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DOCUMENTA: *journal for theater*

Documenta is an important forum for the study of theater in the Low Countries. It is a journal that accommodates in-depth, scholarly contributions on all aspects of theater, as well as essays and critical reflections. Although the main proportion of articles in *Documenta* focuses on theater and performance, contributions relating to music, film and new media are also considered, as far as they relate to the performing arts. The journal was founded in 1983 by Jozef De Vos in the bosom of the Ghent Documentation center for Dramatic Art. Since 2015, *Documenta* has been published by S:PAM (Studies in Performing Arts & Media) of the Department of Theater Studies at Ghent University. The editorial board is composed of theater scholars from various universities and colleges. Editors-in-chief are Christel Stalpaert and Bram Van Oostveldt, in collaboration with Jozef De Vos, who led the journal for 32 years.

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On Theater, Law, and Justice (Not Necessarily in That Order)

–– Steff Nellis (GHENT UNIVERSITY)

This special issue of *Documenta* delves into the reciprocal relationship between 'Theater and Law,' establishing an interdisciplinary space for justice that transcends conventional legal boundaries. In contrast to traditional, rigid judicial frameworks that revolve around accusing and sentencing clearly defined defendants, the performing and visual arts provide a reflective environment for reevaluating legal cases and systems. Each article in this issue aspires to reconceptualize established legal perspectives by presenting artistically inspired alternatives. The contributions illustrate how the performing and visual arts foster empathetic and progressive alternatives to the judicial process, both within and beyond traditional court settings. To underscore the significance of these artistically inspired alternatives, this introduction examines the tragic case of Sanda Dia, a twenty-year-old student who died during an extreme initiation ritual from a student corps at the Katholieke Universiteit Leuven in 2018.

Keywords: theater, law, justice, re-enactment, pre-enactment

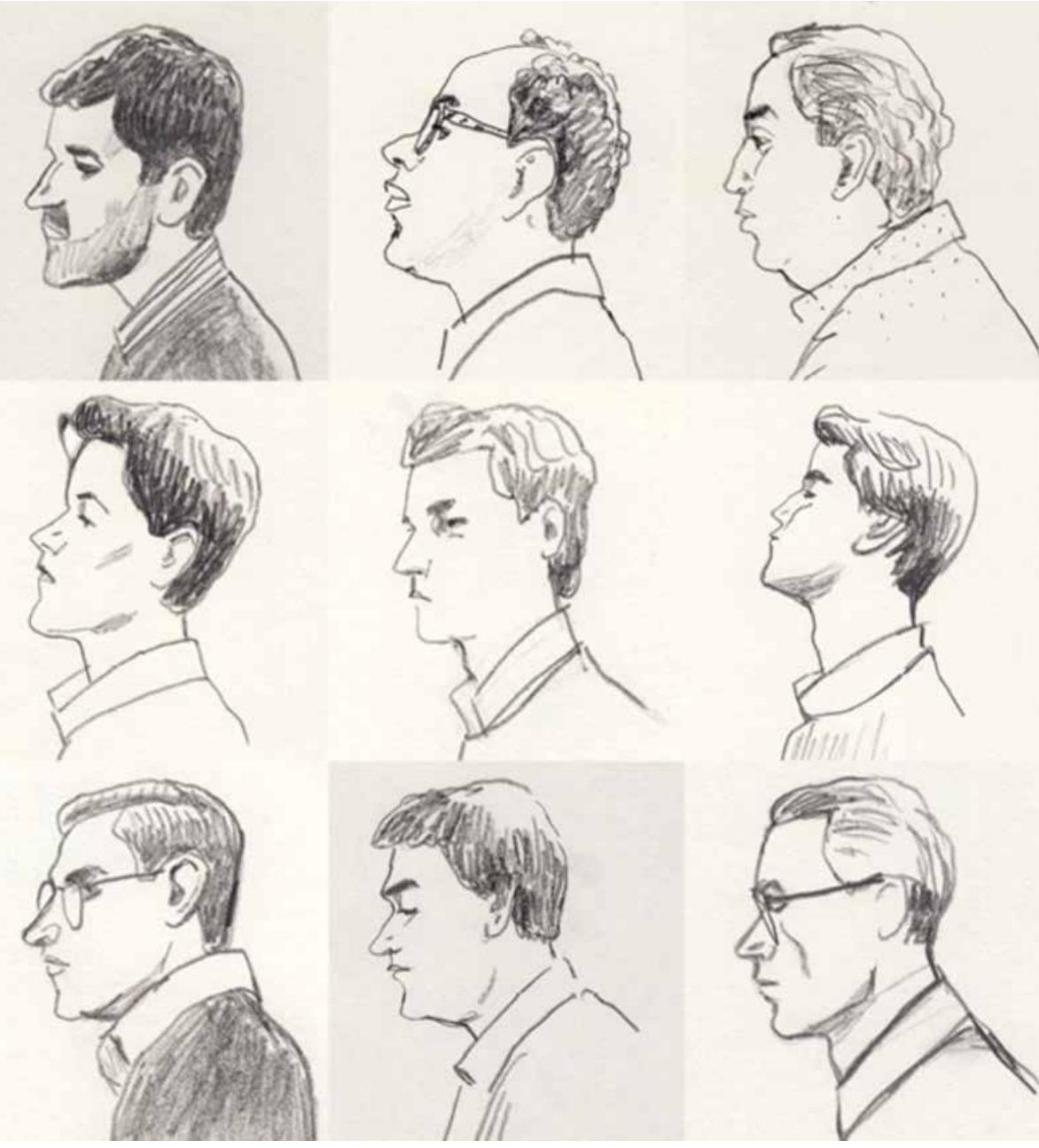

Figure 1. A courtroom sketch of the eighteen Reuzegom members that stood trial
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In Belgium and the Netherlands, student corps, clubs, or unions enjoy widespread popularity. The commencement of the academic year is traditionally marked by the organization of 'student baptisms,' a ceremony during which those freshmen joining a corps undergo initiation rituals deeply rooted in the historical traditions of Western European universities.[1] In English, there is a very specific term for these initiations: 'froshing.' This is typically a term applied to initiating new students into fraternities and sororities in North American universities. Although these 'froshings' are generally perceived as harmless, they concurrently possess a somewhat disparaging nature. Initiates often navigate the city while enduring ironic derision and the occasional pelting of food and liquids from the corps' senior members. Recently, in Flanders, the predominantly Dutch-speaking northern part of Belgium, attention has been drawn to student initiations due to their propensity for violence and abuse. Particularly concerning is the 'sale of pledges' during student initiations, where freshmen are auctioned off to established members, granting a transient right of ownership over the novitiate as part of the latter's initiation into the group. Additional concerns include excessive alcohol consumption, and the coerced ingestion of substances unfit for consumption.

In December 2018, a tragic incident unfolded at the Katholieke Universiteit Leuven (Catholic University Leuven; KUL), leading to the untimely death of Sanda Dia during a student initiation. Sanda was associated with the Reuzegom corps, an exclusive student club established in 1946, comprising of students from a conservative Catholic school in Antwerp who later enrolled at KUL. Historically, the Reuzegom corps had drawn students from predominantly white aristocratic, judicial, public official, and corporate executive backgrounds in the Antwerp region. With his unique background as the child of a Senegalese father and a Belgian mother, Dia was a departure from the typical Reuzegom profile. This deviation surprised his friends and family, given that he became only the second black pledge in Reuzegom's history. Despite the disparity, Dia aspired to leverage the network associated with the corps for career advancement. Unfortunately, his pursuit of societal advancement led to his tragic demise during the rigorous initiation process known as the 'taming' of the pledges.

Given the notorious slowness of the Belgian judicial system, the final verdict in the tragic student death case was only reached in May 2023, nearly five years after the incident. The eighteen Reuzegom members on trial were found guilty of 'unintentional killing' (C), 'cruel, inhumane and degrading treatment (CIDT)' (D), and 'cruelty to animals' (F, G, H).[2] However, they were acquitted on the two most serious charges: 'administration of harmful substances' (A, B) and 'culpable negligence' (E). Without passing judgment on the legal validity of this verdict, it is contended that this case serves as an exemplar of the deficiencies within Belgian legal policy. Public sentiment has criticized the perceived inadequacy of compensation for the victim's family and the short length of the maximum community sentence, especially considering the prolonged period between Dia's demise and the verdict (Daeninck). Furthermore, the lack of comprehensive answers provided for Dia's family throughout the trial has substantially undermined their sense of justice, resulting in public outrage, social upheaval, and distress. The law had been ruled, but had justice truly been served?

This special issue of *Documenta: journal for theater* explores the reciprocal influence of 'Theater and Law,' creating an interdisciplinary space for justice that goes beyond conventional legal boundaries. Unlike traditional regressive judicial structures, which focus on accusing and sentencing clearly defined defendants, the performing and visual arts offer a reflective environment for reevaluating legal systems. Each article in this issue aims to reconceptualize established legal perspectives by proposing artistically inspired alternatives. Moreover, these contributions illustrate how the performing and visual arts nurture empathetic and progressive spaces, both within and beyond conventional courts. The discussion pushes past merely sentencing or exposing defendants such as the eighteen Reuzegom members who are unrecognizably caricatured in the courtroom drawing that opens this introduction. Instead, the issue explores ways to transcend regressive condemnation and advocate for justice. Consequently, this introduction and the subsequent articles argue for looking beyond standard legal systems and jurisprudence. All contributions suggest exploring alternative visions of justice within the frameworks and practices of theater, the performing arts, and the visual arts.

On Law – A Trial by Media

The Sanda Dia Affair sparked widespread consternation and debate when it went to trial, both within Belgium and internationally. Moreover, when it was published in the media following the judicial investigation in the summer of 2020, the lawsuit turned into a 'trial by media.' The hashtag #JusticeForSanda started circulating on social media, encapsulating the concern that if the Reuzegom members implicated in the events were not charged with felonies, they could continue their studies and, like their predecessors, come to occupy the most important positions of power in society, probably even in the legal system itself. Furthermore, the initial reaction of KUL seemed lamentable. They stated that the taming had long been a 'tradition' in the corps and only gave three of the students 30 hours of community service. This included writing a paper on froshing and doing some free tutoring, which they could easily complete within a week (Punch 42). Subsequently, public interest in the case only increased. People started to share pictures of the Reuzegom members online and called for people to take matters into their own hands with the looming failure of the legal system. However, this only did the opposite it intended, as the lawsuit was postponed several times due to legal objections from the lawyers.
To battle against 'media trials' or the mediatization of law is to buy into law's ideology itself, Julie Stone Peters argues. The idea that law is autonomous from other spheres – that law is *not* theater – is fictional: "Law will never resist the temptations of theatre, because law's very being is a theatrical one" (59). As for the Sanda Dia case, media coverage extensively detailed the chain of events and the reactions of those involved. The primary investigation initially aimed to construct a credible reconstruction of the lamentable two-day froshing This reconstruction revealed that the techniques employed in the Reuzegom initiation were notably more aggressive and physically demanding compared to 'baptisms' in other student societies. Notably, in the days leading up to the hazing, the 'pledge tamer' had promised an exceptionally rigorous taming. In my overview of the sequence of events, I rely on Pieter Huybrechts, a Belgian journalist who closely following the case and authored the book *Sanda Dia: The Hazing that Led to Death* (*Sanda Dia: de doop die leidde tot de dood* in Dutch, 2021).[3]

During the first day of the initiation in Leuven, Dia and two fellow pledges encountered degrading and physically demanding challenges. The activities began with a flower-selling competition in Leuven, where Dia, having sold an insufficient number of flowers, was compelled to consume a mixture of purportedly shrimp-based brown sludge and gin. All three pledges were then forced to ingest a concoction of sour milk, fish sauce, and hot peppers. Dia and another pledge, facing poor flower sales, were additionally required to consume a bird's fat globule. Subsequent events included public humiliation in the streets, verbal abuse, and forced alcohol consumption leading to intoxication and vomiting. When passersby inquired about their condition, they were misled. Despite the pledges' deteriorated states, the evening continued in the city center. Finally, in Dia's dormitory, the tamers engaged in further degrading acts, such as cutting the pledges' hair, applying chocolate paste to their bodies, and covering their heads in tomato sauce. The taps in the room were obstructed, denying the pledges access to water. The initiation culminated with tamers urinating on the pledges, rationalized as part of a yearlong tradition (Huybrechts 39-41; 47-51; 58-71).

On the second day of the initiation, it became evident that Sanda was severely incapacitated, struggling to walk. Around noon, the pledges were taken from Leuven city center to Vorselaar in the Antwerp District. In a wooded area with a hut and stream, they were subjected to an extended and sadistic ritual. Forced to dig a pit and sit in near-freezing water, they endured periodic dousing with cold water, urination, and even defecation by one of the tamers. One Reuzegom member, a medical student, expressed concern about Dia's deteriorating condition early on but was disregarded. Further torment involved various forms of degradation, including the consumption of nauseating concoctions including live mice, worms, locusts, and fish sauce: the infamous 'fish sauce test' in which the pledges swallow and regurgitate fish. Moreover, the pledges were subjected to continuous vomiting, dehydration, and exposure in a filthy pit filled with vomit, urine, and feces. The ordeal extended into the evening, with additional cruel acts such as biting off the head an eel and eating live goldfish. Dia's deteriorating health became apparent, with shouts from the group ignored until it was too late. In the end, the medical student insisted on immediate help, leading to a reluctant decision to seek assistance. However, when the tamers took Dia to a nearby hospital in Malle, it was already too late to res-

cue him. His body temperature was far too low and he had ingested to much salt, causing several organs to fail. Dia went into a coma and died two days later, on 7 December 2018 (Huybrechts, 92; 124). In *Crime and Deviance in the Colleges: Elite Student Excess and Sexual Abuse* (2022), Maurice Punch illustrates that the Reuzegom corps is an exemplary case of elite students – with elite parents, at an elite institution – who, in their traditional rumbustious excess, cause tragic events, in this case the death of a fellow student. Even more exemplary is the subsequent employment by the parents of all their political, social, and financial resources to fight for their children in court to attain a mild or no sentence. A typical case of what we might call 'Class Justice:'

> The parents of the corps members involved – including a judge and a provincial governor – were members of the regional power elite and they hired a highly experienced criminal lawyer who used diverse tactics to delay and cast doubt about the criminal process. That is their legal right but that power and wealth discrepancy could only mean that 'justice' for the victim and his family was determined in an arena where professionally callous lawyers used every tactic available to influence the proceedings. (43)

This strategy appeared to be highly effective. The eighteen Reuzegom members faced charges of 'administration of harmful substances resulting in death' (A), 'administration of harmful substances resulting in illness or work incapacity (≤ four months)' (B), 'unintentional killing' (C), 'cruel, inhumane and degrading treatment (CIDT)' (D), 'culpable negligence' (E), and various 'infringements of animal welfare' (F, G, H). Ultimately, they were convicted of 'unintentional killing' (C), 'CIDT' (D), and various 'infringements on animal welfare; (F, G, H), but acquitted on the charges of 'administration of harmful substances' (A, B) and 'culpable negligence' (E). Their sentences ranged from 200 to 300 hours of community service, and each member received a €400 fine, along with monetary reparations to Dia's family (Decré).

Another noteworthy aspect of the ruling is that the Reuzegom members were neither disenfranchised nor does their conviction appear on the extracts of their criminal records. In other words,

their involvement in the Sanda Dia Affair will only be visible to the police, the court, and security services with access to their complete criminal records. Thus, future employers will be unaware of their convictions in this case. Given the initial prosecution's request for effective imprisonment, these sentences may be considered relatively lenient. The ruling emphasizes that the punishment "serves not only as a retributive requirement" but also as a means of "general and particular prevention." In essence, the verdict aims to ensure and prevent the convicted individuals from committing such acts in the future (Decré). While the law has been served, the question lingers: has justice truly been done?

