The Judiciary's Theatrical Achilles' Heel: Acting the Fool (RAF members) compared to Acting in Bad Faith (Alex Jones)

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This article compares theatrical courtroom provocations by leftist activists and militants in the 1960s and 1970s with recent 'bad faith' actions in court by the American right-wing activist Alex Jones. The article proposes that law's theatrical way of showing a general audience how the judiciary aims to serve justice is annoyed but not threatened by defendants acting the fool. The reason is that acting the fool provokes a confrontation between two different kinds of theater *in court*.In this confrontation, the agonistic logic of the court case is still operative, with the law embodying power and the accused acting as its carnivalesque challenger. When the accused acts in bad faith, however, there is a double confrontation, namely inside and outside the court. Those acting in bad faith are what Johan Huizinga defines as spoilsports who pretend to play the game while aiming to destroy it. The article considers how the spoilsport manifests itself in and outside of court through contemporary media and concludes that the theatrical nature of the judiciary needs protection in order to do justice to victims.

Keywords: rule of law, theatricality, acting in bad faith, populism, media platforms

Political and legal scholars have noticed that the rule of law has faced threats in recent decades. Two focal points of these threats are the public nature of jurisdiction and the relation of jurisdiction to new contemporary media and platforms. For instance, political philosopher Jodi Dean, in considering the "parcellation of sovereignty", notices that "private commercial interests are displacing public law through confidentiality agreements, non-compete rules, compulsory arbitration and the dismantling of public-regulatory agencies".[1] Legal scholar and philosopher Raymond Wacks considers in *The Rule of Law Under Fire?* (2021) no fewer than sixteen different threats to the rule of law. Here as well, one threat concerns law's role in the public scrutiny of criminal acts. Another aspect of the problem is that jurisdiction itself is 'under fire'. Here, Wacks considers the rise of right-wing populists, with their ambivalent relation to the rule of law, a major threat: "Typically, these populists reject the rule of law in any recognizable form, but brandish it as a talisman in order to avert censure, attract foreign investment, and thwart possible sanction" (86). The ambivalence that Wacks describes—of populists rejecting the rule of law while brandishing it as a talisman—suggests that populists can show two masks in relation to the law. This paper focuses on one such form of double-maskedness: acting in bad faith.

Previously I have studied court cases that highlight other aspects of populists' double and contradictory take on law. One was a famous case involving Dutch populist Geert Wilders in which his tactic was a form of what I defined as carnivalesque politics.[2] I have also studied cases involving Silvio Berlusconi, Donald Trump, and Jair Bolsonaro, considering how these men use three affordances hiding in archaic elements of jurisdiction as sketched by Johan Huizinga in *Homo Ludens*: wager, match, and chance.[3] Now, I want to consider how current populists challenge the judiciary's theatrical nature by acting in bad faith.

The English phrase 'acting in bad faith' connotes literal theater through the double meaning of the verb *to act*. The verb can either indicate forms of agency or a mode of performing, as in play-acting. This duality is also palpable in Spanish: in 'actuar de mala fe,' the verb *actuar* can both mean doing something or stage acting. The theatrical connotation seems to be missing in the Dutch ('te kwader trouw handelen'), the German ('in böser Absicht handeln'), and the French ('agir de mauvaise foi'). In these cases, the verbs (*handelen*,

handeln, *agir*) indicate only an activity. Still, to define a behavior as 'acting in bad faith' depends on a distinction and mismatch between the actor's inner motives and their appearance or performance. In other words, it depends on the distinction between a theatrical mask that the actor wears and a face underneath the mask that tells otherwise. So even without the ambiguity of the verb *to act*, the phrase connotes a theatrical dynamic.

The Dutch *te kwader trouw* indicates a twisted mode of loyalty, either to people or to principles. In relation to both, *trouw* connotes the verb and noun *vertrouwen*, which means '(to) trust'. The German *Absicht* emphasizes the consequences of someone acting in bad faith. The English *faith*, French *foi*, and Spanish *fe* mean either belief, trust, or intention. Relevant here are not just the intentions of the acting subject but also the effects of the subject's actions on their counterparts. The counterpart believes the actor to be trustworthy when they are not. Someone who acts in bad faith appears to be loyal and principled while in fact they are the opposite. Acting in bad faith is a specific form of theatrical acting, then. My question is how those who act in bad faith can use the court case's intrinsically theatrical nature to counter the execution of law.

