

Empathy at the Crossroads

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Legal docu-performances (LDPs) are the staging of actual legal cases that have already been decided by the court. As such, they can serve as a laboratory in which the interface between theater and law is explored. The transformation from the courtroom to the stage aims to foster a critical examination of the legal process and its influence on public discourse. In this paper I focus on the place of empathy in this examination. While the role of empathy has been contested in both the legal and the theatrical sphere, empathy has also been advocated as essential to the pursuit of justice. In probing the role of empathy in LDPs, I distinguish different kinds of empathy and different strategies of employing empathy in the service of critique. I illustrate these strategies through three performance case studies that challenge the court decision on which they are based: one based on affective empathy, one on cognitive empathy, and one on a combination of the two. I stress, in particular, the impact of these LDPs on the public understanding of the legal and moral issues addressed by performances.

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This article examines the interface of theater and law in one of its most vibrant manifestations – Legal Docu-Performance (LDPs) – performances that stage actual legal cases that have already been decided by the court. The shift from courtroom to theater is designed to offer a more nuanced reading of a case than can be offered by the court, thereby encouraging a critical assessment. Even when the performance is no more than a reenactment of the court case, adhering strictly to the proceeding’s text, it may target not only the particular hearing but also the limitations and biases of the legal process *per se*. While it is well known that the documentary theater often aims at producing a critical reflection on the documented events, the detailed analysis of specific LDPs undertaken here could deepen our understanding of how the legal process is reflected, or even implicated, on stage. Two aspects of LDP make it particularly worthy of scholarly attention: First, the events staged in LDPs have already undergone a thorough process of theoretical interpretation and evaluation in court. Performances therefore involve both the level of events (say, a person found dead) and the level of the court’s interpretation of the events (say murder or suicide). Second, the legal system is, in most societies, a highly prestigious and influential institution. Questioning the interpretation or criticizing the procedures of this esteemed institution may therefore have profound social significance. LDPs seek to provide alternatives to the legal discourse and transform public discourse on law, justice, and the relation between them.

LDPs probe the tension between law and justice. As Frans-Willem Korsten convincingly argues, law and justice speak different, often conflicting, languages (13). He sees empathy as emblematic of the language of justice (134) and points to art as an effective means of mediating the two languages and alleviating the tension between them. In this article I use LDPs as a laboratory in which these tensions are investigated, focusing in particular on the different kinds of empathy they induce and the theatrical means that are at work in performances of this kind. In tracking the role of empathy in LDPs, I will distinguish between different concepts of empathy and different strategies of employing empathy in the service of critique. I begin with a brief survey of the controversy surrounding empathy in theatrical and legal contexts. I then turn to the analysis of three Israeli performances and their empathy-invoking strategies.

On Empathy

The concept of empathy has been hotly debated. While it has been argued on the basis of ample research that empathy is conducive to fruitful social interaction, some scholars have also championed the downside of empathy. Paul Bloom, while aware of the merits of empathy, warns of its dangers, concluding that “if we want to make the world a better place, then we are better off without empathy (2).¹ Both the theater, certainly the political theater from which LDP stems, and legal theory are ambivalent about the role of empathy and its legitimacy within the opinion-shaping process of legal and moral situations. In Brecht’s formulation of his celebrated theory of *alienation* (*Verfremdung*), he represents it as a protest and counter-movement vis-a-vis the ‘empathy theater’ (*Empföhlungstheater*) (Koss 152). Brecht identifies empathy with an emotional experience based on the *suspension of disbelief* and a total surrender to the illusion of the stage (Brecht 91). In reality, Brecht’s position with regard to empathy was more complex: he saw it as a necessary tool in the rehearsal room (195) and even at certain moments on stage (221). The strong linkage he created between empathy and an emotional, non-critical experience, however, gave empathy a suspicious reputation (Lampert 46).

Augusto Boal emphasized that Brecht was not opposed to the emotional experience in and of itself but to the audience’s passivity (103). Boal saw empathy as an important theatrical tool, but at the same time acknowledged its destructive potential. For him, the question was not whether empathy arises during a play, but what the object of empathy is (115). As Boal sees it, the theater should arouse the oppressed’s empathy toward themselves, steering them towards dignity and self-respect, so as to empower them and reinforce their belief that a change in power relations is possible and justified. Many creators of documentary theater (for instance Blank and Jensen 2005) follow Boal in creating works that use empathy as a lever of recognition for the other and his or her right to justice and respect (19). Here, theater is used to evoke empathy for the outgroup, thus going beyond the natural tendency to feel empathy towards one’s ingroup (Sagiv and Mentser 91). In this way, the main flaw of empathy – which, according to Bloom, is that we identify only with those who are similar and close to us – is countered.