On Theater – A Call for Justice

While I do not aim to question the legal validity of the verdict in this case, my intention is to delve into questions surrounding the enduring impact of this trial, the precedents it establishes, and the lessons we can extract from it. Aligned with the various perspectives within this volume, this article explores what we – scholars, theatermakers, lawyers, judges, legislators, citizens, parents, brothers, and sisters – might glean from cases like the tragic death of Sanda Dia. How can we prevent such horrific events in the future? How can we ensure that Dia's death was not in vain? And how can we surpass the confined realm of the judiciary to achieve justice?

In his 2021 monograph, *Art as Interface of Law and Justice: Affirmation, Disturbance, Disruption*, Frans-Willem Korsten delves into the ontological difference between law and justice. "From the legal side," Korsten argues, "law cannot be satisfied with loose ends and is aimed at closure because it is systematic in nature. Any case works towards being closed, and if it is not closed on one level, it moves to a higher level, or the highest one" (21). The judiciary seeks closure, exemplified in the Sanda Dia Affair with a judgment rendered in accordance with Belgian legal principles. In analyzing the case, attorney Philip Daeninck refers to Jeffrey Reiman's seminal work, *The Rich Get Richer and the Poor Get Prison* (1979), which, akin to Maurice Punch's insights, underscores the judiciary's failure to impartially assess individuals across the criminal justice system in its entirety. Daeninck contends that Lady Justice's blindfold, symbolizing impartiality, does not function adequately. Thus, the

issues raised by the Sanda Dia Affair extend beyond legal considerations, delving into broader societal implications, particularly highlighting systemic injustices within the intersectionality of race and socio-economic divides.

However, rather than solely critiquing the seemingly lenient verdict, our focus should shift towards reevaluating our approach to crime and punishment. Advocating for re-socialization and restoration becomes crucial, challenging the evident imbalance in various judgments and prompting a holistic reconsideration of societal responses to crime beyond existing legal frameworks. The question is not whether the verdict is elitist but whether it encourages continuous reflection on shaping a more equitable societal response to injustice. In this sense, Korsten suggests that to appeal to an ever-higher court, "people will have to move to the margins of the system or outside the system, with its imagined courts" (21-22). For in any legal system, the logic of reason is dominant, whereas in the realm of justice, the logic of dreams holds a preferable position. Reflecting on the work of legal scholar Peter Goodrich, Korsten invokes the idea of 'minor jurisprudences' as aesthetic, playful modes of operation within legal systems. Here, art is considered for its potential to highlight principles of the rule of law while opening up the broader realm of justice: "If law is capable of injustices, for instance, this affects the realm of justice; and art is considered the medium that makes this palpable" (19).

There is, indeed, a growing number of scholars from within both the fields of Law and the Humanities involved in thinking through the relation among law, justice, and art. Because of their ontological and formal correspondences, the generic form of theater is also constitutive for the court.[4] In recent years, several publications of varying scope and character have been published on the tense relationship between theater and the courtroom. In 2019, Laura Münkler and Julia Stenzel co-edited an anthology on the staging of law: *Inszenierung von Recht*. Operating within both Law Studies and Performance Studies, Münkler and Stenzel collect essays on the "Zusammenhängen zwischen Ästhetik und Recht sowie nach der Performativität von Recht" that stress the intrinsically theatrical aspects of the law (8). Earlier research conducted by Paula Diehl is also worth mentioning here. In her study *Performanz des Rechts* (2006), Diehl already characterizes the performativity of law in terms

of a wide range of enactments: its 'actors', knowledge production, and the enforcement of the verdict.

Accordingly, Alan Read suggests in *Theatre & Law* (2016) that law should be seen as part of a distinct way of imagining the real and can thereby provide visions of a community, not only echoes of it. Moreover, law provides a model for how society can or should be (36-37; 50). Read indicates an inherent anthropological and ontological connection between theater and law, referring to Alain Supiot's *Homo Juridicus* (2006):

> It is precisely the law, Supiot suggests, that connects our infinite mental universe, all life's possibilities in the radical heteronomy of all possible actions, with our finite, limited, actual physical existence, and in so doing fulfils the anthropological function of instituting us as rational beings. In this sense we are recognizable as human beings, precisely because we are legal beings first. (39)

Read endorses Supiot's view of humankind as 'homines juridicae' instead of 'homines ludentes'. However, he demonstrates that the courtroom, and law in general, remains a place where something is enacted: "It operates through action, not just a mental operation. It is made up of performing and spectating" (12). In other words, the courtroom can be seen as a theater in which the attendees – lawyers, judges, jury, witnesses, prosecutor, defendant, bailiff, and others – try to collect evidence by reenacting the crime that has been committed. Each participant in this complex course of events plays a specific role and tries to convince the other parties. Although historical research into the connection between law and theater, as well as into twentieth-century theatrical tribunals is widespread (e.g., Arjomand 2018; Read 2016; Stone Peters 2022), the recurring theme of justice in contemporary performance practices only recently began to be explored by scholars (e.g., Korsten 2021, Nellis "Enacting Law," Tindemans 2021).

Theater and Law

An increasing number of twenty-first century artists have begun relying on structures of the court in their performances. When severe injustices such as imperial abuses, sexual assault, war crimes, (eco-) colonialism, among other problems are neglected by the international community, theater can publicly condemn these shortcomings within the real legal system by assembling public meetings itself. The performing arts thereby claim a voice in the debate that can counteract the dominant and restrictive legal perspective. After all, theater, as a live event, can be regarded as the most suitable place to discuss actual topics and have heated debates. Therefore, theater seems to be an appropriate apparatus for dealing with societal injustices. While real lawsuits emphasize legal responsibility, 'theatrical tribunals' focus on moral responsibility. This shift is exemplary for contemporary court case performances, which is why the tribunal genre is highly desirable to build upon, to complete and even to precede regular proceedings, trials, and tribunals (Nellis "Enacting Law"). The first five articles in this special issue start from performances that can be characterized as 'theatrical mock trials,' 'judicial theater,' 'tribunal theater,' 'courtroom drama,' or 'legislative theater'. The authors all deal with performances that tackle legal questions on the contemporary stage by relying on the format of artistic (p)re-enactment.

In 'The Irruption of Real Violence: The Open Dramaturgy of Theatrical Mock Trials and Milo Rau's *The Moscow Trials*,' **Kfir Lapid-Mashall** discusses *The Moscow Trials* (2013) by Swiss director Milo Rau. This contribution presents a definition of the 'Theatrical Mock Trial' as an educational practice by discussing its pedagogical benefits in developing critical spectatorship and dialogue. Employing the logic of the mock trial, Lapid-Mashall proposes conceptualizing 'Theatrical Mock Trials' through their postdramatic open dramaturgy. This means that the verdict is not predetermined but reached, instead, in the present of the performance. Correspondingly, the open dramaturgy of such theatrical trials transforms the political insight normally gained by trainees who participate in the mock trial into political acuity from the spectators.

Likewise, **Lily Climenhaga** engages with the intersection of the political and the affective across Rau's tribunal projects: *The Moscow*

Trials (2013), *The Zurich Trials* (2013), and *The Congo Tribunal* (2015). In '(P(Re))Forming Justice: Milo Rau's Trials and Tribunals,' they illustrate how Rau's re-temporalization of necessary but ultimately non-existent institutions installs utopian, affective institutions that serve as demonstrative alternatives to those of the present. All three performances exist in a temporality formerly occupied by apathy. The meeting of internal anger with external outrage produced by these trials and tribunals counters the lack of care that characterizes the apathy of the original or ongoing events. Uncovering how these performances should be understood as 'pre-formations', Climenhaga argues that Rau's tribunal theater serves as a call to justice and the installation of a caring, engaged – but liminal – jurisdiction that considers the needs of the immediate future by reimagining contemporary institutions of the present.

As these examples show, current court case performances do not only bring a continuation of courtroom dramas based on artistic-historical re-enactments. Theater is also founding futuristic tribunals that pre-enact laws and legislation that previously did not exist, or which are not supported by the authorities. These alternative courts no longer focus on the past to draw lessons for the present, but rather focus on the present, the future, or the imagination. Deliberately changing the dramaturgy of the courtroom by including alternative forms of jurisdiction, contemporary artists rethink the ways in which the legal system is preoccupied with judgement and objectivity. In doing so, they make room for marginalized or unheard voices. In this sense, they resemble the iconic international courts, such as the Nuremberg Trials (1945-1946) after World War II or the Truth and Reconciliation Commission in South Africa (1996), that sought to set up people's tribunals that really listened to broader public opinion. Hence, contemporary artistic tribunals not only raise awareness on the specific political subjects they treat, they also critically question the courtroom as an institution of judgement and justice (Nellis "Enacting Law").

In this sense, **Shlomit Cohen-Skali**'s contribution, 'Empathy at the Crossroads,' discusses the role of empathy in what she calls 'Legal docu-performances' (LDPs). These are theatrical re-enactments of legal cases that have already been decided by the court but are transferred into a theatrical setting. Cohen-Skali differentiates between affective and cognitive empathy in LDPs by tracing their

theatrical means within three performances: *Kastner* (1985) by Lerner Motti, *The Hearing* (2015) by Renana Raz, and *Demonstrate* (2017) by Daphna Zilberg. Even when the performance is no more than a reenactment of the original court case, adhering strictly to the proceeding's *verbatim* material, Cohen-Skali argues that it may lead to questions about the extent that the legal system is capable of handling difficult moral dilemmas. As such, the article examines the nexus between empathy and engagement, both at the level of the performances themselves and at the level of change in public discourse.

In 'Legitimately Incongruous: Exploring Artistic and Legal Interplays in *A Game of War* (2021),' **Sixtine Bérard** examines the filmed mock trial *A Game of War* (2021) by the Flemish legal-artistic collective TWIIID. Their (mock) trial between Samson Kambalu and Gianfranco Sanguinetti delves into the intricate legal and artistic aspects in the specific context of copyright. Bérard argues that *A Game of War* can be seen as both an inquiry and a dialogue, serving simultaneously as a re-enactment of the preceding court case and as a pre-enactment of what a lawsuit regarding similar issues could look like in the future. Consequently, the film opens new avenues for dialogue, while fostering a deeper understanding of the intricate interplay between artistic expression and the complex web of legal frameworks.

As these contributions illustrate, the (p)re-enacting principle offers an important strategy with which to rethink systemic ways of enacting law and to reflect, instead, upon new imaginaries beyond regular proceedings. Although theater remains a non-event that does not have the coercive power to change reality directly, the most important political stake of these artistic endeavors seems to be their ability to question both the topic discussed within the trial and the courtroom as an apparatus in itself. By rethinking, deconstructing, and reconfiguring the theatrical dramaturgy of the courtroom on stage, a powerful meta-narrative is installed that can cause individual spectators to think through stubborn systemics within the courtroom in particular and society in general (Nellis "Enacting Law").

This is illustrated by legal and performance scholar **Klaas Tindemans** in the final article of the first installment. In his contri-

bution, Tindemans analyzes three recent courtroom dramas that attempt to give shape to the moral and political indignation about 'Fortress Europe': *Necropolis* by Arkadi Zaides (2020), *Het Salomonsoordeel* (*The Solomon's Judgment*) by Ilay den Boer (2020), and *Simple as ABC #7: The Voice of Fingers* by Thomas Bellinck (2023). All three performances refer to Hannah Arendt's topical question: "Who guarantees the right to have rights?" (Arendt 343). While an increased de-subjectification of refugees attempting to reach a place of asylum is a constant in the state policies of European countries, various theater-makers try to restore the migrant's identity as a (legal) subject. However, the question arises of whether artistic representations of immigration issues sufficiently tackle the political challenges of global mobility. In 'The Resilience of Borders: Law and Migration in Contemporary Performances', Tindemans argues that although borders are impenetrable, reinforced again and again thanks to what is supposed to be a democratic consensus, documentary theater may design a counter-universe, testing it against an audience that is urged to suppress their cynicism through imagination.

The performances discussed in the first five contributions vividly demonstrate that theater can function as a bridge between law and justice. In times of societal turmoil, intricate political landscapes, and social challenges, 'theatrical court case performances' emerge as a powerful tool to facilitate communication among individuals who might otherwise be hesitant to confront pressing issues. The performing arts, in this context, present novel avenues for exploring 'artistic justice.' While the artistic rendition of a courtroom may not possess the same authoritative and punitive force as the law, its ability to bring contemporary issues to the stage and envision innovative approaches to addressing injustices through an alternative legal framework transcends the inherent limitations of our conventional legal system, which operates within a confined regulatory framework. The distinct genre of a 'theater of justice' compellingly illustrates that the performing arts hold the potential to impact reality, either directly or indirectly, and influence how individual audience members perceive and engage with this reality (Nellis, "All Rise!"). Furthermore, as the subsequent section elucidates, these artistic endeavors may even serve as a source of inspiration, influencing the methodologies employed within the judicial system itself.

Law and Theater

In the second installment, we observe how scholars, in recent years, have started exploring the potential of integrating the previously discussed theatrical techniques to dismantle legal procedures and redirect them back into the legal system itself. **Marett Leiboff**, in her monograph *Towards a Theatrical Jurisprudence* (2019), contends that both the judiciary and the theater share the task of continuously bringing attention to instances of injustice and the failures of the legal system, along with their contextual nuances. Leiboff posits that the 'theatricalization' of law serves as a pivotal avenue for cultivating justice within criminal law. Through her concept of 'Theatrical Jurisprudence,' she aims to challenge fundamental assumptions inherent in legal thinking. Rather than relying solely on logic and reason, she argues that the judiciary is intrinsically linked to the individuals behind it – their backgrounds, assumptions, and the unconscious images they employ to animate and make sense of abstract legal principles. This, she asserts, is law's inherent theatricality.

In her contribution to this special issue, titled 'Creating Spaces in Law as a Practice of Theatrical Jurisprudence,' Leiboff intentionally introduces an unconventional and initially challenging perspective. At first, the article may seem a bit odd and difficult to follow. However, Leiboff argues, this is intentional. She urges the reader to bear with her and experience the importance of theatricalization for any case or lawsuit firsthand. Without the ability to theatricalize the law, Leiboff argues, lawyers and judges merely fill in words to create meanings. However, the way in which words and experiences are filled in at court and at a crime scene can be vastly disparate. 'Theatrical Jurisprudence,' for Leiboff, is not merely a historical reactivation through reconstruction or re-enactment of the crime; instead, it serves as a prompt to inquire about how to instill responsiveness and awareness into contemporary legal entities that aspire to achieve justice. This contribution contends that 'theatricalization' can reveal the stakes involved when the law falters or when there is an absence of proper legal functioning. In essence, Leiboff argues that law has to theatricalize in order to open up new spaces for justice.

Correspondingly, in his article on 'The Judiciary's Theatrical Achilles' Heel: Acting the Fool (RAF members) compared to Acting in Bad Faith (Alex Jones),' **Frans-Willem Korsten** contends that the theatrical

nature of the judiciary – the live theatricality of jurisdiction – remains essential when people are to be shown that justice is being done. In his analysis, he turns to several cases in the United States of America. Korsten 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. Relying on Johan Huizinga's definition of the 'spoilsport,' someone who pretends to play a game while aiming to destroy it, Korsten considers defendants like Jones, acting in bad faith, to be a real threat to the judiciary (11). For spoilsports try everything to delay, obstruct, derail, complicate, or multiply court cases. Acting in 'bad faith,' then, works at the interstice between events in court and the court case's public dissemination through social media platforms.