Jurisdiction is organized theatrically because it is staged: it creates a clear distribution of roles (in part defined by theatrical props and clothes); it consists of clearly definable acts; it develops a dramatic plot with a beginning, middle, and end; and all of this is shown to a witnessing, courtroom audience. External to the courtroom, a secondary theatricality is at work when the legal performance in court functions theatrically in front of national and international audiences. This double nature of court cases was central to Yasco Horsman's *Theatres of Justice* (2010) – a study much inspired by Hannah Arendt's analysis of the Eichmann case. Law is performed, then, which is also the major point in Julie Stone Peters's monograph *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe* (2022). As the subtitle suggests, Peters's argument is that theatricality is not so much a threat to the operation of law, but rather allows law to be made to work.

In contemporary circumstances, however, the theatrical nature of court cases has been confronted with new kinds of media, media

platforms, and the kinds of logic these imply.[4] For instance, television cameras in the courtroom and social media engender new forms of staged judicial performances to new audiences. For centuries, the dominant medium for public reports on court cases was the newspaper. Newspapers would obviously report on cases from a certain angle with the aim to sell more; nothing new there. Newspapers, however, always told what had happened in court with hindsight—essentially a matter of ekphrasis. With contemporary media such as television and social media, which incorporate 'live' aspects that newspapers missed, the 'inside' of the courtroom has been broken open, as Tessa de Zeeuw suggested in *Postdramatic Legal Theatres* (2021). My hypothesis is that the *live friction* between the judiciary's theater and other media (television, radio, social media) gives those who act in bad faith in court the opportunity to stage something else, simultaneously, outside of court.

The point can be illustrated by a federal lawsuit filed in March 2022 by Donald Trump against Hillary Clinton, his Democratic opponent in the 2016 presidential race in the United States.[5] Trump accused Clinton of having fabricated financial ties between his 2016 campaign and Russia (i.e., Vladimir Putin). Trump claimed that Clinton had done so in close cooperation with the Democratic National Committee, the Federal Bureau of Investigation (FBI), and former FBI director James Comey. In a ruling dated January 19, 2023, U.S. District Judge Donald Middlebrooks stated the following:

> We are confronted with a lawsuit that should never have been filed, which was completely frivolous, both factually and legally, and which was brought in bad faith for an improper purpose. (Trump v. Clinton, 2:22-cv-14102, at *6)

The judge added that Trump's pleadings were "abusive litigation tactics" amounting to obstruction of justice. In view of this, Middlebrooks imposed $973,989.39 in sanctions against Trump and his lawyer, Alina Habba. The sanctions—compensation for the legal expenses of no less than thirty-one defendants—could not, however, undo the fact that the case had become a focus of public attention with polarizing effects on national political audiences. Middlebrooks's ruling discussed these effects:

> This case should never have been brought. Its inadequacy as a legal claim was evident from the start. No reasonable lawyer would have filed it. Intended for a political purpose, none of the counts of the amended complaint stated a cognizable legal claim. Thirty-one individuals and entities were needlessly harmed in order to dishonestly advance a political narrative. A continuing pattern of misuse of the courts by Mr. Trump and his lawyers undermines the rule of law, portrays judges as partisans, and diverts resources from those who have suffered actual legal harm. (Ibid. at *1).

The first part of this passage could not have been stated more clearly. Regarding the second part, questions remain as to how a blatant misuse of the judiciary can "undermine the rule of law," how this misuse can lead to judges being portrayed as "partisan," and how those who suffer "actual legal harm" are the victims of cases like these. In the first instance, one could think that the judge's imposition of sanctions on Trump and Habba demonstrates that their acting in bad faith did not undermine the judiciary. As the judge argues, however, this behavior burdened the judiciary by taking its attention away from others who truly required it.

I take the judge's remark seriously that those who act in bad faith can exhaust the judiciary, though it concerns exhaustion in a different sense, namely when for a substantial part of the audiences, Trump's acting in bad faith can be considered a necessary tactic against a rule of law that, in their eyes, is the partisan instrument of a perverted political elite. What is being *exhausted* is the good faith that people might have in the working of the judiciary. The result may be a loss of faith in its functioning or of the rule of law in general.