Also in the legal world, different attitudes towards empathy must be voiced.² Barack Obama spotlighted empathy in his election campaign: “the ability to empathize with others is, and ought to be, a key criterion for nomination to the nation’s federal courts” (qtd. in Glynn and Sen 37).³ The proclamation invigorated a heated debate regarding empathy as a tool required by or desired of jurists. Robin West claims that for a large part of the nineteenth century and throughout the twentieth century, empathy was seen as a necessary skill of a judge. Judges Cardozo and Posner, for example, consider judicial empathy a necessary component of a just verdict (Posner 117; Wardlaw 1629). Martin Hoffman also analyzes bold precedential rulings in matters of human rights (segregation in schools, the legalization of abortion) and shows how the judge’s empathy is central to their rulings (245). On the other hand, some jurists see empathy as conflicting with the principle of equality before the law, embodied by Themis, the blindfolded goddess of justice. From this perspective, empathy is seen as triggering a bias when, in fact, “a judge is supposed to have empathy for no one but simply to follow the law” (Garrett). As with Brecht, there is a concern that empathy will interfere with the judge’s sober critical ability. Along with the principled objection, West points out another change in the status of empathy. According to her, in the first decade of the twenty-first century, a dramatic ‘Anti-Empathic Turn’ occurred, leading to its rejection: “Empathy is as irrelevant to the new paradigm of judging as it was central to the old.” In West’s eyes this paradigm shift “can only do mischief” (46).

In response to these concerns, let me note, that the connection between empathy and loss of critical judgement misses a central aspect of the empathic experience. Empathy, as Khen Lampert and others⁴ point out, is receptive to and understanding of the mental state of the other without losing the distinction between the self and the other (Lampert 7). On this account, empathy still allows for the freedom of rational judgment. In other words, empathy (and, as we will see, different kinds and strategies of evoking empathy) is important during the process of deliberation even though it should not dictate conclusions. Psychologists and cognitive scientists distinguish between two different types of empathy: affective empathy (or empathy as emotion) and cognitive empathy (empathy as recognition) (Hoffman 231; Maibom 1). Brain research revealed

two distinct neurological processes corresponding with this diagnosis and two different neuro-systems responsible for them (Raz and Ovadia 7; Shamay-Tsoory 2011).⁵ In affective empathy, on the one hand, empathic persons feel in themselves the emotions they recognize in the emotional experience of the object of empathy. This is an experience that can occur unconsciously and wordlessly, equivalent to emotional contagion. In cognitive empathy, on the other hand, the empathic person understands the emotional, conscious, mental state of the object of empathy via a conscious and intentional process. This process is essentially similar to mentalization and is related to the Theory of Mind (ToM). In daily usage the emotional sense is dominant and it is indeed empathy in this sense that is typically the target of critique. Bloom, for example, explicitly exempts cognitive empathy from his objection (3).⁶ In what follows I will show how different theater strategies activate these two kinds of empathy, separately or in tandem, in order to point to deficiencies and limitations of the legal process.

Affective empathy – The Case of Kastner (1985)

Empathy is at the heart of the tension between the legal and theatrical handlings of the Kastner case. Rudolf Israel Kastner was active in the Hungarian Jewish community's leadership during the Holocaust. As the initiator of Jewish rescue operations, he negotiated (on behalf of several Jewish organizations) with senior Nazi officers, including Obersturmbannführer Adolf Eichmann, financial/military aid in exchange for allowing a number of Jews to flee the country. The nature of these negotiations is at the core of the controversy surrounding Kastner's character and actions. After WWII, Kastner became a member of Israel's ruling party and in 1953 was expected to be appointed spokesman of the country's Ministry of Trade and Industry. Malchiel Gruenwald, a journalist of Hungarian origin, took advantage of Kastner's anticipated appointment to accuse him of self-interested collaboration with the Nazis, holding him directly responsible for the rapid extermination of Hungarian Jewry. The representatives of Kastner's party, led by the Attorney General, filed a libel suit against Gruenwald on behalf of the state. Gruenwald took the 'substantial truth' defense, shifting the burden of proof to the prosecution.