Likewise, in her contribution, 'Performing Institutions: Trials as Part of the Canon of Theatrical Traditions,' **Rocío Zamora-Sauma** explores the dual nature of legal proceedings' inherent theatricality. While such theatrical elements can effectively capture public attention and raise awareness for significant legal issues, they also present a potential for exploitation by those aiming to undermine the legitimacy of these proceedings, as exemplified in the 2013 genocide trial in Guatemala, commonly known as the 'Ixil Trial.' During this trial, the defense strategically utilized the media to portray the proceedings as a theatrical spectacle. This deliberate portrayal served to erode the legitimacy of the trial and sow doubt about the fairness of its outcome. Nevertheless, the media also played a crucial role in dispelling these misconceptions, highlighting that the Ixil Trial was in fact not a farcical legal process. Ultimately, Zamora-Sauma's contribution provides a clear illustration of how the Ixil Trial exerted a profound impact on mobilizing various sectors within the public sphere through media channels.

Sean Mulcahy and **Kate Seear** subsequently redirect our focus from the court of law to parliamentary scrutiny committees, which undertake the task of 'performing' human rights assessments of legislation. In their article, 'Backstage Performances of Parliamentary Scrutiny, or Coming Together in Parliamentary Committee Rooms,' the authors propose that examining parliamentary human rights scrutiny through a performance lens prompts critical inquiries into the audiences and impacts involved. This perspective emphasizes the publics' witnessing and how this act is influenced by the performance,

considering the access, comprehension, and responsibilities of the actors involved. Advocating for a reconfiguration of parliamentary spaces to engage public audiences, their research proposes training parliamentary actors to recognize the impact of their human rights scrutiny work on audiences. In this sense, the authors provide a more nuanced understanding of the parliamentary scrutiny process and advocate for improved public engagement strategies.

In 'Legislative Theatre and Modern Slavery: Exploring a Hyperlocal Approach to Combating Human Trafficking,' **Sofia Nakou**, **Nii Kwartelai Quartey**, and **Stephen Collins** also discuss ways to enhance broader public engagement. The Boalian theater techniques of Act for Change (AfC), a Ghanaian applied theater company that uses performance to address issues of modern slavery and human trafficking taking place within their community, take center stage in this contribution. AfC's projects serve as a significant community forum, offering a supplementary dimension to state-led initiatives. The authors illustrate that grassroots organizations like AfC are very effective in applying a hyperlocal approach, emphasizing community knowledge and networks. While community action cannot replace statutory instruments or state-led initiatives, initiatives like those proposed by AfC are a potentially significant and underdeveloped complementary tool in the fight against modern slavery, placing the community and the survivor at the center of change.

The final article in this special issue focuses on the call for Ecuadorian acts of symbolic reparation following human rights-related crimes perpetrated in Ecuador between 1983 and 2008, as investigated by the ad-hoc Truth Commission installed afterward. In 'From the Truth Commission Report to the Stage and the Museum: The Artistic Dislocation of Violence from the Ecuadorian Chapter of 1983 to 2008,' **Jorge P. Yánez** and **Andrés Aguirre Jaramillo** illustrate that the monetary dimension is a crucial but insufficient aspect of comprehensive victim reparation for serious human rights violations. Symbolic reparations, seeking acknowledgment and recognition through the restoration of honor and truth, hold value not only for individual victims, but is an integral part of a social fabric. However, textualist reparative measures that lack visual representation, relying solely on linguistic references, fall short of invoking a deep and sensitive collective memory. Commemorative plaques in Ecuador illustrate this limitation, emphasizing the need for a Memory Center mandated

Figure 2. The last picture of Sanda Dia, taken by one of the Reuzegom Members on December 5 2018. The picture was circulated through the media at the family's request

by the Victims Act, which remains unfulfilled to date. In Ecuador, theater and the performing arts remain an untapped resource for government-led memory-building, offering a potential avenue for individual victim narratives to permeate the collective consciousness and shape the country's aesthetics of memory.

On Justice – Regarding the Pain of Others

During the second day of the Sanda Dia trial in 2023, a poignant picture took center stage. This photograph depicted Dia, completely drained and soaked, lying in the grass. Sven Mary, the legal representative of Dia's family, presented this disturbing image to the court. While the eighteen defendants rightly sought not to be recognizably portraited in photographs without consent during the

trial, Mary highlighted that Dia himself never had the opportunity to grant permission for this specific photograph – the last image of him, albeit barely, alive. The picture was taken on the evening of December 5, 2018, after the infamous 'fish sauce test' and was subsequently eagerly shared within the enclosed *WhatsApp* group of the Reuzegom corps. Mary not only showcased the photograph during the public hearing but also ensured its online dissemination through public and social media platforms, as explicitly requested by Dia's family. Their intent was for individuals to witness firsthand the deplorable state Dia was in after the grotesque, ten-hour ritual during a two-day hazing that subjected the pledges to cold temperatures, dehydration from alcohol and constant vomiting, and acts of urination and defecation.

In *Regarding the Pain of Others* (2003), Susan Sontag explores the role of images, particularly photographs, in shaping public perception and understanding of human suffering. She delves into the ethical and moral implications of such images and discusses how they influence public opinion. One key argument in this study is that images of human suffering can elicit a range of emotional responses from viewers. However, she also examines the ways in which these images are used in the media, questioning the impact they have on the viewer's understanding of distant and often complex realities. There now exists a vast repository of images that haunt us, and yet, in modern life, it also seems normal to turn away from these images because they simply make us feel too bad:

> That we are not totally transformed, that we can turn away, turn the page, switch the channel, does not impugn the ethical value of an assault by images. It is not a defect that we are not seared, that we do not suffer *enough,* when we see these images. Neither is the photograph supposed to repair our ignorance about the history and causes of the suffering it picks out and frames. Such images cannot be more than an invitation to pay attention, to reflect, to learn, to examine the rationalizations for mass suffering offered by established powers. Who caused what the picture shows? Who is responsible? Is it excusable? Was it inevitable? Is there some state of affairs which we have accepted up to now that ought to be challenged? (91)

While the verdict in the Sanda Dia Affair condemned and sentenced the eighteen Reuzegom members, numerous questions linger unanswered. Undoubtedly, the image of Dia lying in the grass evoked moral indignation among a broader audience. However, as Sontag contends, the efficacy of such images in conveying the true depth of human suffering is limited due to the desensitization that results from constant exposure to images of violence and tragedy: "We don't get it. We truly can't imagine what it was like" (108). Each picture, each image, and every past event is seen in some setting. To comprehend what causes the 'Pain of Others', we posit that the rule of law must be theatricalized. Only then can justice be genuinely served.

In a broader context, all the articles comprising this special issue grapple with the 'Pain of Others,' whether it involves refugees and migrants, survivors of genocide and human rights violations, victims of corrupt legal systems, civil rights protestors, or artists. Previous research has already demonstrated how theater addresses issues from the legal system to establish 'artistic justice' outside the courtroom when official legal procedures prove inadequate. The first five articles continue this trend, spotlighting specific performances where the arts complement, adjust, or deconstruct and reconstruct the legal system. Conversely, the remaining six articles diverge from the legal system, drawing inspiration from the theater. By applying theatrical techniques in classrooms, parliamentary scrutiny rooms, reparative operations, courtrooms, and people's tribunals, these examples illustrate how the performing arts foster empathetic and progressive spaces, both within and beyond conventional courts. Consequently, theater can offer strategies that contribute to creating a reflective environment to reevaluate legal systems. In the case of Sanda Dia, initiatives such as those described in the following articles could provide significant community forums, placing survivors, family members, and the wider community at the center of attention. Seeking acts of symbolic restoration and recognition holds undeniable value for a generation traumatized by this horrendous crime, its legal proceedings, and the outcome of its trial. In this sense, the performing and visual arts might provide a space where people can gather to contemplate the 'Pain of Others,' and where empathy can effectively transform into engagement, striving not only for 'artistic justice' but for a more just society at large. Therefore, this special issue on 'Theater and Law' is indeed an exploration of theater, law, and justice, though not necessarily in that order.

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Works cited

Antwerpen 26 mei 2023 2019, AR 2022/CO/393. Accessed 22 Nov. 2023.

Arendt, Hannah. *The Origins of Totalitarianism*. Harcourt Brace & Co, 1973.

Arjomand, Minou. *Staged: Show Trials, Political Theater, and the Aesthetics of Judgment*. Columbia University Press, 2018.

Daeninck, Philip. "'Is de uitspraak in de zaak Sanda Dia te mild of zijn zoveel andere uitspraken repressief?'" *Knack*, 1 June 2023. Accessed 22 Nov. 2023.

De Coninck, Douglas. *Ontmenselijkt: Achter de schermen bij studentenclub Reuzegom*. Pelckmans, 2022.

Decré, Hanne. "Het arrest over de dood van Sanda Dia ontleed: waaraan zijn de Reuzegommers schuldig? Waaraan niet? En waarom?" *Vrtnws,* 2 June 2023. Accessed 22 Nov. 2023.

Diehl, Paula. *Performanz des Rechts.* Akademie Verlag, 2006.

Dorsman, Leen. "From *Natio* to *Corps* (1575-1820): the Birth of a New Type of Student Association in the Netherlands." *Collected Wisdom of the Early Modern Scholar: Essays in Honor of Mordechai Feingold,* edited by Anna Marie Roos and Gideon Manning, Springer, 2023, pp. 43-60.

Huizinga, Johan. *Homo Ludens: proeve eener bepaling van het spel-element der cultuur. Tjeenk Willink, 1938.*

Huybrechts, Pieter. *Sanda Dia: de doop die leidde tot de dood*. Das Mag, 2021.

Korsten, Frans-Willem. *Art as an Interface of Law and Justice: Affirmation, Disturbance, Disruption.* Hart Publishing, 2021.

Leiboff, Marett. *Towards a Theatrical Jurisprudence*. Routledge, 2019.

Münkler, Laura, and Julia Stenzel (eds.). "Einleitung: Inszenierung und Recht – Funktionen, Modi und Interaktionen." *Inszenierung von Recht*, Velbrück Wissenschaft, 2019, pp. 8-18.

Nellis, Steff. "All Rise! Jurisdiction as performance/performative language." *Forum Modernes Theater*, vol. 32, nr. 2, 2021, pp. 3-41.

—. "Enacting Law: The Dramaturgy of the Courtroom on the Contemporary Stage." *LATERAL*, vol. 10, no. 1, 2021.

Peters, Julie Stone. "Theocracy Unwired: Legal Performance in the Modern Mediasphere." *LAW & LITERATURE*, vol. 26, no. 1, 2014, pp. 31-64.

Peters, Julie Stone. *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and*

Early Modern Europe. Oxford University Press, 2022.

Punch, Maurice. *Crime and Deviance in the Colleges: Elite Student Excess and Sexual Abuse*. Bristol University Press, 2022.

Read, Alan. *Theatre & Law.* Bloomsbury Publishing, 2016.

Sontag, Susan. *Regarding the Pain of Others.* Penguin Books, 2003.

Tindemans, Klaas. "Voices of Law and Justice: The (Re-)enactments of Legal Discourse in Tricycle's Tribunal Plays and IIPM's Trials." *EASTAP*, vol. 3, 2021, pp. 288-337.

Notes

1 See, for instance: Leen Dorsman, "From *Natio* to *Corps* (1575-1820): the Birth of a New Type of Student Association in the Netherlands." *Collected Wisdom of the Early Modern Scholar: Essays in Honor of Mordechai Feingold*, edited by Anna Marie Roos and Gideon Manning, Springer, 2023, pp. 43-60.

2 See the official verdict in: Antwerpen 26 mei 2023 2019, AR 2022/CO/393. Accessed 22 Nov. 2023.

3 For more information on the Reuzegom corps itself, I refer to Douglas De Coninck, who wrote the book *Dehumanized: Behind the screens of the Reuzegom student corps* (*Ontmenselijkt: Achter de schermen bij studentenclub Reuzegom* in Dutch, 2022). Pelckmans, 2022.

4 This has always been the case. On the influential tradition of jurisprudential thought about law as a performance practice, see: Julie Stone Peters, *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe.* Oxford University Press, 2022.

Theater and Law

The Irruption of Real Violence: The Open Dramaturgy of Theatrical Mock Trials and Milo Rau's *The Moscow Trials*

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This article introduces a pathway for considering the political in theatrical performances which simulate an open and undetermined judicial proceeding directed at an audience, here termed Theatrical Mock Trials. The article presents a definition of the mock trial as an educational practice, decodes its theatricality, and discusses its pedagogical benefits in developing political insight and critical thinking. Employing the logic of the mock trial, the article proposes conceptualizing Theatrical Mock Trials through their postdramatic open dramaturgy. This dramaturgy, it is argued, devises a space within such theatrical trials for the emergence of the real, and by that provokes critical spectatorship. The article then analyses Milo Rau's *The Moscow Trials* (2013) as a Theatrical Mock Trial and demonstrates how its open dramaturgy resulted in the irruption of real violence. Such dramaturgy of Theatrical Mock Trials, it is argued, engaged the audience in a political and critical surveying of the authoritative judicial mechanism.

Keywords: political theater, mock trial, irruption of the real, Milo Rau, The Moscow Trials.

Throughout law school I avoided participating in any mock trials. The make-belief of the mock trial experience appeared to be solipsistic, which did not sit well with my political ideals of justice-doing in the legal system. I opted for practicing my novice legal skills doing clinical work, dealing with *real* cases of *real* clients whose *real* human rights were infringed. For the course of four years, I was able to avoid the pretence of mock trials. The day following my final exam in the exhilarating subject of Evidence Law, I began my service as a lawyer in the public sector. I was deployed for two months of mandatory training largely focused on criminal law advocacy. You guessed it; it included a mock trial which could not be avoided.

I remember the stress-inducing environment, in which many of us were working hard to prove our potential as future lawyers; an atmosphere that revealed who of us would go to which lengths to win a case. I also vividly remember the intense pretending involved in that performance. Not only was there a requirement to 'perform' the role of a lawyer, but there was also straightforward acting within the preparation towards, and performance of, the mock trial (for example, a senior lawyer pretended to be a defendant suffering from severe mental illness, while others took on the role of witnesses with overly, and often needlessly, developed backstories). This was a revelatory experience for me; the simulation of a trial exposed its politics, the power dynamics it served, its justice-doing pretence.

This article proposes a pathway for considering the political in Theatrical Mock Trials, meaning, performances that simulate an open and undetermined judicial proceeding which are not conducted for training purposes but are rather directed at an audience. To do so, I will first present the mock trial practice and decode it through Theater Studies terminology. Then, in describing the pedagogical benefits of conducting mock trials, specific attention will be given to their impact on developing political insight and critical thinking among the participants. This will allow me, at the center of this article, to conceptualize the form of Theatrical Mock Trials. I will argue that the open dramaturgy of Theatrical Mock Trials devises a destabilized postdramatic space for the emergence of the real, and therefore carries a political potential for provoking critical spectatorship. This paradigm will be applied to Milo Rau's *The Moscow Trials* (2013) as a Theatrical Mock Trial, demonstrating how its open dramaturgy resulted in the irruption of real violence, producing an

unsettled aesthetic space for enduring a complex cultural conflict. I will argue that the employment of an open dramaturgy in Theatrical Mock Trials charges works such as *The Moscow Trials* with political momentum, inviting the audience to engage in political and critical spectatorship of the simulated authoritative judicial mechanism.