Rules of the game: Cheater and killjoy - fool and spoilsport

To get a sharper understanding of what makes acting in bad faith specific, I want to consider how this form of acting relates to four types of characters that define contrary attitudes to the judiciary and the rules of its game: the cheat, the killjoy, the fool, and the spoilsport. As we will find, they can be subdivided into two subsets, and only the spoilsport acts in bad faith.

Cheating the judiciary comes down to hiding information or lying. Cheaters, of course, do not want to be found out. They may not like the rules of the game, but it is precisely in their attempt to avoid these rules that cheaters show they know and acknowledge them. A good example of a judicial cheater is the U.S. Marine colonel played by Jack Nicholson in the 1992 Hollywood movie *A Few Good Men* (dir. Rob Reiner). Nicholson's character, Nathan R. Jessep, wants to hide the fact that he ordered the killing of one of his own men. The truth is revealed through the skilled if irregular behavior of a lawyer played by Tom Cruise. The lawyer, Daniel Kaffee, was first assigned the case, ironically, because of his preference for making plea bargains, which is precisely a legal way of avoiding public scrutiny by means of a court case. After Kaffee accepts the case, however, things will have to be tested in court. In court, Jessep knows he is hiding information crucial to the handling of the case and lies when he says that he had not ordered a 'Code red' on the basis of which two of his men were to teach one soldier, whom he considered to be weak, a lesson. He is cheating. The question is whether he can be found out.

The killjoy is a character type that is at the center of many feminist debates in recent decades, for instance in the *The Feminist Killjoy Handbook* (2023) by Sara Ahmed.[6] The killjoy knows the rules of the game but unveils the lie of a system that restricts subjects' potential to lead the lives they want to live. This is why the killjoy irritates those who represent the status quo. A good example of a killjoy is the son who denounces his father in the 1998 movie *Festen* (released in English as *The Celebration*, dir. Thomas Winterberg). When the son is supposed to give a festive speech at his father's 60th birthday party, he instead discloses the father's incestuous abuse. The son thereby becomes an accuser who questions the law of the father and unveils the lie in the system that the father personifies.

In the legal context the cheater and the killjoy form a set because they both relate to how truth is hidden or can be unveiled: the cheater hides, the killjoy discloses. The fool and the spoilsport, on the other hand, use competitive or combative tactics not because they want to hide or unveil the truth but because they do not respect the existing system with its claim on truth.

The fool ridicules the judiciary by acting in a carnivalesque way. In the analysis of Mikhail Bakhtin (1968), carnivalesque ridicule

temporarily turns the status quo upside down. Those acting the fool know the judiciary is more powerful than themselves, but they also know its seriousness is vulnerable because the judiciary's power is groundless, or based on a fiction, as Jacques Derrida (2002) argued in "The Force of Law". In its defense of (symbolic) order, the judiciary has a serious task: especially in the European tradition, the judiciary's task is to maintain order and to correct wrongdoings. Symbolically speaking, however, the judiciary's appearance is also farcical, as Peter Goodrich suggests in the introduction to *The Cabinet of Imaginary Laws (2021)*. In Goodrich's reading, the English judiciary needs people dressed up in wigs to speak on behalf of an order that apparently cannot defend itself as it is. If we follow this line of thought, the fool's response in a legal context is a play with the theatrical appearance of the judiciary.

A good example of acting the fool is found in the recent movie *The Trial of the Chicago 7* (2020; dir. Aaron Sorkin – also the author of the 1989 play that was the basis of *A Few Good Me*n). *The Trial of the Chicago 7* is based on a real case that came before a Chicago court in 1969, in which seven protesters against the Vietnam War were charged with conspiracy, the intent to incite a riot, and of teaching others how to make Molotov cocktails. One of the defendants, Abbie Hoffman, is played by comedian Sacha Baron Cohen – and with good reason. Historically, Hoffman was a leading figure in the Flower Power movement, and someone who loved acting the fool. As a defendant in court, he did so with the aim of ridiculing the judge. One clear instance of such ridicule was when he and one of his co-defendants appeared in court wearing judicial robes, reversing the dominant order in the dialectical dynamic between culture and counter-culture. I will unpack these forms of stage-acting in more detail below by analyzing the behavior of Rote Armee Fraktion (RAF) members in West German courts in the 1960s and 1970s.