The trial brought the horrors and conflicts of the Holocaust, which until then had hardly been discussed openly in Israel, to the public arena. For the first time, testimonies were heard and questions asked. How did Jews in Europe act? What were the conditions in which they lived? Did they try to resist? The trial, which initially did not elicit great public interest, became “the most important and painful of the trials ever held in Israel – excluding, perhaps, the Eichmann trial alone” (Segev 247). After long discussions, Judge Benjamin Halevi ruled that “Kastner sold his soul to the devil”. This statement took hold in the Israeli consciousness, providing an unequivocal framework for Kastner’s actions. Namely, he acted out of personal interest and collaborated with the enemy at the cost of the lives of those people he (purportedly) acted on behalf of. The prosecution filed an appeal against the ruling. The appeal hearing lasted for two years, ending with Judge Halevi’s decision being overturned in early 1958, but Kastner’s sentence had already been served. On the night between March 3 and 4, 1957, Kastner was shot at the entrance to his home and died ten days later. He did not live to see his (incomplete) rehabilitation.⁷

In the justification for the appeal’s majority decision, Judge Agranat talked about the limitations of the legal process and the fear that the arbitrator

will not always be able to put himself in the place of the “working souls” [...] to evaluate the problems that stood before them; to take into account the conditions of the time and place in which they lived; and to understand their life as they themselves understood it. (2059)

Judge Agranat points to the judicial process’s difficulty in stepping into the shoes of the accused. The legal discussion’s framework, according to him, falls short in that it is unable to conceive of the circumstances ‘from the inside,’ as the defendant experienced them. A central claim (in agreement with both the minority and majority opinion) was that the hearing in Kastner’s case should not have been conducted in court. These insights and the ruling reached in the appeal, however, had hardly any effect on public opinion, which was still strongly in line with the initial sentence. That Kastner ‘sold his soul to the devil’ remained engraved on public consciousness.

Thirty years later, Israeli playwright Motti Lerner sought to tell Kastner's story in *Kastner*, a play that premiered in 1985. At the end of the long research process, he says:

For me, a close, intimate emotional connection was created [...] During the writing I felt that I could get into Kastner's skin, penetrate his heart and guts and examine them from a profound depth that no one reached before. (Lerner qtd. in Semel 161)

In contrast to the limitations of empathy expressed by Judge Agranat, Lerner emphasizes his ability to experience the character from the inside. It is important to note that this was not Lerner's original position. The playwright's initial interest in Kastner's character arose from Judge Halevi's characterization of him:

Kastner is presented as a man whose actions began in 1944 as a Zionist and ended in 1945 as a collaborator with the Nazis [...] I thought this is the story I want to tell - how a person crosses the lines. (Lerner qtd. in Semel 159)

But the writing process changed the playwright's position:

Little by little, as the details became clear to me, a completely different picture began to emerge than the one presented in the trial. (Lerner qtd. in Semel 160)

Lerner 'was forced' to provide Kastner with a theatrical defense. *Kastner* is a direct response to Judge Halevi's ruling and the narrative that emerges from it. Lerner locates the prologue in the Israeli courtroom of 1954, choosing not to leave us within that setting but transferring us to 1944 in order to bring to life the reality of Hungarian Jews in those days. The audience witnesses the contradictions between the events as Lerner understands them and the interpretation they received in the verdict.

In her analysis of the initial verdict, Leora Bilsky emphasizes that Judge Halevi interpreted Kastner's actions through the legal prism of contract law. The assumption underlying contract law is that a contract is made as a result of the choice and free will of two equal

parties in the transaction. Judge Halevi's decision to examine Kastner's transaction with the Nazi officers through the prism of contract law implicitly assumes that Kastner had a complete picture of the state of affairs, that the details of the transaction were presented honestly and transparently, and that Kastner acted freely. Bilsky explains:

The lens of contract law allowed him to see a very restricted portion of the lives of the people who were involved in the negotiations. It was precisely this narrow focus that generated the image of Kastner as an omnipotent Faustian figure in a latter-day morality play. (48)

Lerner reacts directly to Judge Halevi's verdict. He strives to show the chasm between the real Eichmann (the chief Nazi commander) and how Kastner saw him. Lerner sees Kastner as blind to reality. At the beginning of the play Kastner criticizes the blind and naïve trust that his fellow leaders place in Eichmann. At the same time, he believes that the slim chance that the Nazis would actually keep their word requires him to continue with the deal. Later in the play the situation intensifies. In scene 22, where Kastner meets Eichmann, the former tries to find out if there is any truth in rumors about the transports and the concentration camps, claiming that these contradict the promises given so far. Eichmann rejects the words outright and says: "I suggest you not act on rumors," adding a screamed threat: "Kastner, you are walking a narrow tightrope." The scene ends with Eichmann's statement: "Our word is our word." The next scene only includes the speech of the Hungarian Secretary of State for Jewish Affairs, who proudly announce:

Hungarians have never managed to get rid of so many Jews in such a short time. Allow me now, on such a solemn occasion, to introduce to you the man who initiated this operation, and participated with us in all stages of its planning.
Obersturmbannführer Adolf Eichmann! (scene 23)

The juxtaposition of the images emphasizes the gap between Kastner's conception and reality. It makes it clear that Kastner's negotiation 'partner' is a man who at any moment may sentence him to death. The play, and even more so its stage performance, allows the audience to look into the character's emotional state. They are

given a taste of the horror and danger inherent in every decision. In scene 33, Kastner says:

I can't, I don't have the strength anymore. [...] I don't believe I can manage another meeting with Eichmann. Every time I go into his office, I don't know if I'll get out alive...

Understanding the horror undermines the validity of the contractual narrative that Judge Halevi concocted.

The threat with which Kastner is faced is reinforced by the stage performance. Casting the right actor to play Eichmann was critical. Haim Nagid writes: "Ilan Dar's elegant and sophisticated appearance does not reduce the atmosphere of evil that he spreads around him, but somewhat diminishes the reluctance to face him. The casting is able to make it clear how it was even possible to negotiate with him" (265). Eichmann's stage presence – a character that inspires confidence yet who clearly has a streak of madness – makes one better understand Kastner's plight.

Lerner does not challenge the idea of negotiating with the devil but rather its moral framing. Eichmann remains a devil and Kastner indeed makes a deal with him. But he does not sell his soul. Lerner takes advantage of the theater's capacity for anachronistic action and places in Kastner's mouth an explicit reference to Judge Halevi's statement. In scene 41, a fellow Jewish leader declares: "We will make no more deals with the devil," and, in response Kastner delivers one of the play's central monologues:

You won't make deals with the devil anymore? You? I am the one who knocks on these doors every day. It is my throat he grabs with his fingernails. [...] I am infected with his filth, when I come and offer you suggestions in his name. Me. Not you. But when he offers to free Jews I am willing to do business with him. I am ready to make a deal with him even for one Jew, and when he comes with an offer to save a million Jews, who am I to say "we don't make deals with the devil?" You who are the leader of the Jews, what gives you the right to say such a thing? Who gives you the right to reject such an offer?

Lerner does not argue with the image but turns it on its head: Yes! Kastner negotiated with the devil and in doing so he endangered himself and paid a price, but he did so to save Jews – as many as he could.

Oded Teomi, who played Kastner, did considerable research into the character. When the actor died, 36 years after the play was performed, Kastner's granddaughter, Merav Michaeli, eulogized him:

I was 16 years old when Oded Teomi came to our house to learn about Kastner, my grandfather [...] He has long been a great actor and a great star, but he came to study. [...] Oded Teomi got so deeply into Kastner's character that he started smoking for real at that time, not only on stage. Oded Teomi was a great actor. He has played many great roles, but for me, he brought my grandfather back to life. The mythical grandfather, whom I never knew, who was murdered as a result of the harsh and grave incitement of the extreme right,⁸ suddenly grew skin and tendons. All the stories I had heard about how he bravely stood up to Eichmann – suddenly I saw them on stage. (Merav Michaeli's Facebook page)

The change in Kastner's image that Michaeli recognizes is more general. Dan Laor, Ayala Sheklar, and others point to the play's impact on Israeli discourse about the Holocaust, in particular, the understanding of concepts such as heroism and cooperation and attitudes toward survivors (Laor 164; Sheklar 22).⁹

Kastner's case raises questions about the legal system's ability to comprehend a case's unique details. How close to the actual case can the legal process get? Lerner presents a clear position: The theater enables a character to be shown as a living presence during his moments of deliberation. The audience witnesses the character as a human being and feels empathy. This experience may be even more powerful than the actual presence of the witness giving an after-the-fact account of his past decisions.