1. The Mock Trial – A Practice and its Theatrical Decoding

Legal scholar Andrew Lynch traces the history of mock trials[1] in the common-law tradition to medieval times:

> The practice of mooting is buried in early legal history. [...] the genesis of moots can be traced back to the establishment of the Inns of Court of medieval times. Young men residing at the Inns as apprentices took instruction from their seniors and were required to perform in moots over several years before they could be admitted as practitioners. (Lynch)[2]

Lynch lays out three key features of mooting, then as now: (a) trainees assume advocate roles and perform them before a simulated bench; (b) they argue the law before that bench, based on a hypothetical scenario; and (c) they are expected to answer questions the bench presents regarding the case, their arguments, or the law, probing aspects the trainees might have not considered in their preparation. Nowadays, conventional mock trials typically involve teams of students representing a fictional client facing a fictitious legal problem, whose performance of advocacy regarding that problem is judged by students, practicing attorneys, law faculty or, on occasion, members of the judicial branch of government (Knerr et al 27).

Decoding the practice of mock trials through theater studies terminology illustrates the theatricality inherent to this pedagogical apparatus. Mock trials resemble theater as they straightforwardly require the participants to *pretend* to represent a *fictitious* party of a *fabricated* case. Mock trials are not actual trials, but rather "dramatizations that have the form of a trial" (Posner 2111).[3] Mock trials are thus etched in *mimesis*, as they, quite literally, operate as a mimicking of court proceedings. More significantly, it is crucial for their pedagogy that they entail more than a simple structural

simulation of a trial's progression. To best simulate actual trials, mock trials deliberately summon the unrehearsed (for instance, in the form of a surprising question from the judge or an unplanned declaration from a witness), and thus necessitate extemporization in reaction to the live and unexpected development of the case in the present of the mock trial event. In their simulation, mock trials evoke an essence of liveness. Furthermore, mock trials construct a unique relationship between the event and its audience. At their core, as a form of training, mock trials obligate the critical examination of the performers and their performance, the evaluation of their arguments, and the reaching of a judgement. These simulations are therefore directed at an 'audience' of adjudicators, whose intended role is to judge the performance.

2. Mock Trials as Pedagogical Tools for Developing Political Insight and Critical Thinking

When held within the legal profession, mock trials function as practical training for future attorneys with the goal of better preparing them for 'real-world' advocacy. However, mock trials have become a popular pedagogical tool across a vast variety of disciplines beyond the legal profession.[4] The most obvious pedagogical benefit of participating in mock trials is practicing life-skills such as public speaking and collaborative work. Yet mock trials cultivate another key pedagogical benefit, namely, the development of political insight and critical thinking among its participants.

Justice education scholar Katharine Kravetz stresses that the paramount educational value of mock trials is the invitation extended to the participants to consider matters of morality and justice within the legal process. Mock trials expose students to societal structures and institutional processes, with which they can engage. Students can thus assess "whether these structures and processes are effective, and where they might be modified or changed" (147), discuss "the fairness and morality of the system", and develop a more profound and nuanced outlook on the judicial system (158-59). As acknowledged by sociology scholar Meg Wilkes Karraker, "the mock trial also provides an all-too-rare opportunity to demonstrate how social institutions and actors are inextricably bound together in society"

(134). Furthermore, participation in mock trials provides tools of critical thinking and affords the participants with opportunities to practice them, as "the Mock Trial elevates the process of thinking over the product of thought" (Farmer et al 403). Exploring this significant impact, Karraker details how critical thinking skills are implemented and developed throughout the mock trial:

> Mock trials can direct student thinking toward: the refinement of definitions of social phenomena; the evaluation of the quality of evidence; the search for cause and effect relationships; the testing of assumptions, and the pursuit of logical consistency. (134)

During the mock trial in which I participated, I was given the task of delivering the closing arguments for the defence. This was an intricate role, since the closing arguments cannot be fully prepared in advance as the progression of the trial is yet unknown. Therefore, I was required to be present and attentive throughout the mock trial, observe all that emerged, and work rather quickly. On top of the need to employ rhetorical skills, that role particularly required a critical gauging of the trial as it unravelled – the arguments made by both parties (and the arguments neglected or avoided), the testimonies, the judges' questions and reactions, etc. Moreover, the experience of mimicking the legal performance provided me with the tools to study this performance from the outside, and revealed the performativity of the law and its mechanisms.[5] In doing so, the mock trial fractured the justice-doing façade of the legal performance and exposed what it sought to conceal: the forceful exercising of authority. The mock trial experience was fundamental in the development of my critical outlook of the law.

Such profound political impact inherent to the participation in mock trials leads me to the questions at the core of this article: could such political efficacy be applied in a theater simulating a trial before an audience? Could such political momentum be transferred from the realm of pedagogy (meaning, from the mock trial's participants) towards the realm of theater (meaning, to the audience)? The valuable pedagogical benefits of participating in a mock trial, I will now argue, can be reconceived into the potential political efficacy of a form of theater I will term 'Theatrical Mock Trials'.

3. Theatrical Mock Trials and their Open Dramaturgy

I propose to conceptualize the form of a Theatrical Mock Trial for performances that simulate an open and undetermined judicial proceeding directed at an audience. This term is rooted in the intended beneficiaries of the event, and thus in its function. While mock trials are intended to operate as a pedagogical apparatus upon their participants, works of theater are *a priori* intended to operate upon an audience. This shift therefore dictates a transformation of the function of mock trials into Theatrical Mock Trials: these works are not conducted for a pedagogical aim, but are rather trial simulations aimed at raising a question of political importance. Such works include, for example, Roger Bernat and Yan Duyvendak's *Please, Continue (Hamlet)* (2011), Osman Nuur and Lara Staal's *Europe on Trial* (2018), as well as Milo Rau's *The Zurich Trials* (2013), *The Congo Tribunal* (2015), and *The Moscow Trials* (2013), with the latter being at the center of this article.[6]

Theatrical Mock Trials construct a performative simulation of a judicial proceeding. While the extent of structural simulation of a trial varies between different performances, at their core, Theatrical Mock Trials present a case and follow a set of conventional procedural stages. Yet, the simulation does not conclude at a simplistic structural resemblance to the trial's procedure or form. The performative simulation in Theatrical Mock Trials, like in mock trials, delivers a profound imitation of the essentially extemporaneous characteristic of the legal performance in a fair trial. While performances of Theatrical Mock Trials differ in the scope of their rehearsal process and level of dependence upon pre-written texts, they quintessentially necessitate that: (a) the verdict, the end, is not predetermined, but is *de facto* reached in the present of the performance; and (b) the deliberately spontaneous and live progression of the trial in the present of the event.[7] This attribute ties the simulated theatrical performance to the legal one it replicates through the cruciality of liveness shared by both.[8] For this study of the Theatrical Mock Trial I will refer to this attribute as 'open dramaturgy'.

The notion of such an open dramaturgy can be positioned within the postdramatic thought, reflecting the perceptions of postdramatic theater as "more presence than representation, more shared than

communicated experience, more process than product, more manifestation than signification, more energetic impulse than information" (*Postdramatic Theatre* 85). This *Theater of Situation*, as suggested by Hans-Thies Lehmann:

> Highlight[s] presence (the doing in the real) as opposed to re-presentation (the mimesis of the fictive), the act as opposed to the outcome. Thus theatre is defined as a process and not as a finished result, as the activity of production and action instead of as a product, as an active force (energeia) and not as a work (ergon). (*Postdramatic Theatre* 104)

To re-introduce the pedagogical benefits of mock trials as the political efficacy of Theatrical Mock Trials, I propose to explore their open dramaturgy through the political potentiality in the emergence of the real. Lehmann suggests that the emergence of the real on a postdramatic stage is not unnoticeable, accidental, or disturbing to the performance, but rather intentional and critical. The irruption of the real, as Lehmann outlines it, is not just the appearance of the seemingly real, but it is "the unsettling that occurs through the indecidability whether one is dealing with reality or fiction" (*Postdramatic Theatre* 101).[9] The boundaries between the aesthetic, the signifying, and the extra-aesthetic, the signified, are porous, and a postdramatic theater leads the spectator to experience this desired ambiguity. Lehmann proposes that the ambiguity generated by the irruption of the real is key for the political in contemporary postdramatic theater practice:

> One precondition of the tragic – and as we may add now: of the political in theatre – is the momentous undermining of key certainties: about whether we are spectators or participants; whether we perceive or are confronted with perceptions that function 'as if' or for real; whether we dwell in the field of aesthetic make-belief or in real actuality. ("A Future for Tragedy?" 99)[10]

The result of this practice, argues Lehmann, "is the necessity for the participants to make a decision about the nature of what they live through or witness" ("A Future for Tragedy?" 100).

Therefore, when the performance of the judicial process is simulated in a theatrical performance, the open dramaturgy of Theatrical Mock Trials transforms the political insight gained by trainees who participate in a mock trial into political acuity gained by the spectators. The open dramaturgy of Theatrical Mock Trials devises a space for the undetermined, the spontaneous, the impromptu, to emerge, and through that – the real. As I will soon demonstrate, when this dramaturgy is positioned within the setting of the Theatrical Mock Trial, it relentlessly unsettles the boundaries between fictional and real as the event progresses in the present of the performance. The outcome, the verdict, is of a lesser importance than the process which led to it, the advocacy, the judgement itself, the justice-doing mechanism. Through their focus on the presentation of the process, on the doing of justice and not just the outcome, Theatrical Mock Trials confront the audience with an ambiguity between the 'as if' and the 'for real,' provoking critical spectatorship.

4. *The Moscow Trials* and the Political in the Open Dramaturgy

Over the course of three days in March 2013 at Moscow Sakharov Center, Swiss director Milo Rau set up *The Moscow Trials*.[11] This tribunal conducted a theatrical (re)trial of three court proceedings held by the Russian judicial system which accused and convicted artists and curators of "inciting religious hatred" under article 282 of the Russian Criminal Code. The three trials regarded the exhibitions *Caution, Religion!* (2003) and *Forbidden Art 2006* (2007), both exhibited at Sakharov Center, and the musical demonstration by the Russian activist punk band Pussy Riot (2012).

In the original trials, the curators of the exhibition *Caution, Religion!* were accused of exhibiting artifacts that were deemed offensive to the Russian Orthodox Church. The exhibition closed within five days from opening, after a group of armed religious protesters affiliated with the church vandalized it (Bernstein 423-24).[12] The curator of *Forbidden Art 2006*, together with the former director of Sakharov Center, were accused of inciting religious hatred for featuring 23 artifacts, of which display was previously banned in Russia, in an exhibition intended as a protest against censorship.[13] Lastly, following their performative protest at the Cathedral of Christ

Figure 1. Maxim Shevchenko (Senior Prosecutor Expert) addresses the jury. *The Moscow Trials* (2013). © IIPM _ Maxim Lee

the Saviour in Moscow, the members of Pussy Riot were accused of inciting religious hatred in a trial which led to the imprisonment of three of the group members (Riccioni and Halley 211-13, 224).[14]

4.1 The Simulated Open Dramaturgy and the Irruption of Real Violence

Whereas the original trials were not held before a jury, *The Moscow Trials* sought to simulate a judicial process following the structure of a criminal jury trial according to Russian law. As a Theatrical Mock Trial, this simulation extended beyond the mere structure of the judicial proceeding and towards reproducing its open and undetermined qualities. The performance did not rely on a predetermined text, but rather implemented an open dramaturgy, generating an aesthetic

space for the impromptu litigation of the cases. That is not to say that the performers did not plan their statements, arguments, and lines of interrogation ahead of the performance[15] – meaning, in a way, they did 'rehearse' for the performance – but that the progression of the trial resembled the extemporaneous progression of an actual fair trial.

In an interview regarding the performance, Rau stated that while the process of the trial itself "was extremely disciplined and organized according to Russian legislation", the negotiations and the answers of the participants were not predetermined: "Neither I nor the participants of each side knew anything of the content of each speech. It was the only proper and sensible way of conducting the trial so that its outcome would remain open and free" ("Pussy Riot's Moscow Trials" 281). This distinction carries political weight as the simulation replicated the progression of a fair trial (and a trial by jury), and not that of a show trial, in which the verdict is predetermined regardless of the evolution of the trial, the arguments made, or the evidence presented.[16] As articulated by Milo Rau in an article published in *Documenta* in 2016:

> The name already shows that one of our major inspirations for these trials were the communist show trials – perfectly planned and controlled spectacles that were used by the regime to intimidate political opponents and influence the general population. ("New Realism and the Contemporary World" 131)

> The idea was to show what would happen if the original anti-artistic trials would not have been show trials, set up by the Russian regime and with a predetermined outcome, but real trials. ("New Realism and the Contemporary World" 133)

The Moscow Trials did not merely provide an aesthetic representation of past trials, but was rather a postdramatic performance that's aim was, paraphrasing Rau's *Ghent Manifesto*, not to "depict the real, but to make the representation itself real"; not an artistic representation of real events, but rather, as described by theater scholar Martin Hodoň, "an actual event" in which "the artistic gesture was manifested in its re-existence and realisation" (Hodoň 273).

In his reading of the performance's interaction with the real, Hodoň argues that the performance generated a 'hybrid', merging 'artistic reality' with 'lived reality':

> This artistic strategy focuses more on the reflection of society from the perspective of civic engagement and the socio-political situation, where art is both a fiction and a replica portraying reality, rather than on the achievement of artistic goals. [...] The liminal nature of reenactment represents the merging or fusion of artistic reality with lived reality. The concept of performativity is both self-referential and constitutive, creating an impression of reality. (274)

The artistic strategy Hodoň refers to, I would argue, is anchored in the performance's open dramaturgy, and in how it summons the irruption of the real. In the case of *The Moscow Trials*, this dramaturgy allowed for, and perhaps even invited, an irruption of real violence into the aesthetic theatrical space. That, in three manifestations of violence: (a) violent speech by the performers, (b) authoritative violence by the Russian immigration authorities directed at the performance's creative team, and (c) a threat of real violence directed at the performers and the performance itself.

(a) *Violent Speech by the Performers*

Several statements made throughout the performance either justified previous violent actions or constituted new expressions of violence. These statements were made by performers who assumed the role of witnesses for the prosecution, and were directed at the defence. These witnesses – real people portraying themselves – praised violent acts against artists and art which do not conform to their perception of Russian Orthodox Christianity, explicitly expressing hateful and hostile views, some of which were devastating to hear.

However, it seems, both parties were interested in these violent expressions. The prosecution and its witnesses wanted to voice their views and persuade the jury in their righteousness; and, on occasion, the defence provoked such expressions of religious fanaticism as a strategy used for the purpose of displaying it before the

jury as a means of questioning its legitimacy. For instance, during the heated proceeding of the Pussy Riot case, an artist who unequivocally supported the prosecution was called to testify. When interrogated by the defence attorney, he 'warned' her to be careful when talking to him ("I warn you. Don't cross me again"). The judge stated that he cannot threaten anyone in the courtroom. He replied by saying: "I just tell her to be more careful." This tactic move by the defence exposed the jury to the extent of this witness's violent attitudes for the purpose of discrediting him and therefore weaken the prosecution's argument.

While the witnesses' views themselves were known to both parties, their impromptu responses were unrehearsed, performed live for the first time in the present of the performance. The heated spirits, the hostility, and the violent expressions which emerged during the performance thus appeared to be painfully real. Yet the demonstration of violence extended beyond the aesthetic when real authoritative violence disrupted the performance.