The spoilsport, finally, seemingly follows the rules of the game but willingly acts against the rules of the game in order to destroy it, or to set up a different game in its place. In *Homo Ludens* (1938), which was written as the Nazis in Germany were misusing the rule of law to set up a totalitarian state, Johan Huizinga defined the action of the spoilsport as follows: "The spoilsport shatters the play world itself" (11). Translated to the rules of the game in a legal case, the spoilsport aims to shatter either the rules or the requirement of

having to play according to the rules. The spoilsport does not want to play along in good faith but also cannot be explicit *in court* about his endeavor to act in bad faith. This is to say that unlike the fool, he cannot explicitly show himself in court. The spoilsport's mask must be revealed for what it really is by others. An example of this has been given above: Trump and Habba acted as spoilsports, and Middlebrook had to reveal this.

Below I will elaborate on characteristics of the spoilsport by considering cases involving the U.S. American alt-right talk show host and conspiracy theorist Alex Jones. Before dealing with Jones, however, I will consider why, in my reading, radical leftists acting the fool in court did not threaten the rule of law, although it may have irritated the judiciary.

Judicio-theatrical confrontation by acting the fool

In the 1970s the RAF was West-Germany's most influential terrorist group, fighting a state that it considered to be the heir to the Nazi regime and a willing instrument of a neo-colonial capitalist system that violently subjected people all over the globe. During the 1970s, the leaders of what was defined as the first generation of the RAF were tried and incarcerated at the Stuttgart-Stammheim prison, which hosted a specially built on-site courthouse. Even though Stuttgart-Stammheim was the most heavily guarded prison in Germany, several members of the RAF managed to commit suicide within it: first, Ulrike Meinhof on May 9, 1976, and then three other members—Andreas Baader, Gudrun Ensslin, and Jan-Carl Raspe—on October 18, 1977.

During the trial the jailed RAF members engaged in several hunger strikes in protest of the isolation in which they found themselves. At a certain point, an invitation was sent on behalf of Klaus Croissant (lawyer to the defendants) and Ensslin to France's most important philosopher at the time, Jean-Paul Sartre, asking him to visit Baader in support of the defendants' struggle for more humane treatment. Sartre responded positively, asking the French-German activist and politician Daniel Cohn-Bendit to join as his interpreter. The two men were allowed to visit Baader in jail for half an hour on December 4,

1974. After the meeting, Sartre remarked privately to Cohn-Bendit: "Ce qu-il est con, ce Baader;" that is: "What an idiot, this Baader." Other translations could be *what a fool* or *what a jerk*.[7] In an article, Cohn-Bendit suggests that Baader had been lecturing Sartre, this 'grand penseur,' and had thus provoked Sartre's response. Perhaps Baader had also not considered Sartre his possible savior but just one more instance of an authority for which he chose to act the fool.

The theatrical impulse of later RAF actions, or the political choice to play-act, was especially strong in the early days of a much broader, radical student movement. Jeremy Hamers sketches how in the 1960s "urban performances" by radical students were inspired by the "militant theatre" of the Situationists (2011, 2).[8] The radicals' theatrical provocations of the state began a spiraling process, however, that played out as follows:

> The provocation soon met a double obstacle which led to a progressive decline in its provocative capacity. In the face of a State which was becoming more and more violent, the agitator gradually had to become more and more provocative. This evolution had its limits, for, as it is impossible always to go further in the strict framework of the public and revendicated act, the process ends de facto in an institutionalization that transforms the agitator into a representative of the system that he intended to denounce. (ibidem)

Whereas the radicals had first enacted urban performances and militant theater in the open, using the public space as a podium for action and the provocation of the state, the state then forced the radicals to either go along with its rules of the game by subjecting themselves to limits on acceptable public action, or further radicalize their provocations. In Hamers's analysis, this radicalization occurred in April 1968, when Ensslin, Baader, Thorwald Proll, and Horst Söhnlein, at the time still activists belonging to the radical Berlin student circle, set fire to parts of two department stores in Frankfurt.