Kastner exemplifies affective empathy not so much because Lerner intended it to do so (in fact he sought to elicit both an emotional and cognitive process of understanding), but because the horrible context



Figure 1. Rudolf Israel - Kastner - PR from the movie Kill Kastner



Figure 2. Oded Teomi as Kastner, 1985. © The Cameri theatre archive

that the performance recreates in detail makes it nearly impossible not to respond emotionally to the titular character's ordeal. Cognitive empathy has become salient, however, in the ongoing discussion of the Kastner affair prompted by the performance. Thus, Lerner's play managed to do what the appellate judges felt was impossible to sustain in court.¹⁰

Cognitive Empathy – The Case of *The Hearing* (2015)

In *The Hearing* by Renana Raz – a reenactment of a hearing that resulted in the dismissal of teacher Adam Verta – cognitive empathy is a dominant element in the creation of a space for listening. The focus on listening, as will be shown, is essential for the critical process of the performance. The strategy is opposite to that of *Kastner*. *The Hearing* does not attempt to ‘bring to life’ the characters on stage, but rather to recreate the ‘dry’ legal hearing. It does so by opening various channels of listening that allow emotional detachment while

Figure 3. The Hearing, 2015. © Kfir Bolotin



evoking cognitive empathy. The case is considerably less dramatic than *Kastner* and yet, over the course of the play, fundamental questions arise about freedom of speech, ideological indoctrination in schools, and the norms of public discourse.¹¹

In January 2014, an Israeli high school student sent the Minister of Education a letter of complaint against teacher Adam Verta who, in her opinion, expressed 'anti-patriotic' opinions. She alleged that Verta had lambasted the state of Israel in his classes, cast doubt on the morality of the Israel Defense Forces, and in general expressed 'extreme left-wing opinions.' Consequently, the teacher was summoned to a 'hearing' – a formal, quasi-judicial process¹² that almost inevitably leads to dismissal. The hearing was conducted by the school headmaster and two other senior officials from the school's



umbrella organization (ORT) who served as judges (henceforth referred to as the judges), and ended with a recommendation that Verta would resign. The student also sent the letter to Member of the Knesset, Michael Ben Ari, who posted it on his Facebook page. The letter drew many reactions, including threats on the teacher's life.

In *The Hearing* (subtitled *A Re-listening Event*), listening is the primarily dramaturgical device of the performance. Renana Raz, the director, uses the recording of the hearing¹³ to reenact the event. *The Hearing* begins with a recorded reading of the student's letter, after which four actors enter the room. The performers do not play characters, but instead listen to the recording via earphones and speak out their text as they hear it, functioning as amplifiers. They deliver the text exactly as it was spoken, grammatical errors, hesitations, slips of tongue, etc. included. Thus, in addition to the original text, the actors bring to stage what Diana Taylor calls the 'repertoire' (19); namely, intonation, pitch, emotions. But the performance takes another measure against the full representation of characters: the four actors change roles – each figure is represented by at least two actors. The reenactment is interrupted once for the director's 'intervention' when the actors share Raz's first-person thoughts about the hearing. At the end of the hearing the actors leave the room and the recording of the hearing continues to play, its sound filling the room.

I want to examine four theatrical means that are central to the performance's critical process and its engendering of cognitive empathy: a complete reenactment of the hearing, the use of headphones, role changing, and the reflective process of the director herself.

Complete Text Reenactment

The wording and intonation of *The Hearing* reveal the lack of empathy on the part of administrators. The student's letter of complaint makes it clear that her conversation with the teacher was emotionally charged, with each party exaggerating the other's position. A hearing is intended to offer clarity and objectivity, to disentangle the threads of an argument. In this instance, however, the hearing reinforces the polarization. Verta states at the beginning of the hearing (and several times during it) that he has been subject to threats on social media



Figure 4. The Hearing, Renana Raz, 2015. © Kfir Bolotin

since the student's complaint was posted. He cites posts that call him a 'traitor'. The judges make the absurd claim that these threats to his life are his own fault, arising as a direct consequence of the statements he made in class. Two judges complete each other's thoughts, stating: "But it's a twist of things, when you enter such a pit [voicing opinions] you have to understand its consequences. It snowballs, good consequences, bad consequences, legitimate, illegitimate. Consequences..." (Renana). Verta urges the judges to recognize the distinction between a legitimate opinion (a political position) and an illegitimate opinion (for example, a racist position), between simply voicing an opinion and giving an obvious incitement, but the judges fail to appreciate the difference.

The Use of Headphones

The headphones emphasize the actors' act of listening and create a contrast between their attentive listening and the mechanical process that Raz understands to have taken place in the real-life hearing. This two-layered listening – the actors to the recording and the audience to the actors – defines the performance as a 'hearing' while simultaneously making the spectators ponder their own way of listening and interpreting. The audience is prompted to reflect on this technique, the gap between listening to the recording and listening to the actors listening to the recording: What kind of

listening is required to repeat word for word what was said in the recording? What kind of listening does it require from the spectator? What kind of listening was there in the original hearing process?