(b) *Authoritative Violence by the Russian Immigration Authorities*

During the second day of the performance, the Russian immigration authorities obstructed the trial. The performance, as poignantly put by German Studies professor Helga Kraft, "was apparently regarded by the Moscow authorities as a dangerous reality" (43). They interrogated Rau and the creative team about their visa permits. Rau had to stop the proceedings, and the judge called for a break explaining to the audience that "our director is a Swiss citizen and has problems with the immigration authorities". The defence attorney was then transformed from pretending to represent the defence in the simulated trial to representing Rau in his real, actual case before the Russian authorities. When Rau was taken into another room in the museum, the prosecutor Maxim Shevchenko, a well-known nationalist journalist and public figure in Russia, intervened and defended the progression of the performance. He warned the officers that their actions are damaging to Russia's international reputation: "You jeopardize the performance in the museum, an action by modern art. You also compromise the Russian state, because all this here will be reported in the international press tomorrow". In a riveting turn of events, the authoritative threat to the theatrical

judicial performance – the artistic expression – was safeguarded by the prosecutor, who represented the Russian interest seeking to restrict offensive artistic expressions.

The real governmental action irrupted into the performance, interrupted it, and jeopardized it, through the demonstration of corrupt authoritative force. As noted by Kraft: "Rau could not have gotten a better dissemination of his intentions to expose abuse of the law" (43).

(c) *A Threat of Actual Violence*

A threat of actual violence directed at the performers and the performance itself occurred after the interruption of the Russian authorities. Members of an Ultra-Orthodox association in Moscow gathered outside the museum threatening to disrupt the performance. In an interview, a member of the group stated that they were informed that there was a performance happening to defend Pussy Riot and criticize the Orthodox Church. The prosecutor Shevchenko, yet again, spoke to the protestors in defence of the performance: "We are staging a discussion here. I ask you not to interrupt us. This is not an anti-orthodox action. I am an Orthodox myself, I give you my word." The protestors entered the space and watched the performance for some 15 minutes before leaving.

These interruptions are a striking testament to the unsettled boundaries between fictional and real within this Theatrical Mock Trial. This aesthetic event had real ramifications. It "evoked and made visible", as Rau stated, "something which previously lay hidden" ("Pussy Riot's Moscow Trials" 281). I would argue that it made visible the scope of authoritarian violence inherent to the Russian judicial system.

These demonstrations of real violence in *The Moscow Trials* disrupted the 'security' of the situation of theater, and thus unsettled the aesthetic distance between the audience and the performance. They destabilized the conventional theatrical dichotomy between fictional and real to the extent that the spectators were to wonder how they should react to, and thus judge, the action of the performance. They compelled the audience to wonder if these moments could or could not have occurred in reality, and why. In the destabilization of fictional and real, the theatrical simulation of the trial was made both

Figure 2. Representatives of the Russian immigration authority check the ID of Milo Rau (director). Behind Rau is Maxim Shevchenko (Senior Prosecutor Expert), next to Milo Rau sits Maxim Krupskiy (prosecutor). *The Mosow Trials* (2013) © IIPM _ Maxim Lee.

transparent and opaque, invisible and evident. Such ambivalence was invited by the active force of the open dramaturgy, oscillating between aesthetic representation and real actuality, making the theatrical representation itself real. The open dramaturgy devised a dynamic space for the real to emerge; and through the emergence of the real, the audience could judge concealed structures of injustice, violence, and abuse of power which were exposed.

4.2 The Political Efficacy of *The Moscow Trials'* Open Dramaturgy

The performance of *The Moscow Trials* was held one year after the convicting verdict in the Pussy Riot trial; a trial which, as described in the abstract of Rau's documentary film about the performance, "was only the latest episode in a ten-year series of show trials of artists and dissidents, staged by Putin's system to prevent any form of democratic change". The performance of *The Moscow Trials* did not just re-enact the past, but was charged with a current political impulse. These re-enactments were "an act for the future: it only seems as if one speaks about the past. It happens in the now and takes place for the future" (Rau, "Pussy Riot's Moscow Trials" 284). The demonstrations of violence which emerged through the theatrical simulation presented the audience with haunting and current questions about the power dynamics and the abuse of power within their local judicial system: who could use violence within the performance and "get away with it", who deemed themselves entitled to power or the use of violence, at whom was the violence directed, and who was debilitated by the violence or the threat it posed?

In the documentary film, Marat Guelman, a Russian curator who supported the defence in the actual trials of *Caution, Religion!* and *Forbidden Art 2006*, shared his views on the value he found in this performance. He reverberated the political significance in presenting the tension between real and staged:

> The project is especially attracting because there is no independent court in Russia. This is why there is a *staged* trial here today. For me it is more believable than a *real* one. Who knows, perhaps this *staged* trial will turn out to be an alternative to conventional case law. (Emphasis added)

This notion was reiterated by Yekaterina Samutsevich, a member of Pussy Riot who participated as one of the defendants in the performance. To her, this re-enactment of the experience of being accused in the actual trial was an opportunity to (re)tell the story of Pussy Riot. This performance, she believed, offered an opportunity "to finally express one's opinion, which is absolutely impossible to do in a *real* court" (emphasis added). Similarly, the defence lawyer stated she had hoped *this* court would listen, and that *this* verdict would

be the one that should have been reached in the *actual* court. In (re) telling the stories of these trials within a theatrical space, she hoped her arguments would resonate beyond the replicated tribunal and impact public opinion about the Russian regime, and about freedom of artistic expression under its control.

These sentiments suggest that the 'staged' Theatrical Mock Trial constructed a more trustworthy justice-doing mechanism than the 'real' trial, the actual trial – the show trial? – which was held by the Russian judicial system. This Theatrical Mock Trial was believed to allow for independence, fairness, and objectivity which were perceived unattainable within an actual Russian court. The simulation's open dramaturgy exposed the faults of the local unjust system, and by that formed an aesthetic and political alternative for Russian authoritative justice-doing mechanisms. As articulated by Rau, "*The Moscow Trials* are a retake ('Wiederaufnahme'), not a repetition. It concerns not the simulation of a juridical process, but its opposite: the enabling of a process, which was not possible when it was originally conducted" ("Pussy Riot's Moscow Trials" 281).

These sentiments in praise of the Theatrical Mock Trial, when voiced by the people defending the artistic expression, are perhaps rather self-evident. The defendants were found guilty in an actual court and sought an alternative court to re-try their cases. However, as the Russian authorities won the previous trials, it raises a question as to why would Shevchenko, a Russian anti-liberal nationalist journalist, participate in such a theatrical re-trial? As noted by Rau, while it initially was difficult to convince them to participate ("Pussy Riot's Moscow Trials" 282), both parties of the performance "got the opportunity to make their case again before a jury of real Muscovites" ("New Realism and the Contemporary World" 131). The prosecution sought to prove that the actions tried in this Theatrical Mock Trial were illegal and offended the believers. The prosecution saw itself as the defender of Russia, and of its values; as representing traditional values in face of liberal depravity.

Therefore, the political in this performance of a Theatrical Mock Trial, it seems, was the possibility to endure conflictual dialogue when it was impossible – or, at least, less possible – to do so in an actual courtroom. Through its open dramaturgy, this Theatrical Mock Trial created a space for the voicing of conflict. This space

was not devoid of violence, as we have seen; yet it endured it, and repositioned it for the judgement of the audience. As a counter-effect to the irruption of real violence, this Theatrical Mock Trial also allowed for the emergence of dialogue; not a peaceful one, occasionally not even cordial, and at times blatantly hostile, but a dialogue nonetheless.

This political significance of *The Moscow Trials* resonated during the parties' closing statements, yet it was simultaneously both revered and undermined. It appeared that both opposing parties argued the same thing: these cases were not just about the artists themselves or the artistic expressions themselves; these trials were about the identity of Russia, its values, and its future. These cases, dealing with the conflict between religious feelings and the freedom of artistic expression, when argued in the simulated tribunal, evoked grandiose arguments. The abstraction of the case by the advocates of both opposing parties elucidates a tension within the possibility for critical intervention of Theatrical Mock Trials. On the one hand, such performances allow for a deeper critical and political examination of the matter at hand. When theatrically simulated, a particular case in a Theatrical Mock Trial is charged with an allegorical quality. In *The Moscow Trials*, the cases transcended into serving as an index of a culture war, of the future of a nation, of its values and identity. On the other hand, this abstraction might negate the performance's political potential. If the Theatrical Mock Trial solely revolves around the participants' opinions and not necessarily about what is just in the case at hand, about voicing political beliefs and not about finding concrete arguments to support them or answering tough questions about them – such generic exchange might eliminate the possibility for real political impact. It can be deemed to mirror the critique posed by Legal Realism,[17] meaning that there is no objective justice to be sought in trial (or in its simulation) which is beyond the personal or the cultural; that judicial rules are a rhetorical façade for a system which masks the ability to justify any and all arguments.

The performance of *The Moscow Trials* concluded with the jury's verdict. As to the first question posed for their judgment, "did the accused perform acts that offended the believers and incited hate against them?" three jurors voted no, three voted yes, and one abstained. As to the second question, "did the defendants wilfully intend to incite hate against believers or offend their feelings?" five

jurors voted no, one voted yes and one abstained. When realizing the outcome of the trial, the sole juror who voted 'yes' on both questions rejected the fairness of the performance, saying: "this whole event was organized just to incite more hate and to show that the Russian people support these petty crooks."[18] This revolt against the fairness of the Theatrical Mock Trial has somewhat exposed the performance's pretence of devising an alternative and fair justice-doing mechanism, yet such exposure did not necessarily weaken its claim for political efficacy. This self-reflexive revolt against the perceived fairness of the artistic expression itself, I would argue, illustrated the possibility inherent to this theatrical form to endure such revolt, a possibility unattainable within the Russian judicial system. It was a revelatory expression of frustration in need of voicing and, perhaps more importantly, in need of hearing.

Consequently to the acquitting verdict, Shevchenko claimed that the verdict had been wrongly interpreted by the court. He stated that the division of the jury votes illustrated the division of Russian society, and that the trial did not end either with a guilty or a not guilty verdict. The defence attorney explained why, according to criminal procedure, this was in fact an acquitting verdict. In response, Shevchenko announced that "this verdict is not justified, the court is not trustworthy." In a deviation from the original trials, the prosecution lost in the Theatrical Mock Trial. To them, upon their loss, the simulated proceedings instantaneously lost their legitimacy. The deviation in the outcome between the actual and the simulated trials, however, revealed the profound accuracy of the simulation: it exposed that losing will not be tolerated by the Russian prosecution. The euphoria of the dialogue, of a prosecutor who, just a day earlier, protected the trial from violent interruptions, was then shattered. But was the possibility for political change on the audience shattered with it?

Before concluding, it is necessary to speculate about the efficacy of such critical interventions were a Theatrical Mock Trial to take place within a distinctly different – say, democratic – political context. Would Theatrical Mock Trials carry the same political magnitude when held within extremely undemocratic regimes if performed within the context of a democratic one (for example, in Rau's *The Zurich Trials*)? While this discussion extends beyond the scope of this article, it is vital to remember that judicial systems exercise

Figure 3. Maxim Shevchenko (Senior Prosecutor Expert) with Yekaterina Samutsevich (Pussy Riot) © IIPM _ Maxim Lee

authoritative violence even within democratic regimes.[19] Therefore, I would assert that Theatrical Mock Trials present analogous political momentum within varied societal contexts.

Conclusion

As the atrocities of the war led by Vladimir Putin in Ukraine persist, on January 2023 Pussy Riot released a short film titled *Putin's Ashes*.[20] The video captures twelve Pussy Riot members burning a 10x10 foot portrait of the Russian president, performing rituals, and casting spells against him. As violent visuals such as stabbing the ground with knives are paired with texts like "we will eat you alive" and "sharpening a knife for Putin" – aestheticized, yet poignant, violence

is presented in protest of the horrendous real violence perpetuated by Putin on Ukraine soil. Created by Nadya Tolokonnikova, who was sentenced for two years imprisonment in a Siberian penal colony following the Pussy Riot trial, it is blatantly evident that Pussy Riot's agonising political art against Russian mechanisms of authoritative violence and oppression prevailed regardless of, or perhaps despite, their decade-old trial.

In this article I sought to identify the political in Theatrical Mock Trials. Beginning by decoding the theatricality in the practice of mock trials, this article stressed the pedagogical cruciality of the extemporization during the live development of the event. Such extemporal pedagogical simulations, I argued, expose societal structures and institutional processes, and encourage their participants to employ critical thinking in evaluating the system's fairness and morality. Projecting these findings back onto theater, this article conceptualized the form of a Theatrical Mock Trial: a theatrical simulation of an open and undetermined judicial proceeding. I argued that the open dramaturgy of Theatrical Mock Trials devises a postdramatic space for the undetermined, the spontaneous, the impromptu, to emerge, and through that – the real. Reverberating the logic of the mock trial, such works invite the audience to engage in political and critical examination of the authoritative judicial mechanism.

Analysing Rau's *The Moscow Trials* as a Theatrical Mock Trial, this article demonstrated how the performance's open dramaturgy allowed for, and perhaps even summoned, an irruption of real violence into and through the aesthetic space. By disrupting the 'secure' situation of theater and unsettling the boundaries between fictional and real, these irruptions urged the audience to judge the exposed structures of injustice within the Russian judicial system, its functions and its violence, the forces it serves and its abuse of power. *The Moscow Trials* created a space for the voicing of a complex cultural conflict; a space which was not devoid of violence, yet it endured it, and repositioned it for the judgement of the audience. Anchoring the political of *The Moscow Trials* in its open dramaturgy, the article illuminated how this Theatrical Mock Trial allowed for the emergence of dialogue – an adverse and tempestuous one, and therefore, perhaps, agonizingly real.

Works cited

Agamben, Giorgio. *State of Exception*. The University of Chicago Press, 2005.

Arjomand, Minou. *Staged: Show Trials, Political Theater, and the Aesthetics of Judgment*. Columbia University Press, 2018.

Ball, Milner S. "All The Law's A Stage." *Law and Literature*, vol. 11, 1999, pp. 215-221.

Benjamin, Walter. "Critique of Violence." *Walter Benjamin: Selected Writings*. Edited by Marcus Bullock and Michael W. Jennings, Volume 1 1913-1926. The Belknap Press of Harvard University Press, 1996, pp. 236-252.

Bernstein, Anya. "Caution, Religion! Iconoclasm, Secularism, and Ways of Seeing in Post-Soviet Art Wars." *Public Culture,* vol. 26, no. 3, 2014, pp. 419-448.

Farmer, Kevin, Stevin Meisel, Joe Seltzer and Kathleen Kane. "The Mock Trial: A Dynamic Exercise for Thinking Critically About Management Theories, Topics, and Practices." *Journal of Management Education* vol. 37, no. 3, 2012, pp. 400-430.

Hart, H. L. A. "Formalism and Rule-Scepticism." *The Concept of Law*, 3rd ed. Oxford University Press, 2012, pp. 124-154.

Hodoň, Martin. "MILO RAU. AND JUSTICE FOR ALL." *The Slovak Theatre*, vol. 70, no. 3, 2022, pp. 270-281.

Karraker, Meg Wilkes. "Mock Trials and Critical Thinking." *College Teaching*, vol. 41, no. 4, 1993), 134-137.

Knerr, Charles R., Andrew S. Sommerman and Suzy K. Rogers. "Undergraduate Appellate Simulation in American Colleges." *Journal of Legal Studies Education*, vol. 19, 2001, pp. 27-62.