For Hamers, to understand this act as marking the RAF's willful turn to violence misses the point. The act had perhaps lacked a theatrical quality *per se* but was still informed by what Hamers calls

a "theatrical origin". If the German populace were angered because some consumer goods were burnt, the radicals reasoned, ought they not be more outraged by the people burning in the Vietnam War? The discrepancy between the two kinds of 'arson' had to be *shown*. Setting a department store on fire was first and foremost a public performance with a pedagogical aim à la Brecht. If successful it would make the audience *see* and become active against the state.

Nevertheless, a line had been crossed. Ensslin, Baader, Proll, and Söhnlein were brought to court in a widely publicized trial that began on 13 October 1968. During the hearings, the three male defendants took on disruptive and carnivalesque roles. This followed a larger pattern of the time, as historians Jacco Pekelder and Klaus Weinhauer note: "During the student rebellions of the 1960s, there had been unprecedented courtroom scenes in the FRG [West Germany], with left-wing radicals mocking judges and prosecutors and turning trials into farcical political demonstrations" (2016, 244).[9] In the 1968 trial, the defendants acted as if they were extremely bored, ostentatiously gave false testimony, and shouted things like "Hail order!" Eventually, the four were sentenced to three years in prison. After their release they would go underground as the RAF, only to resurface again in the Stammheim prison courtroom on May 21, 1975.

As Willi Winkler (2008) describes, the trial moved so slowly in the beginning that almost no progress was made. The state had appointed lawyers the defendants did not want, Baader had no official legal representative, and the defendants used every opportunity to frustrate progress. In a study entitled *Law and Reflexive Politics* (1998) legal scholar Emilios Christodoulidis interpreted the courtroom behavior of Baader, Meinhof, and Mohnhaupt as a "form of ridicule," and considered its effects on the judiciary. To Christodoulidis the core issue was that the RAF members refused

> to acknowledge the court as the agent of justice and the legal discourse as a forum where the confrontation could be resolved. The prime problem with this aspect of the confrontation as war or as ridicule, is that it goes unacknowledged in law. These 'total' confrontations go unobserved by the judges. In systems-theoretical terms

> they do not resonate in law, they trigger no response in the legal system, no environmental stimulus to be picked up by the legal sensors. The sensors, instead, break down the confrontational context by picking up stimuli like contempt. (176)

Although Christodoulidis has a point that law cannot *acknowledge* ridicule, he is mistaken to argue that ridicule or carnivalesque behavior goes "unobserved by the judges". And there is a more fundamental point. Obviously, the RAF members would not be bothered by accusations of contempt. In fact, such accusations would satisfy them. The reason is that they followed a theatrical logic of carnivalesque confrontation between a dominant culture and counter-culture.

The behavior of the RAF defendants was a carnivalesque response to a serious court, just as some of the Chicago Seven's responses to their own case in court were. The movie on the Chicago Seven case suggests that at some point the defendants came to realize that acting the fool would not help them, so they turned to seriousness. As part of their protests against the Vietnam War, the movie informs us, some of the defendants registered the names of all United States soldiers who died in combat in Vietnam. When at the end of their trial they are given the opportunity to respond to the judge, they start to read all these names. In the movie the judge's call for order becomes farcical. In the real handling of the case, the judge had become farcical himself because of the enormous number of forms of contempt he accused both the defendants and their lawyers of: a hundred and fifty nine in total.

Much in line with those who propagated play as a form of counter-culture in the 1960s and 1970s, the carnivalesque is defined predominantly for its subversive potential: ridiculing power. The form of Renaissance carnival that interested Bakhtin may have had such a function as well. Still, the subversive effect of Renaissance carnival may have been limited because it was licensed or sanctioned by those in power.[10] Considering the context in which Bakhtin worked, namely Stalinist Russia during the build-up toward World War II, where ridiculing power could cost one's life, we perhaps must ask why Bakhtin chose to study Renaissance carnival. One explanation is that Bakhtin wanted to study whether the carnivalesque is a means

to survive a suffocating system of oppression. This is another way of considering the courtroom behavior of RAF members and some of the defendants in the Chicago 7 trial. Unlike cheating, being the killjoy, or acting in bad faith, carnivalesque play is not meant to deceive anyone. Rather, it is a survival strategy that may reflect the participant's faith in the reversal of what they view as an unjust order.

