’ the truth and efficacy of language, and for centuries in the courtroom setting an oath has been accompanied by the presentation of the hand to the courtroom to demonstrate that the hand remains unmarked (a throwback perhaps to a time when instances of previous criminality would be etched or tattooed on the palm of the offender). This overtly theatrical act, the combination of a gesture with a phrase, purports to secure the words used in some form of truth event, or as Émile Benveniste puts it, an ‘oral rite’: ‘Its function consists
not in the affirmation that it produces, but in the relation that it institutes between the word pronounced and the potency invoked’ (Agamben, 2011, p. 4).

Giorgio Agamben’s take on the significance of the oath is one predicated on a crisis for the oath. Paolo Prodi’s work *Il sacramento del potere* (*The Sacrament of Power*, 1992) provided a comprehensive historical archaeology of the oath and came to the conclusion that while central to the specificity and vitality of Western Christian culture, its recent decline corresponds to a ‘crisis in which the very being of man as a political animal is at stake’ (2011, p. 1). Indeed, in a 2001 review of the UK court system, Lord Justice Auld recommended reforms of the declaration process, acknowledging that ‘a combination of archaic words invoking God as the guarantor of proposed evidence and the perfunctory manner in which they are usually uttered detracts from, rather than underlines, the solemnity of the undertaking’ (O’Brien, 2012). As the first generation to live beyond the centrality of the oath as a ‘solemn and total, sacrificially anchored bond to a political body’, and rather in a world of secularized ‘affirmation’ of our willingness to speak with honesty, Agamben would contest that we now find ourselves on the threshold of a ‘new form of political association’ (2011, p. 1). That shift starts with the loosening of a previous bond between the living being and its language, with a consequence that Agamben summarizes in characteristically apocalyptic terms: ‘When the ethical – and not simply cognitive – connection that unites words, things and human actions is broken, this in fact promotes a spectacular
and unprecedented proliferation of vain words on the one hand and, on the other, of legislative apparatuses that seek obstinately to legislate on every aspect of that life on which they seem no longer to have any hold’ (2011, p. 71). I will come to the socially deleterious consequences of such proliferation in the final section of this book.

The tenth and last of my associations between theatre and law is perhaps the most obvious and yet most misunderstood: the capacity for lawyers and judges to costume and bewig themselves. This is where most reflections upon the relations between theatre and law commonly begin and end, and that is not necessarily a bad thing. Judicial robes date back to the toga, and, as such, from its earliest incarnation the robe begins to allow for the separation of the professional from the nonlawyer, of course carrying with it the remnant of a certain priest-like quality of ministration.

But when pointing out the absurdity of the UK barrister’s deployment of the wig, now perched in a reduced form on the top of their head like some comical hairy hat, is to forget that the lawyer is never, indeed was never (according to Gary Watt), meant to feel comfortable in the second skin of their legal office. They should find the robes of office irritating, ensuring they are alive to the formality and culture of the law as distinct to the nature of the community from which their appellants come. After all, the lawyer stands at the threshold of an individual’s life, their freedom or their loss of liberty. Indeed, in the UK legal system judges and barristers have to be robed and bewigged when the case might determine the defendant’s right to liberty.
The complexity of reading such costumed signs is well demonstrated by Michel Pastoureau in his work *The Devil’s Cloth: A History of Stripes and Striped Fabric* (1991). In his essay therein on ‘The Order and Disorder of the Stripe’, he catalogues the historical shifts that stripes on cloth and clothing represented: ‘the contemporary period has very much made itself the receptacle of all these practices and all the earlier codes, since coexisting within it are stripes that remain diabolic (those by which prisoners in death camps were ignominiously marked) or dangerous (those used for traffic signs and signals, for example) and others, that over time, have become hygienic (those on sheets and under-wear), playful (those used for leisure and sports clothes), or emblematic (those on uniforms, insignia, and flags)’ (p. 4). For male solicitors and barristers in the 19th- and 20th-century legal systems, the pinstripe, just so wide but not too wide for fear of falling over into the diabolic, was the costume of choice for court appearance; a uniform, yes, but also an emblematic flag as wide as the girth of many who wore its vertical pronouncement of rectitude so snugly. Recognizing the gender bias of any such analysis is a helpful reminder of the gender split that prevailed in UK courtrooms well into the 21st century. In 2012 only 23% of high court judges in England and Wales were women, with only Azerbaijan and Armenia having a lower ratio (Bowcott, 2012). Simultaneously donning ubiquitous pinstripe acknowledges the peculiar way the otherwise ‘showy’ male advocate might wish to neutralize something of his behaviour through the choice of such a common cloth.
So costuming in law is perhaps the inversion of costuming within the theatre. While worn individually, and with flashes of idiosyncratic flair by extroverts such as Michael Mansfield, QC, in the court room costuming operates to efface the individuality of the legal operators while cumulatively establishing the one thing we must all recognize: the singular face of the law. The face the law makes, as Gary Watt puts it, is critical to the law’s public persona. He tells the story that when Viscount Kilmur, one of the prosecutors at the Nuremberg Trials, in December 1955 wrote to Sir Ian Jacob, Military Assistant to Sir Winston Churchill, Viscount Kilmur summed up the commonly held presumption that this book would probably need to contest if it is to get very far: ‘It is inappropriate for the law to be associated with anything that could be associated with entertainment.’