Kozinski, Alex. "In Praise of Moot Court–Not!" *Columbia Law Review*, vol. 97, no. 1, 1997), pp. 178-197.

Kraft, Helga. "Milo Rau as Influencer: A New Realism in Theater." *Theater*, vol. 51, no. 2, pp. 2021, pp. 38-47.

Kravetz, Katharine. "The Mock Trial Course in Justice Education." *International Journal of Phytoremediation*, vol. 21, no. 1, 2001, pp. 147–168.

Lehmann, Hans-Thies. "A Future for Tragedy? Remarks on the Political and the Postdramatic." Postdramatic Theatre and the Political, edited by Karen Jürs-Munby, Jerome Carroll and Steven Giles. Bloomsbury Methuen Drama, 2013,; pp. 87-109.

—. *Postdramatic Theatre*. Translated by Karen Jürs-Munby. Routledge, 2006.

Lipman, Masha. "The Absurd and Outrageous Trial of Pussy Riot." *The New Yorker*, 7 August 2012.

Lynch, Andrew. "Why Do We Moot? Exploring the Role of Mooting in Legal Education." *Legal Education Review*, vol. 7, no. 1, 1996.

Murphy, Kim. "2 Moscow Museum Officials Fined for "Blasphemous" Art Exhibition." *Los Angeles Times*, 29 Mar. 2005.

Myers, Steven Lee. "Moscow Journal; Art vs. Religion: Whose Rights Will Come First?" *The New York Times*, 2 Sep. 2003.

Nellis, Steff. "Enacting Law: The Dramaturgy of the Courtroom on the Contemporary Stage." *LATERAL*, vol. 10, no. 1, 2021.

Paramonova, Maria. "Criminal Case Was Initiated Against the Organizers of the Exhibition "Forbidden Art-2006"." *Human Rights House Foundation*, 29 July 2008.

Peters, Julie Stone. "Legal Performance Good and Bad." *Law, Culture and the Humanities*, vol. 4, 2008, pp. 179-200.

Posner, Richard A. "Mock Trials and Real Justices and Judges." *Cardozo Law Review, vol.* 34, 2013, pp. 2111–2155.

Rachid, Mohamed A., and Charles R. Knerr. *Brief History of Moot Court*. 2000.

Rau, Milo. "Ghent Manifesto." *NTGent*, 1 May 2018.

—. "New Realism and the Contemporary World: The Re-Enactments and Tribunals of the International Institute of Political Murder." *Documenta* vol. 34, no.2, 2016, pp. 121-137.

—. "Pussy Riot's Moscow Trials Restaging Political Protest and Juridical Metaperformance." *Anthropology, Theatre, and Development*, edited by Alex Flynn and Jonas Tinius. Palgrave Macmillan UK, 2015, pp. 279-285.

Read, Alan. *Theatre & Law*. Palgrave Macmillan UK, 2016.

Riccioni, Ilaria, and Jeffrey A. Halley. "Performance as Social Resistance: Pussy Riot as a Feminist Avant-Garde." *Theory, Culture and Society*, vol. 33, no. 7–8, 2021, pp. 211-31.

Roberts, Sarah. "Staging Reverberations of Past Events: A Documentation and Analysis of the Poetics and Politics of Sibikwa Theatre's Chapter 2, Section 9." *Journal of Contemporary Drama in English*, vol. 5, no. 2, 2017, pp. 251–76.

Rogers, Nicole. "The Play of Law: Comparing Performances in Law and Theatre." *Queensland University of Technology Law and Justice Journal*, vol. 8, no. 2, 2008, pp. 429-443.

Schwirtz, Michael. "Russian Curator Subpoenaed Over Censored Art." *The New York Times*, 13 May 2008.

Shcherbina, Tatiana. "Forbidden Art Verdict: They're in Mourning for Soviet Censorship." *OpenDemocracy*, 15 July 2010.

Smith-Spark, Laura. "Russian Court Imprisons Pussy Riot Band Members on Hooliganism Charges." *CNN*, 17 Aug. 2012.

Tayler, Jeffrey. "What Pussy Riot's "Punk Prayer" Really Said." *The Atlantic*, 8 November 2012.

Tomlin, Liz. "Political Dramaturgies of Affect: Anthony Neilson's God in Ruins and The Wonderful World of Dissocia." *Affects in 21st Century British Theatre: Exploring Feeling on Page and Stage*, edited by Mireia Aragay et al. Palgrave Macmillan, 2021, pp. 85-104.

Notes

1 The scholarship on this topic occasionally uses the term "moot court" or "mooting" instead of "mock trial." Conventionally, mock trials simulate trials in lower circuit courts, and thus incorporate the process of proving facts and providing evidence, witness testimony and direct- and cross-examination, as well as, usually, having the arguments directed at a jury. Moot courts customarily simulate the procedure of an appellate court, meaning, they deal with questions of law more than with proving facts, and in which the advocates direct their argument to a judge or a panel of judges and answer their questions. However, for cohesion purposes, this article will refer to both as mock trials.

2 For further historiography of moot court see Rachid and Knerr.

3 It can alternatively be argued that, as a training apparatus before the performance in actual trials, mock trials are a form of rehearsal. In his critique of the inadequacy of mock trials, American appellate judge Alex Kozinski stated that they are "dress rehearsals for a play that is never performed" (189).

4 The use of mock trials as a pedagogical tool has been implemented beyond the walls of law schools, i.e. in criminology, nursing, chemical education, counsellor training, economics, science and philosophy courses to name a few (Farmer et al 401–02).

5 For further research on the performativity of law, which exceeds the scope of this article but upon which it builds, see, among others, Ball, Rogers, and Peters.

6 Such works are sometimes referred to, and analysed as, theatrical tribunals or Tribunal Theater (see, for instance, Nellis).

7 'Courtroom dramas' as well as the plethora of theatrical adaptations of documentary legal material will therefore not be considered Theatrical Mock Trials as they rely on prewritten text.

8 Echoing Alan Read (with a grain of salt), the theatrical performance "has nothing on the legal system when it comes to foregrounding the palpable, and necessarily 'open' present of its workings" (14).

9 As insightfully put by theater scholar Sarah Roberts: "Lehmann's use of 'irruption' (rather than eruption) is particularly productive. The word denotes an invasion or sudden (or otherwise violent) breaking inwards rather than an outward explosive action" (259).

10 As with many facets of postdramatic theater, Lehmann's conditional link between the political and 'real actuality' is hardly uncontested (see, for example, Tomlin).

11 This analysis is based on Rau's documentary film about the performance, courtesy of Fruitmarket Arts and Media.

12 For more on *Caution, Religion!* see Murphy; on its violent destruction see Myers.

13 For more on *Forbidden Art 2006* and the subsequent trial see Schwirtz and Paramonova; on the verdict and its political significance see Shcherbina.

14 For a translation and interpretation of the Pussy Riot performance see Tayler; on the trial see Lipman; on the verdict see Smith-Spark.

15 In an interview conducted by Lea Fistelmann, Rau was asked about the rehearsal process for this performance. Rau described that there was a significant phase of preparation before the performance, which included conversations with the participants, the formulation of an indictment, an agreement on who was to be invited, and making "clear arrangements about speaking time and the whole ritual in itself" ("Pussy Riot's Moscow Trials" 281).

16 For more on the attributes of show trials see Arjomand 4.

17 For more on Legal Realism and its derived concept of Rule Skepticism see, for example, Hart.

18 'Petty crooks' referred to the artists put on trial.

19 See, for instance, Benjamin and Agamben.

20 Available here. I was fortunate enough to catch its screening at Deitch Gallery in Los Angeles in February 2023.

(P(Re))Forming Justice: Milo Rau's Trials and Tribunals

–– Lily Climenhaga (GHENT UNIVERSITY)

Since the founding of the International Institute of Political Murder in 2008, Swiss German theater-maker Milo Rau has gained international attention for his political theater projects. '(P(Re))Forming Justice: Milo Rau's Trials and Tribunals' looks specifically at Rau's trial and tribunal projects: *The Moscow Trials* (2013), *The Zurich Trials* (2013), and *The Congo Tribunal* (2015). It engages with the intersection of the political and the affective in Rau's re-temporalization of necessary but ultimately non-existent institutions to create utopian, affective institutions that serve as demonstrative *alternatives* to those of the present. In uncovering the connection between the aesthetic references of affect and politic, this article connects three performance elements within Rau's projects: (1) the political impulses of these constructed, temporary institutions, (2) their affective power, and (3) the concept and question of justice. Bringing the anarchist concept of *prefiguration*, Frans-Willem Korsten's *apathy,* Olivia Landry's *Theater of Anger,* and Robert Walter-Jochum's *Theater of Outrage* into contact with affect, this article uncovers how Rau's tribunal theatre, in its creation of a jurisdiction located in the future – a prefiguration for what these spaces should look like – serves as a call to justice that breaks with the apathy of the present.

Keywords: Milo Rau, IIPM, NTGent, theater of anger, theater of outrage, preformation

Since founding the International Institute of Political Murder (IIPM) production company in 2008, Swiss-German theater-maker Milo Rau has gained international attention, acclaim, and even incredulity. As a political artist, Rau – alongside his work in the repertoire theater – has facilitated petitions, founded political parties, authored political declarations, staged public marches, and formed assemblies, think tanks, and talk shows that temporarily bring activists, artists, and politicians together in dialogue. The political action projects that have won Rau the most international attention are (arguably) his performative trials and tribunals: *The Moscow Trials* (2013), *The Zurich Trials* (2013), and *The Congo Tribunal* (2015/2017/2020/2021).

Rau's trials and tribunals are 'prefigurative,' which Mathijs van de Sande defines as a "political action, practice, movement, moment, or development. A space where political ideals are experimentally actualised in the 'here and now', rather than hoped to be realised in some distant future. Thus, in prefigurative practices, the means applied are deemed to embody or 'mirror' the ends one strives to realise" (230). Rau's prefigurative tribunals function by constructing of *alternatives*, as Rau explains:

> [T]rials and tribunals offer a chance to deconstruct things that seem too complex to understand, such as the globalised economy. By bringing the different 'actors' together in one constellation […]. It also gives you the opportunity to rethink what kind of institutions we actually need to be able to address the challenges facing us today, such as global inequality or the climate crisis. ("Why Art" 111)

Looking at both the political and the affective, this article connects three elements of the performances: (1) the political impulses of Rau's constructed, temporary institutions, (2) their affective power, and (3) the concept and question of justice as it impregnates these aspects of the projects.

As the title '(P(Re))Forming Justice' identifies, Rau's trial and tribunal projects are more than *just* a performance, these projects – particularly *The Congo Tribunal* – are about forming institutions that better serve the needs of the present by (re)distributing justice evenly (or, at the very least, more evenly). The theatrical tribunal

acts as a *preenactment* of an institution that does *not yet* exist – a future-oriented alternative – that provides a socio-political critique of existing judicial institutions and legal structures such as the International Criminal Court, the trials act as a *reaction* to specific examples of past failures of existing judicial systems in Russia and Switzerland. What we see in these institutions' one-time performances – which Rau calls *symbolic institutions for the future* – is a liminal alternative institution that integrates the reforms Rau and his team identify as necessary to transnational judicial institutions alongside a prefigurative alternative.

'(P(Re))Forming Justice' explores Rau's trials and tribunal, which I refer to as *reactments* because of how they react against the injustices and failures of existing institutions, in two parts: first, 'A Symbolic Institution for the Future,' explores the theory behind these projects and what it means to construct an alternative in a performative and inherently (one could even say inescapably) fictive space, while clarifying the distinction between *reenactive* trials like *Moscow Trials* and *preenactive* tribunals like *Congo Tribunal*. This section draws on existing theories and analyses of politically engaged art alongside Rau's own reflections about his reactments and anarchist theory. The second section, 'Apathy – Anger – Outrage,' examines how Rau and his team construct affective institutions that respond to the failures of existing judicial institution by filling in their absences and reinvigorating actors, spectators, and a wider public, producing anger and outrage to counter the overwhelming force of apathy. This section draws on Frans-Willem Korsten's concept of apathy as a disruptive force denoting a lack of care. Considering the numbing power of apathy, this section then reflects on the tribunal's awareness-producing power, building on political artists Stephen Duncombe and Steve Lambert's artistic equations "YOU + AWARENESS = CHANGE" and its pluralizing inverse, "CHANGE = PEOPLE + AWARENESS" (26). With these equations, Duncombe and Lambert centralize awareness – namely the artist's ability to raise awareness through politically engaged art – in the production of change (26-28). This final section of the article goes on to explore awareness as an important aspect of affective energy, engaging with Oliva Landry's Theater of Anger and Robert Walter-Jochum's Theater of Outrage in respect to Rau's work.

A Symbolic Institution for the Future

In *Art as an Interface of Law and Justice: Affirmation, Disturbance, Disruption* (2021), Frans-Willem Korsten identifies art as a space – what he calls an interface – that brings "unresolved issues of justice" together and makes them "into something of the present and the future" (4). Art, as a meeting space – which is also how Rau views his art – inherently creates an affirmative, disturbing, or disruptive force. By uniting conflicting and often polarizing perspectives in the performance space (pro-Putin, ultra-Orthodox Russian talk show hosts with religion- and regime-critical artists in *Moscow Trials*; mothers whose children have been massacred with the militia leaders and the minister in charge of police who failed to intervene in *Congo Tribunal*), Rau's politically engaged theater provides the opportunity to tear a small hole in the fabric of the law, creating a crack in the habitus of law and justice dictated by a neoliberal economic system. Performative trials and tribunals offer a space to highlight the failures of the existing legal system, because, as Korsten puts it, "art is considered as the medium that makes this palpable" (18-19).

The crucial difference between art and on-the-ground politics is marked by liminality: activism and real-world politics are long-term, ongoing processes, while activistic art is temporary and project-based. Rau is aware of the freedom offered to him and his projects through the status of *just art*:

> Kunst wird aber nie Machtpolitik sein. Die Frage 'Was muss man tun, damit die Dinge sich ändern' ist eine machtpolitische. Diese Frage kann die Kunst realpolitisch nicht beantworten, nur symbolisch. Der Künstler ist ein Vor-Augen-Führer, ein Vorbereiter, aber kein Politiker. Kunst und Macht lassen sich nicht vereinen, das ist die spießige Wahrheit. ("Zukunft (1)" 240)[1]

According to Rau, the artist and artistic intervention fulfill a revelatory, emergent function that can show what a change (i.e., the alternative) could look like. For Rau, this means constructing performative institutions based on real-world necessity such as a trial in Moscow for left-wing visual and performance artists divorced

from the political influence of the ultra-Orthodox religion, or a tribunal in the DRC that holds multinational corporations responsible for benefitting from and attributing to the instability in the region (240). Rau is acutely aware that the symbolic and, therefore, unreal space of these performative projects is one of the reasons why they are allowed – particularly in conflict zones like the DRC – to take place. He is a theater-maker, not a law-maker, and it is precisely this distinction that gives Rau, IIPM, and NTGent the freedom to stage their performative institutions (Rau, "The Congo Tribunal"). These trials and tribunals transpose potential futures (or, in *Moscow* and *Zurich Trials*, idealized versions of the past) into the present of the live performance. It is an active attempt to create (or perhaps more accurately inspire) change with the hope that the symbolic, performative act will be picked up and carried forward into reality by those outside the theater.