Consequently, to describe Trump's dealings with the political and legal establishment as carnivalesque—as political theorist Elizaveta Gaufman does in "The Trump carnival: popular appeal in the age of misinformation"—appears to mix up playing the fool with acting in bad faith. Trump does not act the fool in order to ridicule power, nor does he have to survive a system that oppresses him, although he consistently plays that card. He acts first and foremost as a spoilsport: his aim is to spoil the existing legal game in order to gain the political space that allows him to start his own game.

Judicial-theatrical impasse: A radical right-winger acting in bad faith

As we have seen, a United States federal judge accused Trump of acting as a bad-faith litigant. Let us now move to the alt-right talk show host Alex Jones, who behaved similarly when he was sued for defamation. Through platforms such as *prisonplanet.tv* and *infowars.com*, Jones became a provocative and polarizing figure in U.S. American politics. He became infamous with his suggestions that the 2012 Sandy Hook Elementary School shooting—which resulted in the deaths of twenty schoolchildren and six school staff members before the killer committed suicide—was a government hoax. Jones's claims led to the targeted harassment of the victims' parents by his viewers and listeners. In response, some of those parents brought Jones to court, where they were awarded damages amounting to $1.44 billion (as of February 2023).

In response to Trump's lawsuit against Hillary Clinton, as we saw, Judge Middlebrook could easily show that the plaintiff had simply conjured up accusations. Trump alleged that FBI Director Comey and Hillary Clinton had together decided to prosecute him, but in fact Trump had never been prosecuted. So Middlebrook stated:

> I find that the pleadings here were abusive litigation tactics. The Complaint and Amended Complaint were drafted to advance a political narrative; not to address legal harm caused by any Defendant. (Trump v. Clinton, at 7)

Now, suppose we translate the defining elements in this quote to the position of a defendant. Such a defendant, like Jones, would have to use defense tactics intended to advance a political narrative instead of seriously acknowledging any (legal) harm he may have caused himself.

One of the Sandy Hook defamation cases against Alex Jones was *Scarlett Lewis v. Alex E. Jones, Infowars, LLC, and Free Speech Systems, LLC*. Over the course of the trial, which was heard in the 459th District Court of Travis County, Texas, the lawyer for Sandy Hook parent Scarlett Lewis brought forward a motion of contempt against Jones because of his systematic refusal to produce documents despite the court ordering him to do so. The court granted the contempt motion, stating that:

> defendants have intentionally disobeyed the Court's order. The Court also finds that Defendants' failure to comply with the discovery order in this case is greatly aggravated by Defendants' consistent pattern of discovery abuse throughout other cases pending before this court. (Scarlett Lewis vs. Alex E. Jones, at 2)

After mentioning all the instances in which Jones and his allies refused to hand in documents, the Court "finds that Defendants' discovery conduct in this case is the result of flagrant bad faith and callous disregard for the responsibilities of discovery under the rules" (Scarlett Lewis vs. Alex E. Jones, at 3). Acting in bad faith here comes down to a "consistent pattern" of failing to properly inform the judiciary. This pattern is also a tactic that aims to delay and ultimately derail the process by exhausting the opponent. For instance, the order finding Jones in contempt of court was issued in 2021, but Lewis had originally sued Jones and Free Speech Systems for "intentional infliction of emotional distress" in October 2018.

In the three years between 2018 and 2021 Jones consistently tried to exhaust his adversaries and the judiciary. Near the beginning, for instance, Jones's lawyer filed a motion to dismiss Lewis's claim on the grounds of Jones's right to free speech. In Texas, this can be done by appealing to the Texas Citizens Participation Act (TCPA), which states:

> If a legal action is based on or is in response to a party's exercise of the right to free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action. (Tex. Civ. Prac. & Rem. Code. § 27.003(a))

In response, Lewis and her lawyer motioned for documents that could support her claim that Jones's alleged defamation was not protected as free speech. The Court ordered the defendants to produce these documents in January and March 2019. Failing to respond, the defendants were called to court on April 3, 2019. A dialogue between the Court and the defendants' attorney, Robert Barnes, provides another example of acting in bad faith:

> - The Court: And will you concede today, and you are for the record, that for the purpose of deciding the motion to dismiss, the Court can assume that the statements made by Alex Jones were done with malice, that is to say, he knew they were false and said them anyway.
>
> - Mr. Barnes: We're not disputing the intent issue as to this motion, that's correct, Your Honor.
>
> - The Court: So he intended to make false statements. The question is, can you take that intent to make false statements and can an individual bring a claim for intentional infliction on those facts?
>
> - Mr. Barnes: Precisely, Your Honor. In other words, if the case is – when someone has not been personally mentioned – in the defamation context they call it colloquium, which the word colloquial comes from. And if no statement is ever