The face the law makes is one that clearly has to be on show, and seriously so, if Viscount Kilmur is to be taken at face value. The recent debates that Judge Peter Murphy presided over at Blackfriars Crown Court in London in 2013, concerning the rightness or not of permitting the Niqab to be worn in court proceedings in the UK, plays a particularly sensitive part in any such deliberation. On the one hand it would appear the height of cultural oppression to deny a woman the right to veil herself as she wishes. But it is the peculiar fascination of the law with its own faces, and the faces of the accused, that has fuelled this most recent of dilemmas that, after all, has as much a performative dimension as it does a legal one. But why is that, and why does performance lie at the heart of the Common Law system?
Well, these ‘rules of engagement’ I am laying out here between performance and law are by their nature only rules because they are written down. And in the deployment of the English language for this book, and especially so because we are talking about something called Theatre & Law, one set of things can be said and another set of things cannot be said. This is obvious when one looks at the breadth and diversity of the European tradition of legal concepts from Roman Law, systematically laid out in The Dictionary of Untranslateables (Cassin, 2014) with names such as loi and droit in French, gesetx and recht in German and ley and derecho in Spanish. I am barely equipped to deal with these linguistic varieties, never mind launch out into wholly distinct languages and modes as embodied within the great historic traditions of law in cultures such as the Yoruba dating from the 12th century or the ‘Customary Law’ of aboriginal peoples.

In English the word ‘law’ has a much wider extension as a concept than ‘right’ or its French equivalent droit, and it is wholly bound up with the millennia-long emergence of its codes and practices embedded in institutions with their own historical determinants (which themselves in each of these places have their own traditions of emergence). These are not just any institutions, but ones where the premium is on a certain kind of ceremonial as performance. It was the courts of the English Kingdom (within the context of a parliamentary system) from the Magna Carta in 1215 to the Bill of Rights in 1689 that according to Philippe Raynaud played a major role in the unification of English law, producing a law that was both ‘customary’ and based on ‘case law’,.
while providing the royal power with the centralized structure that was needed in order to govern (Cassin, 2014).

Now, for our purposes here it is important to emphasize that this Common Law was never meant to appear like a ‘judge-made’ law; it was, rather, conceived in the way it was to be revealed, performatively, by a judge who ‘became’ the mouthpiece for the law. This is a further reason why it is Common Law rather than the Statute Law (made by authorities) or Equity (the rules that supplement the Common Law), the other two pillars of the English justice system, that detain me in this book. If the first rule of law is ‘precedent’, which it is, then it is this conveyancing of the customary nature of its previous practices, through a form of restored behaviour as judicial ventriloquism, that becomes the performative frame of the Common Law system.

The rules of engagement between theatre and law that I have laid out above thus involve not only shared practices, each historically specific and mediated by cultural continuities, but also principles. On the one hand this book has begun to trace out where these practices coalesce and differ and the consequences of such association, and on the other, between these historically specific examples, I have explored the perhaps more pressing problem of how the very principles of law, as embedded within practices such as oath-taking, the presentation of the defendant for trial known as habeas corpus and the probate or will of the dead, are by their nature already principles of performance.

So, by way of conclusion to these ‘rules of engagement’, what if I were to propose, picking up on an idea proposed
by Gary Watt, the rather outlandish idea that it is not that lawyers have always pretended to be stage actors (although it is quite obvious from the most cursory observation in the world’s courtrooms that many of them do), but rather that stage actors have always pretended to be lawyers? What difference might such an inversion make to our understanding of the history of theatre itself?

The pervasiveness of the law and its rhetoric from a time well before the first actor, Thespis (534 BCE), was clearly evident to everyone, not just Plato and Aristotle. Plato’s *Laws*, written in the form of dialogue, runs to a substantial 12 books, after all, and represents one of his longest works. Aristotle’s *Poetics* by contrast, his template for dramatic theory and practice, was written in just two parts, of which the second, on comedy, was presumably deemed so unimportant as to have been completely lost. Legal orators and their oratorical devices were very well known, written about and circulated before the first extant dramatic evidence comes to our attention. It is unthinkable, I would then propose, to ‘think the actor’ without the already and everywhere evident advocate. This realignment of cause and effect that I began with, the ‘legal act’ and ‘the act of law’, complicates any simple consequential relationship between theatre and law I might have started out with.

I am not going to call these the ‘ten commandments’ of the relations between theatre and law, but if I were, it would at least remind us before finishing the first part of this book that before Common Law, which I have referred to so far as though there were no alternative, there was Divine Law.
In the cultures I am considering, that is Common Law cultures, the law ‘left’ this religious domain in its steady, but only ever partial, secularization. Law apparently left ‘faith’ and ‘belief’ behind through the conduct of profane performances that were responsible for securing its efficacious functioning on the side of ‘rationality’ and ‘reason’. Norman Mailer was proved right in this sense at least. The demonic world of *The Crucible* was no longer to hold sway; rather, the family tragedy of the Proctors becomes a study in the improper conduct of human relations borne out within codes and rights.

In encountering the oath earlier, this continuous complication of a dark side is writ large, or spoken loud, in its other: the curse. As Giorgio Agamben says: ‘What the curse sanctions is the loosening of the correspondence between words and things that is in question in the oath. If the connection that unites language and the world is broken, the name of God, which expressed and guaranteed this connection in blessing, [*bene-dicente*], becomes the name of the curse [*male-dizione*], that is, of a word that has broken its true relation to things’ (2011, p. 42). This ‘break’ is not only therefore the turbulent sphere in which law is being played out today, but it has always been precisely the ‘cursed’ ground on which theatre plays its special part. A word that has broken its ‘true relation to things’ is a word that is spoken in the theatre. The very act of theatricality sunders any necessary causal relation between words and things. That is the a *priori* of all performance. Performance has always been the place where such slippages are no longer there to
be forgiven, or not, but to be witnessed for what they reveal to us about the relations between action and intention, effects and affects. So let us go back to the courtroom to see what it has to say about that theatrical act, before we go to the theatre to see what it says about its legal cousin.
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