These institutions do not *yet* exist but are necessary: "ein *richtigerer* als die *richtigen*" ["a trial more real than the *real* one"] ("Affirmation" 16; "In My Projects" 202). Performances construct fictive spaces using symbolic means, seeking pragmatic results: "Es wurden Realitäten in einem artifiziellen Rahmen geschaffen, den es vorher als Institution noch nicht gab" [Realities were created within an artificial framework, which didn't exist previously as an institution] ("Man muss" 16-17). For Rau, the symbolic act takes place in the meeting of the spectator (on various levels and positionalities) and performance, which serves as a light for the future ("Das Symbolische" 24-25). However, Rau's *symbolic* should not be interpreted as ethereal and intangible, but as concrete and specific (living and breathing): symbolic acts performed seriously and unironically, treated *as if* they were real, legally legitimate institutions. For both *Congo Tribunal* and *Moscow Trials,* this meant finding real cases, real crimes, even pre-existing trials to serve as precedence for the fictional institution. For *Congo Tribunal*, the three precedence cases (one for each day of the tribunal) are (1) the BANRO case ("Has the Canadian mining company BANRO benefited from political instability during the war?"), (2) the Bisie case ("Are multinational corporations not being held legally accountable for human rights violations because their commitment in Africa is essential for Europe's raw material and energy policy?"), and (3) the Mutarule case ("Does uncertainty and violence continue in Eastern Congo because too many local and international players benefit from the conflicts?") ("Hearings/The Banro Case"; "Hearings/

The Bisie Case"; "Hearings/The Mutarule Case"). *Moscow Trials* uses a three-day, three case structure: The first sitting examined the case of *Caution! Religion* (2003), an art exhibition denounced by the Orthodox Church for its use of religious imagery, vandalized by local hooligans, and eventually condemned by the Russian Parliament for inciting interreligious hatred. The second sitting looked at another Sakharov Center exhibition, *Forbidden Art 2006*, which used religious imagery to discuss the question of institutional censorship and was similarly received by the Church. The third and final day of the trial was dedicated to the most internationally notorious of the artist trials: the trial of the punk-rock protest group Pussy Riot for their short political action performance *Punk Rock Prayer* in Moscow's Cathedral of Christ the Saviour on February 21, 2012. Although Rau asserts his projects are not based in a conditional tense, an as-if – "Es gibt in meinen Projekten kein Als-ob, keine Reserve" ["In my projects there is no as-if, no reserve"] – by removing the central obstacles in the way of such trials, tribunals, and institutions, there is an inherent as-if (*als-ob*) ("Affirmation" 16; "In My Projects" 202).

Reactments construct *alternatives* untethered from divisive politics and ideological differences, marking the utopian element of the projects. Rau's as-if sits in how the alternative is freed from ideological and political blockades present in national and international power structures. These alternatives are simultaneously fictional and factual: the people involved are real, their testimonies are real, the conflict is real, but the institution is not legally sanctioned and has no real power. While *The Congo Tribunal* concludes with a guilty verdict to each of its accusations, these verdicts are not carried on a judicial, legislative level into the real world – they remain firmly implanted in the unsatisfactory world of art. And when *Moscow Trials* narrowly overturns the original trial's verdict, this, too remains isolated and separate from the real world; the two imprisoned members of Pussy Riot, Nadezhda Tolokonnikova and Maria Alyokhina, continue their sentences after the trial closes. Actual political, social, economic, even cultural change does not occur the institution itself, rather the institution holds the potential to carry forward real change through its participants. This potential lies not in what could be considered the weak verdicts of these events, rather in how they bring people (both locally and internationally) together with knowledge in an expansive, albeit not unproblematic, way – again, CHANGE = PEOPLE + AWARENESS.

When Rau was named artistic director of the Belgian cultural institution Nederlands Toneel Gent (NTGent), he opened his five-year term (2018-2023) with the publication of *The Ghent Manifesto*. The first of these ten rules acts as a credo for Rau's vision for the future of NTGent: "It's not just about portraying the world anymore. It's about changing it. The aim is not to depict the real, but to make the representation itself real" (NTGent Team 280). Rau is not the first (nor will he be the last) artist to suggest theater's potential to facilitate real world change. Bertolt Brecht famously called for a theater that extended beyond the physical performance space, exploding into the street. We can parallel the first rule of *The Ghent Manifesto* with the educational and world-shifting goals of Brecht's didactic theater, which theater scholar Marc Silberman explains as follows: "Brecht's point of departure assumes that any representation of reality is always a construction of reality, and the goal of constructing a particular reality is to gain knowledge about it in order to undertake actions effectively that change it" (173). Like Brecht and many current political theater artists, Rau subscribes to the idea that theater, by engaging with the immediate present, can attack and perhaps even alter the established order. The performance space offers artists the freedom of a space for radical imagination – temporarily emancipated from the confines of neoliberal governance and (il)legality – allowed to exist under the guise of art and theater. Disruptive – but mostly within the limits of the given order – and thus perceived by (particularly Western) power structures as more annoying than potentially dangerous (Korsten 13-14; 20-23).[2] Rau's theater thus fits within a long, established tradition of a transformative political art – variously called artivism, (socially) engaged art, emergent art, community-based art, dialogic art, interventionist art, participatory art, collaborative art, social practice, and many more (Malzacher 17). Rau's reactments undertake a process Malzacher describes within engaged art practice as moving beyond "relational reflection or aesthetics. It takes a stand, or provokes others to take a stand. It does not only want change; it wants to be an active part of this change, or even to initiate it" (13).

However, this form of politically engaged theater is not unproblematic in its aspirations. In 'Protest Performance: Theatre and Activism' (2019), English theater critic Lyn Gardner identifies a central issue with what could be called *mainstage political theater* (i.e., repertoire-based political theater produced by state-subsidized

Figure 1. Milo Rau during an investigative film shoot with Congolese soldiers
© 2015 Fruitmarket, Langfilm & IIPM _ Eva-Maria Bertschy

cultural institutions like NTGent).[5] She highlights that this form of theater largely takes place within a closed, homogeneous place: "political theatre seldom really changes anything, because unlike performances out on the street, it can easily be ignored. It takes place behind closed doors, plays to a limited audience made up of these who can afford a ticket and to an often liberal-leaning crowd who agree with the message of the play in the first place" (2). Gardner goes on to define what she calls *activist theater*, which – inspired by Augusto Boal's Forum Theater, which itself builds the base of Brecht's didactic theater – has the potential to "inspire change" through audience empowerment that uses a (temporary) community to uncover alternatives (2). In *Legislative Theatre* (1998), Boal identifies the theater as a space where actors and spectators alike can "improvise solutions or alternatives to the problems put forwards by the show" and where "potentialities can be 'act-

ualised' or developed: the potential becomes actual. The person can re-dimension himself, investigate himself, find himself, recognise himself" (67-68).[3] Likewise, political artists Duncombe and Lambert identify the radical imagination and transformative potential of an interventionist political art:

> Art allows us to imagine things that are otherwise imaginable [...] [it] allows us to say things that can't be said [...] Art, if we let it, allows us to take the mundane, imperfect world we live in and combine with radical, idealistic visions of the future. Through creative thinking we use these contrasting visions to form tangible, complex plans that inspire and re-enliven our work and others to join us. It enables us to map our goals against reality, envisioning pathways to a better world that was previously uncharted. (32-33)

Through Duncombe and Lambert, Gardner, Malzacher, and even Silberman's reading of the theory behind Brecht's didactic theater, two central (and interconnected) observations about politically engaged art: outward mobility and assembly.

In a brief digression from the central argument of this article, it must be mentioned that within much of Rau's work, there is a problematic relationship with the issue of authorship. Although it is Rau's name attached to these productions, we cannot ignore the frequently overlooked labour of participants in moving these projects forward. In reactments, Rau and his team provide participants with a dramaturgical frame rather than a scripted encounter. Therefore, what happens within this frame cannot be predicted and can only be simultaneously responded to through processes such as editing of documentary films or editorial features on the event. It is also difficult to discuss these institutions as democratic in a non-symbolic sense, because – as the director/instigator – Rau himself selects and extends invitations to participants, who, in turn, decide whether to participate – there are, after all, no representatives of Banro in *Congo Tribunal* or of Putin's government in *Moscow Trials*.

Returning to mobility and assembly, assembly within Rau's work – specifically, the idea of mobilizing and bringing together people of vastly different backgrounds in a single space (although this, as previously

mentioned, is neither so simple nor transparent as it could be) – is clearly visible in Rau's description of his trial and tribunal projects as quoted at the beginning of this article. This outward mobility is marked by the hope that Rau's enactment will eventually serve as a frame for a real, legitimated trial or tribunal and will be carried forward into the real by the participants in these projects. This is also why Rau describes these performances as a *Möglichkeitsrealismus*, a realism of possibilities ("Das Symbolische" 24). In other words, (at least according to Rau) reactments make the unimaginable imaginable: "Was nicht darstellbar ist, ist nicht denkbar, und das *Kongo Tribunal* hat etwas real gemacht, was vorher nicht einmal in den verrücktesten Träumen vorstellbar war" ["That what cannot be represented is not conceivable, and the *Congo Tribunal* made something real, which was not imaginable in anyone's wildest dreams"] ("Man muss" 16-17). One cannot help but be reminded of Alan Read's suggestion in *Theatre & Law* (2016) that the law not simply echo the real and the community in which it exists, but should provide visions of these, offering a mode for how society should and can be (Read 36-37).

It is important to distinguish between Rau's alternatives. Projects like *Moscow* and *Zurich Trials* construct alternative judicial institutions, however, these institutions are marked not so much by the *als ob* (*as if*) as a *was wäre wenn* (*what if*). There is a significant difference in the temporality of these institutions. A difference that can be partially explained using Rebecca Schneider's writings on reenactment and preenactment. In the introduction to her seminal text *Performing Remains: Art and War in Times of Theatrical Reenactment* (2011), Schneider explains reenactment as "[t]he practice of re-play or re-doing a precedent event, artwork, or act that has exploded in performance-based art" (2). In a 2019 article, Schneider extended this discussion of reenactment into the realm of the preenactment, which she connects and distances from the temporality of the reenactment as such:

> Preenactment, too, presumes future repetition – and thus is always itself a form of reenactment in the making, preenacting reenactment. […] Preenactment seems to say: What's happening in the present isn't really happening now, but it is what will be happening in the future when this preenactment is the past. Much like rehearsal, pre-enactment scripts itself not only toward a future event (which is

> our common way of thinking about it), but anticipates its own *raison d'*être as a matter of the past – the past that it, preenacting toward a coming (re)enactment, will have become. It is thus playing the present as the future's past. (121-122)

Congo Tribunal enacts a tribunal that has not yet happened. It *anticipates* a future (political) event, rather than extrapolating from the tendencies of the past (Marchart 130). Rau and his team imagine, organize, and stage a tribunal for the DRC that considers the role of multinational corporations in the conflict alongside the actions of local groups and individuals, because there is no tribunal for the conflict and never has been. While the production is referential of transnational tribunals and organizations like the International Criminal Court, it does not reference a specific, existing trial or tribunal. In contrast, Rau's earlier tribunal works – *Moscow* and *Zurich Trials* – are more *reenactive*. These productions look backwards instead of forwards in time (although they do contain a gesture of reform for the future). The central thesis of these productions centres around the question: *What would have happened if* (1) the Russian judicial proceedings that found Pussy Riot members guilty (as well as the curators of the two other cases examined by the performance) was a jury trial that followed the Western model, or (2) Switzerland's constitution had space in its provisions about freedom of speech to hold the Swiss right-wing newspaper *Die Weltwoche* liable for its printed attacks against marginalized communities (Switzerland's Muslim and Roma communities).[4]

Rau is also aware of this reenactive impulse in *Moscow Trials*. In a reflection written shortly after his return from Moscow, Rau stated: "'The Moscow Trials' retraced the steps of this story of a state- and church-driven campaign against inconvenient artists. […] [It is] a retake ('*Wiederaufnahme*'), not a repetition. It concerns not the simulation of a juridical process, but its opposite: the enabling of a process, which was not possible when it was originally conducted" ("Pussy Riot's Moscow Trials" 280-281). Words like "retrace" and "retake/*Wiederaufnahme*" indicate the centrality of the original in its re-run. The tense of the central question of these projects are the key distinguisher between projects like *Congo Tribunal* (the preenactive) and *Moscow Trials* (the reenactive): 'Why isn't' versus 'why wasn't'. Yet, the line that draws these two models together is

much stronger than that which divides them. At their core, both the pre- and reenactive reactment are rooted in a rejection – an emphatic declaration of "No!" – that founds the utopian performative, asserting this is how it should have been or how it should be.

What we see in Rau's reactments is a utopian alternative offered by a space of rejection as well as how the director interprets the concept of protest: "protest means saying 'no', but without knowing how it will turn out" ("Art of Resistance" 47-48). This idea of rejection as the foundation for action falls along the lines of what Irish Marxist philosopher John Holloway describes in *Crack Capitalism* (2010):

> Imagine a sheet of ice covering a dark lake of possibility. We scream 'NO' so loud the ice begins to crack. What is it that is uncovered? [...] the No is backed by an other-doing. [...] The original No is then not a closure, but an opening to a different activity, the threshold of a counter-world with a different logic and different language. [...] These are times and spaces in which we take control of our own lives, assume the responsibility of our own humanity. [...] We start from being angry and lost and trying to create something else, because that is where we live, that is where we are. (17; 19-20)

The crack is a rejection of the conditions of the present, which is itself an act of resistance. It is based in a perpetual desire (that is simultaneously naively simple and impossibly difficult) to break from the horrors and injustices of the present and create a different (and inherently non-Capitalist) world in the immediate present (3-7).

Cracks are created through acts of refusal, but these refusals must be accompanied by acts of creation to counter the system in which they find themselves. The plurality of these acts (refusal and creation) is significant. Cracks, according to Holloway, cannot sustain themselves in isolation, only in solidarity: "All around the lake there are people doing the same thing as we are, screaming 'NO' as loud as they can, creating cracks that move just as cracks in ice do, unpredictably, spreading, racing to join up with other cracks, some being frozen over again. The stronger the flow of dignity within them, the greater the force of the cracks" (17). Rau's political actions – as summarized in the director's own words at the beginning of this article – are based in a concept of solidarity. This solidarity is based

in the act of creating otherwise impossible collectives, "bringing the different 'actors' together in one constellation" ("Mitleid (1)" 111; "Why Art" 111). However, in the tribunal and trial format, this idea of solidarity – particularly in the performance of these institutions – is not so simple, because such real-world institutions are based not in solidarity but in productive conflict, where different sides present their, at times, incompatible perspectives and objectives. Both *Congo Tribunal* and *Moscow Trials* result in 100-minute documentaries edited for wider distribution that tidily wrap up Rau's involvement (very specifically the Swiss/European and outsider Milo Rau, who is a visitor to these spaces) with the issue as he departs. We must therefore approach these productions with a certain critical distance, because what we see is seldom the entire story of the potentially messy or uncomfortable encounters.

Increasingly, Rau's tribunals and political projects are about the formation of *networks of solidarity* – to borrow a term from Boal – that will outlast the performance. Rau is certainly not the only political artist to highlight the importance of relationships and networks left behind by artists working in spaces of conflicts that are meant to be picked up and carried forward by participants after the performance. Conflict zone theater scholar James Thompson identifies such traces as the groundwork for future interactions (62), Tim Prentki connects the collective act of creation with the experience of solidarity (60), and Jan Cohen-Cruz highlights the centrality of kinship in the exchange between the artist and community (1-3).