> made about that person, can that person bring a claim for defamation or intentional infliction of emotional distress when they have never been mentioned? (Alex E. Jones; lnfowars, LLC; and Free Speech Systems, LLC, Appellants v. Scarlett Lewis, Appellee, at 2)

The double strategy may be clear. First, Jones admits via his lawyer that he has intentionally made false statements and that these were "done with malice". This is also what the judge wants to have "for the record". However, for now this is not Barnes's point. The defense's tactic is to stop the trial by arguing that Jones cannot be proven to have intentionally harmed *specific individuals*.

After the District Court denied the defendant's motion to dismiss Lewis's lawsuit on the grounds of free speech, an appellate court affirmed this ruling. The appellate judge believed that Barnes's argument was not substantial, quoting a statement by Jones on an Infowars broadcast from November 2016:

> So, if children were lost at Sandy Hook, my heart goes out to each and every one of those parents. And the people who say they're parents that I see on the news. The only problem is, I've watched a lot of soap operas. And I've seen actors before. And I know when I'm watching a movie and when I'm watching something real. (Alex E. Jones; lnfowars, LLC; and Free Speech Systems, LLC, Appellants v. Scarlett Lewis, Appellee, at 8)

The appellate judge, placing the quoted text in a broader set of comments by Jones, made a pivotal distinction between conveying falsehoods and expressing opinions. False statements, that is, are not protected as free expression. The judge then responded to the defense's argument that Lewis's defamation claim lacked merit because Lewis was not specifically named in Jones's statements about the Sandy Hook mass shooting. For the judge, however, Jones's mentioning the parents of Sandy Hook victims made them an identifiable and limited class of potential plaintiffs. So, the appellate judge affirmed the District Court's denial of Jones's motion to dismiss Lewis's lawsuit.

Note that in 2019 Jones had already acknowledged via his lawyer that his statements were false. It was only in August 2022 that he acknowledged this himself in open court, pressed in front of a jury that was deciding on the damages he would be ordered to pay. After saying how much he regretted what he had said, and how irresponsible it was, especially now that he had met the parents, Jones repeatedly says he considers the Sandy Hook events "a hundred percent real". This was broadcast nationally and internationally, including what Jones then added:

> And the media still ran with lies that I was saying it wasn't real on air yesterday. It's incredible. They won't let me take it back. They just want to keep me in the position of being the Sandy Hook man. (my transcription)[11]

It is ironic to see how Jones accuses "the media" of tarnishing his reputation. He accuses others of wanting him to remain the "Sandy Hook man", whereas he, supposedly, would love to correct this and leave the affair behind. That this was not the case became clear when judge Barbara Bellis read the verdict and Jones was not in court. He was on the air again, providing commentary on the verdict as it was broadcast live from the courtroom. He was laughing about the verdict, mocking it as if the award of damages were an auction reaching its highest bid. He asked his audience: "Do these people actually think they're getting any of this money?"[12] He then asked his audience to donate more money to his legal fund so that he could keep on bringing "these people" – that is the Sandy Hook parents – to court.[13]

This is the impasse, then. On the one hand, the judiciary works: Jones is judged and the verdict is made public in court. On the other hand, Jones is already showing he does not care by doing what the judge had reprimanded him for in court: setting up his own show – but now via his own platform. In court, Jones had no trouble confronting the judge with a mix of lies and rants about his many political opponents. Judge Bellis had to deal "with somebody who doesn't follow ordinary norms in the court and doesn't respect the process" (Cousins). Jones is not acting the fool in court but acts as a spoilsport who attempts to dismantle the operation of the judiciary. Although in court he will show a mask of being serious, he will tell his own

constituency simultaneously. He has no respect for the judiciary whatsoever and will call the trial against him a "Kangaroo Court" (Hsu and Qiu, 2022).