The headphones create a sense of alienation between the actor and the text he repeats. This estrangement prompts questions relating to the authenticity of the three judges: Are they expressing their sincere views or are they merely playing the role imposed on them by their official position? And note that this is the very question that lies at the heart of the case, both regarding the conduct of the teacher – the defendant – and regarding the hearing process itself: Are teachers at liberty to speak their mind, or are they always bound by their official role? Can a teacher voice his opinions in class? Does he have to be an ‘amplifier’ of the system? What are the limits of educational discussion? And what about the judicial procedure: Are judges required to disclose their own position or can they hide behind legal procedures and rulings? Each of these questions is amply discussed in the literature and the hearing, though not presuming to answer them invites the audience to consider them.

Role changing

The actors’ change of roles prevents us from identifying specific characters with specific actors and creates distance between actor and character. The exchange requires viewers to examine their own mental biases – does a certain representation of a character arouse more sympathy/antagonism than another? Fragmented representation is often used to suggest the plurality of possible interpretations. Here, however, the fragmentation has yet another effect: certain claims made during the hearing are problematic regardless of who states them. Verta claims that he held discussions about the morality of the Israel Defense Forces’ actions and how this morality could be evaluated. The school principal retorts: “You are not authorized to judge whether the actions are moral or not”. This statement is clearly problematic, no matter who expresses it. When listening to different actors reciting the same figure’s text, say, the school’s headmistress, the audience no longer sees a particular individual, only the contours drawn by his or her professional identity. On the one hand, detachment of this kind may suppress emotional empathy; on the other, it may increase our sensitivity to the speakers’ argu-

ments and reasoning. We may not feel emotional empathy toward a particular character as we would toward a person, but by listening carefully to her words, we come to understand the pressures and constraints that her professional identity imposes upon her. At the same time, by focusing on official rather than personal identities, the performance underlines the moral risks of over-identification with one's job at the expense of humane, caring relationships.

The headphones and the switching of roles are means of estrangement, but my argument here is that they serve to stimulate cognitive empathy; they sharpen the spectators' attention to allow them to understand the emotional, mental, and cognitive state of the characters in the hearing. This situation recalls what we may call, (alluding to Lindsay B. Cummings) 'estranged empathy' – listening through the changing voices of the actors and the 'disturbance' it creates as it generates a neutral space and allows spectators to hear the character's voice without prejudgment (76). There is a clear contrast here to *Kastner* where a live presence, or the illusion of such, enables the spectator to see and experience the character. Here it is precisely the *absence* of the concrete character that allows viewers to understand the situation more objectively.

Reflective Process of the Director

At a certain moment the actors turn to the audience in the name of Raz (again taking turns and speaking in the first person), sharing the thoughts and insights that she had while listening to the recording. Raz, through the actors, expresses her astonishment at the fact that although the judges insist that the teacher acted contrary to regulations, they never cite a law that the defendant allegedly violated. This avoidance leads her to think that there is, in fact, nothing unlawful in the teacher's actions. Raz invites the viewers to undertake the same process: to listen carefully to what is being said and to give an account of how they interpret it. The personal presence of the director is a very effective means of directing such questions to the audience.

At the end of the official hearing, the presiding judge stays with Verta for a one-on-one conversation. The desire to get things over with, to wrap the entire episode up stands out here. The case needs to be closed as quickly and smoothly as possible. She does not want

to fire Verta – a process that would involve taking a clear position, but instead offers him ‘friendly advice’. However, as he feels his safety is compromised, the best thing he can do is resign. The Ort Network, for its part, would see this as a ‘justified resignation’ and would not bring claims against him for breach of contract. At this point the actors place the dismissal letter and a pen in front of four spectators, leaving them with the decision of whether or not to sign. The actors leave the room while the original recording of the hearing plays, now audible to all. The audience is now faced with the hearing itself and the need to make a decision.

Co-occurrence of affective and cognitive empathy – The Case of *Demonstrate* (2017)

Daphna Zilberg’s *Tadgimi* [Demonstrate] – a documentary court drama is a performance that enacts text from a rape trial.¹⁴ As in *The Hearing*, the critical potential of protocol performances lies in the courtroom becoming the scene of the crime. Here, the reconstruction of the trial may evoke an emotional attachment to the victim in spectators who experience empathic distress in response to what they perceive as injustice on the part of the court, but this is only part of the critical process. The theatrical language of the performance is just as effective in bringing about cognitive empathy and reflection. By making use of both kinds of empathic involvement, I argue, the performance leads to questions about the extent to which the legal system is capable of handling sexual abuse cases.