Conclusion

This brings me to what I defined in the title of this article as the judiciary's 'Achilles' heel.' When Julie Stone Peters argues in *Law as Performance* that judges should at all costs prevent cases from becoming the site of a circus or carnival (196), she focuses on the carnivalesque. As I have argued, although the carnivalesque may subvert or irritate, it offers no real threat to the judiciary. Defendants like Jones, acting in bad faith, offer a far more serious threat. Jones did everything to delay, obstruct, derail, complicate or multiply court cases. He publicly admitted in court, first via his lawyers and then by testifying himself, that with regard to the Sandy Hook shooting he had had it wrong and had been spreading falsehoods. Yet his own platform allowed him to show a principally other mask. Here, Jones's acting in bad faith in court became something to be admired by his followers because it could be seen as a necessary tactic against a supposedly 'partisan' judiciary, behind which there would be political forces attacking Jones. Acting in bad faith, then, works at the interstice between events in court and the court case's dissemination to audiences at large via contemporary media and media platforms. If this is the judiciary's theatrical Achilles' heel, this can be mended, but it needs new legislation. It could be legally obliged, for instance, that defendants are in court when the verdict is pronounced. Such legislation was adopted in the Netherlands in 2021; since then perpetrators of sex crimes or violent misdemeanor are obliged to be in court during sessions, when the verdict is read, or when victims use their right to speak.[14] This shows that the theatrical nature of the judiciary needs legal protection itself. It also suggests that the live theatricality of jurisdiction remains essential when people want to feel, or are to be shown, that justice is being done.

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Notes

1 Also see Robert J. Bunker and Pamela Ligouri Bunker, *Global Criminal and Sovereign Free Economies and the Demise of the Western Economies: Dark Renaissance*, London: Routledge, 2014.

2 Frans-Willem Korsten, "Besmirching Judges, Undermining Authority: Populists' Carnivalesque Play with Feelings of Law and Justice." *Schriften des Rudolf-von-Jhering-Instituts Gießen* 3 (2023): 191-214.

3 Frans-Willem Korsten, "Populists in Court: Wager, Match, and Chance Considered as Generic Forms of Playful Legalities," *Law, Culture, and the Humanities* (2023). The article focuses on one chapter of jurisdiction in Johan Huizinga, *Homo Ludens: proeve eener bepaling van het spel-element der cultuur*. There are currently two new English translations of this book in the making.

4 For a historical comparison, see Peter Goodrich, "Disciplines and Jurisdictions: An Historical Note." *English Language Notes* 153 (2010): 153-161.

5 On Trump's use of the judiciary, see J. D. Zirin, *Plaintiff in Chief: A Portrait of Donald Trump in 3.500 Lawsuits*. All Points Books, 2019.

6 Ahmed explored the issue previously in *Living a Feminist Life* (Durham, NC: Duke University Press, 2017).

7 For a more elaborate interpretation of this phrase, see Grégory Cormann and Jeremy Hamers, "« Ce qu'il est con… » Des idées aux corps : Sartre, Baader et la grève de la faim." *Les Temps Modernes* 667, 1 (2012): 31–59.

8 The history of the RAF-members is re-assessed in J. Smith and Andre Moncourt, *The Red Army Faction: A Documentary History. Volume 1: Projectiles for the People* (Oakland: PM Press, 2009) and *The Red Army Faction, A Documentary History: Volume 2: Dancing with Imperialism* (Oakland: PM Press, 2009).

9 What is now "Germany" consisted at the time of the western Federal Republic of Germany (FRG) and the eastern German Democratic Republic (GDR).

10 I agree with Terry Eagleton's argument in *Walter Benjamin: or Towards a Revolutionary Criticism* (1981) that carnival's power is limited because it is licensed.

11 Guardian News, 'Alex Jones admits that Sandy Hook shooting wasn't faked: 'It's a 100% real'';. https://www.youtube.com/watch?v=AOQeCtFVAWM

12 Cf. Erin Snodgrass and Lloyd Lee, "Alex Jones mocks $965 million Sandy Hook verdict: 'Do these people actually think they're getting any of this money?'" *Insider*, Oct 12, 2022; or Tiffany Hsu, "'Do these people actually think they're getting any money?' Jones denounces the verdict, and fund-raises," *New York Times*, October 12, 2022.

13 Snodgrass and Lee, "Alex Jones."

14 *Staatsblad van het Koninkrijk der Nederlanden* 220, 2021, 1.