In 2008, in the Jerusalem district court, three men were charged with the rape of a 14-year-old girl. The three judges and two lawyers were all male. Over the course of the trial the girl was requested to demonstrate the posture in which she was raped, a request that elicited extensive public criticism. The case became the subject of two plays¹⁵, both of which expose the insensitivity of courts to the victims of sex crimes and subject them to humiliation – a second rape, so to speak – rather than showing empathy and offering protection.

Zilberg’s *Demonstrate* uses the trial’s legal language. It stands to reason that, due to the public debate surrounding the trial, the audience had a preconceived notion of what happened and expected the performance to reinforce their viewpoint. Spectators were fully

prepared to be appalled by a legal system that sanctions this sort of insult. The performance fulfills this expectation. The defense lawyer is aggressive both when addressing the girl and when joking with the judges. The questions directed at the girl are embarrassing: What was she wearing? How did her clothes come off? What exactly penetrated her body and in what posture? What was her general understanding of various forms of sexual conduct? The request that she demonstrate the posture – the apex of the investigation – only reaffirms the court’s outrageous insensitivity to the girl’s trauma.

Furthermore, despite adhering to the text of the protocol, the artistic choices and means of representation emphasize the critical layer of the performance. The design of the space and costumes recreates the typical courtroom scene. In addition, stage design subtly signals to the audience that something is wrong. The realistic design is given a slight twist with pink sponges over the loudspeakers and a pink screen with an ascending and descending line graph over the judges’ seats. At times the graph seems to represent the plaintiff’s heartbeat and document her anxiety. At other times it serves as a visual reminder of the recording of the court’s protocol – a recording which makes the performance possible.

In order to highlight the absurdity of the situation, where a young girl (the victim) is investigated and judged by five older men, the play’s director employs gender reversal – five women play the role of judges and lawyers while the girl is represented by a young man. At the same time, the original language of the trial is retained, the women using masculine grammar, the man using the feminine. This technique results in a less automatic grasp of the dialogue and a heightened sense of gender inequality.

Power relations are also stressed by the division of the space: judges placed center downstage, the lawyers to their sides, the audience surrounding them – two rows on each side. The actor representing the girl is isolated, placed at the far end of the hall, alluding to the distance the girl had to cross in order to speak and make her case. The distance is further accentuated by three video cameras broadcasting fragmented close-ups of the girl (remember the actor is a man). Her broken image calls to mind the trauma she experienced, as well as the difficulty in arriving at the truth. The screens also symbolize the invasive gaze (both at the trial and on stage) and the





Figure 5. Demonstrate, 2017. © Ronen Goldman

forced performativity so brutally manifested in the reenactment. The gender swap technique adds a cognitive element of reflection to the spontaneous emotional empathy generated toward the girl. Moreover, it mitigates the difference between men and women in the audience; they are on a par in terms of their ingroup-outgroup identities (in this case gender-based identity).

Awakening empathy towards the girl is just one component present in the critical course of the play. The message is more complex. The performance does not represent the judges as acting out of cruelty or lack of empathy towards the girl. Certainly, the girl's lawyer shows her empathy. Nevertheless, it was *he* who suggested the demonstration! It was because of the girl's difficulty in conveying what she had gone through and the court's effort to understand that led to the unhappy request for a demonstration. A woman sitting next to me in the audience remarked "the demonstration actually makes sense." Here we find a clear example of what is sometimes called an empathic failure – empathy turning against itself, so to speak. Why did the lawyer and judges fail so badly here? Demonstration or reenactment is a common procedure in legal investigation, consisting of suspects being asked to reconstruct their deeds. Empathic failure in this trial resulted from the court's familiarity with the reenactment procedure, familiarity that blinded them to the inadequacy of the procedure for the case at hand. They were following the routine of their profession. The performance's implication is, therefore, not that these particular judges were guilty of extreme insensitivity, but that the common legal process is inadequate in cases of sexual crimes.

Faithful to the original event, the demonstration takes place on the floor of the courtroom. At this moment, the actor-plaintiff proceeds to the center of the space, closer to the judges and kneels on the floor. Almost everyone must stretch, bend, or otherwise change position to see what is happening. The almost unnoticeable, automatic movement of the spectators in their chairs, trying to get a better view of the demonstration, is crucial to understanding the dramaturgy of the play. Inadvertently, the audience shares the court's peeping. Are they guilty as well? The play points to the inherent inadequacy of how the legal system handles sexual crimes. The very fact that, in contrast to our expectations, we can understand the court's conduct, helps us realize that what is at issue is not this judge or that lawyer, but the system itself and its accepted procedures.

Conclusion

When discussing the use of legal structures in contemporary performances Klaas Tindemans urges a multilayered dramaturgy (11). His focus is primarily the problem of truth and the representation of reality. Referring to Norton-Taylor (113; 131), he says: “It remains a matter of discussion if the theater, creating a specific performative relationship between actors and audience, can allow itself to skip the question of reliability of the represented discourse. Can theater claim truth, not only in the representation of the facts itself, but also in the due process (of law) in which these facts are told?” (Tindemans 6). One way of circumventing the problem, according to Tindemans, is to settle for a single narrative that ignores alternatives while avoiding undecidability and indeterminacy (11). It is clear why the legal procedure, which is driven by an obligation to reach a decision, is prone to this predicament. In Tindemans’s view, theatrical works based on legal cases are susceptible to the same weakness: they also tend to collapse the variety of layers into a single one and suppress undecidability. I share Tindemans’s plea for complexity and multidimensionality but have more confidence in the LDP’s ability to satisfy these desiderata. I have tried to show that empathy is a central component in achieving such a multilayered understanding. Empathy itself, I have shown, is multilayered and involves extending both emotional and cognitive channels to the other and the injustice he or she may have encountered. The links between empathy and engagement have also been illustrated in this article. In my three LDP case studies, the empathy-engagement nexus is examined both at the level of performance and at level of the change in public discourse surrounding the original cases triggered by the performances. Highlighting the legal methods used in court by reenacting incidents on the stage enables us to detect the cracks through which empathy can be introduced so as to reduce the gap between law and justice.

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Notes

- 1 Also see Bloom 2017, 25: "Empathy is biased, pushing us in the direction of parochialism and racism," and Breithaupt, 2019.
- 2 I am referring here to judges and empathy in the judging process, but similar claims praising or condemning empathy can also be found in relation to lawyers.
- 3 Also see Colby, 1945-2015.
- 4 Also see Eisenberg and Eggum 73, Yozfovsky, Katsuti and Knafo-Noam 11.
- 5 It should be noted that the phrase most associated with empathy, 'stepping into the other's shoes', actually applies to both types of empathy presented here – stepping into the other's shoes can have a physical, tangible expression and

- can be a conceptual metaphor for seeing reality from the other's point of view.
- 6 Decety and Yoder (1) show that cognitive empathy is specifically correlated with sensitivity to injustice and with willingness to act against it.
 - 7 Upon appeal the verdict was not unanimous and included a sharp criticism of the testimony given by Kastner in favor of the Nazi officer Kurt Becher at the Nuremberg Trials and avoided ruling on the question of cooperation with the Nazi regime. Be aware that Kastner was not the defendant in this case, so we are not talking about the acquittal, even so, refraining from giving a decision is not equivalent to full blown rehabilitation.
 - 8 Here, Michaeli is referring to Kastner's assassination by Right-wing activists and not to Judge Halevi's ruling.
 - 9 In the wake of the Eichmann Trial this change was already underway. The trial deviated from the usual legal procedure by summoning a large number of survivor-witnesses and having them tell their stories. It was the dramatic effect of these stories and the empathy they evoked that were instrumental in this change (Yeblonka 175, 215).
 - 10 Kastner's case still resonates in Israeli public discourse. Evidence can be found in daily newspapers, in the podcast "Retrial" of the Public Broadcasting Corporation's 'Kan' in 2022, in a new version of the play that Lerner wrote in 2019, and in the repeated vandalism of the commemorative plaque at the entrance of Kastner's house.
 - 11 This case also drew public attention, for example "Sh'at Efes" ("The lesson"), a television drama from 2022, was based on this incident.
 - 12 A quasi-judicial process is an administrative function that is obliged to use a judicial approach and to comply with the basic requirements of natural justice and due process. While the ruling is binding, it can be appealed in court.
 - 13 The hearing took place and the teacher himself recorded it and uploaded it to Youtube. It was also made public in a link shared in a newspaper article about the case. www.youtube.com/watch?v=BnZNTEm4BU
 - 14 It is based on the audio recordings of the court case filed with the court archive. Their publication involved a second court case because they were initially made public without legal permission. Only in 2013, after journalists Raviv Drucker and Itai Rom started a legal battle to reveal the hearing's protocol, in which the complainant gave her testimony – the public release of the recordings was approved. The affair was covered in the investigative documentary program Hamakor [the source] on 10.09.2015.
 - 15 The second performance is Maya Buenos's *Wetter Have Mercy on Me* (2015)