What we see across these, is a call for what Boal describes as reciprocal knowledge (Boal 52). For Rau – and for much of engaged art – knowledge and the expansion of knowledge is a necessary condition for the activistic change desired. Here, we return to Duncombe and Lambert's formulas "YOU + AWARENESS = CHANGE [and] CHANGE = PEOPLE + AWARENESS" (26). We find what simultaneously splits and unites these unscripted, highly ritualized, but dramaturgically plotted and staged trials and tribunals with existing judicial institutions. The judicial system is based in the acknowledged. As Korsten explains, "Law requires officially acknowledged courts as the places where laws, the only valid ones, can be enacted and the decisions are based on which law is operate as the rule" (31). Rau's judicial performatives are about knowledge, specifically the revelation of the unacknowledged. "Knowledge," Duncombe and Lambert explain in


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Figure 2. Stage-set during preparations for the theatre project "The Congo Tribunal" in the theatre hall at Collège Alfajiri in Bukavu © 2015 Fruitmarket

'The Art of Activism,' "is what determines the horizons of our imagination" (32). This is why the expansion of knowledge – marked by an outward-facing dissemination through the performance and its materials (e.g., pamphlets, interviews, mass media), i.e., the act of "trying to change what people know" – is so central to constructing a political theater that can overcome the apathy of neoliberalism through affective practice (32).

Apathy – Anger – Outrage

The Moscow Trials, *The Zürich Trials*, and especially *The Congo Tribunal* exist in a temporality formerly occupied by apathy. *Congo Tribunal* offers the most striking example of this apathy because of the extremes of the situation it represents. Apathy is defined by Korsten in his analysis of *Congo Tribunal* as the absence of care:

> apathy can be traced in an absence, not of this sense of fairness itself, but of any kind of agency around or in relation to it. Apathy denotes a missing form of care, but also missing forms of desire or indignation. The absence of these [...] is captured by the phrase 'I don't care', which can easily become the phrase 'could not care less,' and this in turn can easily become numb silence. In the context of law and justice apathy is measurable in terms of an inability to care, then, an inability that can destroy a feel for law and a sense of justice. Additionally, it is measurable in terms of a lack of desire and indignation. The latter two can be assessed in how intensely people relate to things. Apathy indicates a lack of being related; it implies the inability to respond. (34-35)

Apathy exists very differently in the DRC than in either Moscow or Zurich, a fact that is related to the reenactive-preenactive divide. In *Congo Tribunal*, Rau and his team deal with the Global North's economic apathy – which can be explained in the context of Western consumer society, where the actualities of the means of production are out of sight and therefore out of mind – and with local apathy. Korsten locates this local apathy in a form of survival-based hopelessness, symptomatic of what Achille Mbembé calls necropolises, or death-worlds: "One of the horrors palpable in the situation in the

Eastern Congo, and in almost all cases of unregulated and relentless warfare, is that people have been so hurt and damaged that they no longer can care about anything except bare survival" (Korsten 36). Mbembé identifies necropolises as symptomatic of neoliberal world, where certain lives are deemed worth protecting and others disposable – made objects as they are unmade as subjects – in the name of the vitality, security, and wealth of a specific group (i.e., Europeans or those in the Global North) (Montenegro et al. 142-144). Mbembé describes this process as "the *generalized instrumentalization of human existence and the material destruction of human bodies and populations*" (Mbembé 14; italics in original quote). One could argue that the international contribution of *Congo Tribunal* is the awareness highlighted in Duncombe and Lambert's equations: i.e., making Western audiences in Germany, Switzerland, and beyond aware of the situation in the DRC and the role multinational corporations like BANRO, Glencore, and MPC continue to play in the proliferation of this conflict. Locally, *Congo Tribunal* projects the possibility of hope – something Rau's Congolese audience is eager to embrace, as indicated by the packed auditorium in Bukavu and its subsequent iterations produced independent of Rau in Kolwezi (Korsten 41).

The apathy that *Congo Tribunal* resists and rejects is best summed up as a resistance to how things are (i.e., things do not need remain as they are). In comparison, the apathy *Moscow* and *Zurich Trials* resists is based in the past: We cannot simply accept what happened. The obvious future gesture of this clause is: because if we do accept it, will happen again. In short: "Why isn't?" (*Congo Tribunal*) versus "Why wasn't?" (*Moscow Trials*). *Moscow* and *Zurich Trials* refuse to let sleeping dogs lie, allowing neither the Russian artists' trials nor the inflammatory speech printed in *Die Weltwoche* to settle into the fog of history. These projects do the inverse of the phenomenon Frederik Le Roy identifies in Rau's early reenactments – which are marked by an investigation into why the reenacted events "haven't become *settled history*" (Le Roy 2017; italics in original). Instead, these projects refuse to let incidents that would prefer to be forgotten *settle*, forcing them back into the spotlight.

So much of what Rau does with staged trials and tribunals is tied up with how the temporary spaces are created and brought into being. These performative spaces fall under the purview of what


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Figure 3.
Setting "The Kongo Tribunal" at Sophiensaele Berlin © 2015 Fruitmarket, Langfilm & IIPM Daniel Seiffert

German-Jewish political philosopher Hannah Arendt calls the *space of appearance*. Arendt connects *being* with an *urge to appear*, "to fit itself into the world of appearances by displaying and showing, not its 'inner self' but itself as an individual" (*Life of the Mind* 29). Closely connected to this prerequisite of being, the space of appearance – which Arendt closely associates with the Greek polis – is a liminal space where political actors are both seen and heard. For Arendt, this visibility and audibility is the prerequisite for existing and being viewed as a part of the world (Brennan and Malpas 43; *Portable Hannah Arendt* 447). Just as Arendt understands appearance as "a public self-disclosure through speech in a community," for Rau's projects, delegates' physical presence – particularly non-European ones – is key (Barbour and Zolkos 6). This physical (visible) presence is connected to representation through self-representation, democratic representation, and theatrical/performative representation. The seemingly simple act of bringing people together through five- to ten-minute presentations on a stage has a disclosive function, because appearance correlates with reality and the right to appear (Dean 337).

As Arendt states in *The Human Condition* (1998): "[whatever is denied appearance] comes and passes away like a dream, intimately and exclusively our own but without reality" (199). For Arendt, the space of appearance comes into being "wherever men are together in a manner of speech and action" (Arendt quoted in Knauer 727). In other words, the space of appearance occurs through interaction with others. For Rau, this space – or spaces – of appearance is about visibility, presenting alternative voices: those people directly affected by economic policies and political repressions of the present. Projects like *Moscow Trials* and *Congo Tribunal* construct spaces of active political engagement that recognize differences in experience and different political opinions.

Projects engage with what Maike Gunsilius in "Perform, Citizen! On the Resource of Visibility in Performative Practice Between Invitation and Imperative" (2019) describes as the unevenly distributed resource of visibility: i.e., visibility is a neoliberal commodity (264). Rau's tribunals focus on those events excluded from the neoliberal sphere of visibility in an intersubjective act centered around the visibility and audibility of the witness-turned-subject. For Judith Butler, building on Arendt's groundwork, connects appearance and

public articulation with *intelligibility*, or recognition. Both visibility and intelligibility are intertwined with social, political, economic, and cultural norms and, therefore, inherently connected to power relations (Gunsilius 264-265). This means the questions of "Who is not made visible?", "Who is not made intelligible?", and "Who is not made recognizable?" are just as, if not more, important than the question of "Who is?", because the issue of visibility, intelligibility and recognition is intrinsically political.

All of Rau's trials and tribunals are about the issue of presence, particularly *Congo Tribunal,* because of the severity of situation in DRC and the fact that the first three days of the tribunal took place in the DRC (Korsten 40). There is an awareness in this project that the judiciary is a closed, often exclusionary, space. The presence evoked by reactments engage with theater theorist Diana Taylor's concept of *¡presente!*: "Coming into presence, into ¡presente!, means becoming a 'who' to one another in spaces that withhold recognition, and forging spaces of appearance out of spaces of disappearance" (47). This coming into presence in the reactment are another act of rejection. A rejection of the ways things are or the ways things were. For example, *Congo Tribunal* – as a preenactive event – identifies and rejects the necropolitics applied by the Global North to the Global South that expels the Congolese populace "from humanity" for the sake of Coltan, gold, and other natural resources (121). What emerges through this (albeit temporary) extended space of visibility and recognition is what Rau calls "an act of civil self-empowerment" ("The Truth of Circumstances" 60-61). What Rau creates in Moscow, Zurich, Bukavu, and beyond is an affirmative space, where the anger, sorrow, and experience of the witness are taken seriously and at face value.

Theater and German studies scholar Olivia Landry, in *Theatre of Anger: Radical Transnational Performance in Contemporary Berlin* (2021), identifies a current trend in German theater that she refers to as Theater of Anger. Theater of Anger gives minoritized subjects a space in which to perform anger and perform in anger, in order to speak out against social injustice (4). While Rau's theater undeniably occupies a different space than the post-migrant, Berlin-based anger described in *Theatre of Anger*, Landry's analysis offers a productive frame to engage with the internal mechanisms of the tribunal performance as a re-galvanizing and interruptive force:

> Bringing anger to bear on theatre regalvanizes theatre's capacity as a medium of confrontation, protest, and resistance. For, to paraphrase Fischer-Lichte, the very possibility of theatrical performance emerges from an encounter, a confrontation, an interaction. Theatre interrupts, just as an encounter interrupts. The theatre of anger returns politics to the stage in a direct way as it pioneers new modes of theatre. (18)

Landry, using the affective lens of feminist theorist Audre Lorde, reads anger as "loaded with energy and information" (17). The trials staged in Moscow, Zurich, and Bukavu similarly engage the anger of their participants. Like in the scripted plays of Theater of Anger, rather than pathologizing the anger of Rau's participants as the problem of the individual, projects affirm both the experience of the individual and the situation they react against (25-26). Affirmative anger shows something is wrong with the system that the individual is trapped within: for example, the neoliberal economic system that exports natural resources from the DRC to the Global North without regard for the local populace, or a judicial system so corrupted by government and church influence that political artists have no chance of receiving a fair share within it.

Landry identifies anger as an active emotion: a catalyst for movement that "pursues transformation and change" (32-34). In anger's movement-building potential, we recognize that anger is also a collectivizing and uniting force. For Aristotle, anger is rooted in its capacity to inspire a person to defend others: "The idea that the passions are incited by what occurs within a world of care and concern – parents, children, friends, those loved or close to us – as well as what happens directly to us" (Aristotle qtd. Landry 28). Let us return to the apathy mentioned at the top of this section: namely, apathy as the absence of care. Rau's trials and tribunals react against this apathy and the connected existence of the inhabitants at only subsistence level in the necropolises of the Global South. In the space created, we find what could be called the life-giving (or, in the context of Mbembé's *death-worlds*, life- or subject-returning) power of anger.

Landry explains that "self-worth and care for others are the two conjunctive forces at work in the scene of anger" (28). In the chapter

"Irritation" in *Ugly Feeling* (2005), Sianne Ngai – also drawing on Lorde's wisdom – connects the activating power of anger to the act of justice, stating:

> "The observation that justice conversely requires anger, and cannot be imposed solely by reason, underscores the passion's centrality to political struggles throughout political history" (182).

Korsten similarly notes that the realm of justice is "propelled by desires and fears, feelings of understandable revenge and unresolvable pain, of longing and hope," and identifies the effectiveness of *Congo Tribunal* in how it counters "the missing form of care, but also missing forms of desire of indignation" (9; 35-36). Apathy, in the context of law and justice, can be measured by the inability to care, come together (i.e., "a lack of being related"), and respond (34-35). *Congo Tribunal* created a space where those people impacted on all levels of the crisis in the Eastern Congo came together in a space that made a space of indignation and collective anger possible. A space where "the creation of law that does not stem from a strong norm-world, a *nomos*, but from a strongly felt necessity or desire for a space of speech where the execution of law can take place" (36). The collective anger of the participants (and the hope this collectivity contains) is the affective glue that holds the performance together and creates what Robert Walter-Jochum calls an activist collective, paving the way for post-performance action (161-162; 167).

Walter-Jochum highlights the role of what he calls *Empörung*, outrage, in Rau's political actions: "in Raus Arbeiten übernimmt Empörung die Funktion, denjenigen eine Stimme zu verleihen, die unter den Bedingungen bestehender politischer Institutionen und öffentlicher Diskurse kein Gehör finden" ["in Rau's work, outrage takes on the function of giving voice to those who cannot be heard under the conditions of existing political institutions and public discourses"] (167-168; my translation). Once again, intertwined with issues of anger and outrage, we find questions about the limits of visibility, audibility, and assembly in the public sphere's current constellations. Walter-Jochum identifies three communicative levels of outrage in Rau's theater: (1) the internal, i.e., among participants; (2) the external, i.e., via mass and social media; (3) what can be described

Figure 4. Audience member in the open-mic discussion following the Bisie mine case ("Bukavu Hearings") © 2015 Fruitmarket, Langfilm & IIPM Daniel Seiffer

as the foyer, i.e., the ingroup of Western intellectuals and theater folks who watch these performances (the proverbial choir to whom Rau is preaching) (170-173).

Walter-Jochum's internal Outrage (inter-participant outrage) closely relates to Landry's Anger as an artist driven mechanism that creates the conditions for a theater that responds and speaks out against social injustice. Anger, as Landry uses it, is not bi-directional (between actor and spectator) or multi-directional (among actor, spectator, and those outside the theater), but internal, among creators and actors. This inward directionality calls back to Gardner's critique of political theater as taking place behind closed doors with a limited audience (2). Instead, Anger concerns itself with the embodied subject, "chiefly preoccupied with putting hitherto absent bodies onto the stage" (15). If we use Anger as the internal, binding agent of tribunals and the force that leads the push for post-performance justice in the preenactive tribunal (e.g., the act that cracks the window of possibility for a real tribunal for the Congo) and reform in reenactive ones (e.g., what would happen to Russian artists if we removed the oppressive hand of Putin's government and religion from the courtroom), then Outrage is the hand they extend to their audience and beyond. Namely, a catalyzing affect that is itself indicative of the desired outcome of Duncombe and Lambert's equation: change.

Conclusion: The Performance of Care as the 'Preformance' of Justice

The meeting of internal anger with external outrage produced by these trials and tribunals counters the lack of care that characterizes the apathy of the original/ongoing event. What occurs is a space in which injustice can be unearthed by means of hope – and hope is one of the key features that propels the realm of justice (Korsten 8-9). The anger and outrage cumulate in an outward moving enragement, jointly producing what Marc Léger in *Vanguardia: Socially Engaged Art and Theory* (2019) calls "socially *enraged* art." This art is marked by creators' and participants' refusal to channel their anger and outrage into existing institutions, instead demanding the creation of new, better ones (166). The affective quality Rau taps into is entrenched in a politics of care.

The balance of local performances – featuring local and international participants – and international outreach, extends the spotlight of visibility to Mbembé's necropolises. For Korsten, the hopelessness of the necropolis of the DRC is directly connected with apathy, and apathy with silence (i.e., the lack of a voice). Caring – shocked back to life by the parallel forces of anger and outrage (of which care is also an integral part) – is an antidote to apathy. Taylor, in her analysis of presence and ¡presente!, highlights that caring acknowledges "the interconnectedness between ourselves and others" as well as the absolutely political positionality of caring: "Who cares about the 'over there' when there's so much to care about here?" (122). By bringing those who occupy these death-worlds to the witness stand, into the public sphere, and back to the realm of interconnectedness (a process Taylor calls subjectification), Rau and his team reinvigorate care and transform it into a radical act.

This discussion of Rau's trials and tribunals engages in a theory of alternatives that is rooted in a rhetoric of negation. Rau's reactment is embedded in concepts that surround the insufficiency of past and present institutions to deal with the horrors and injustices of the present and the failures of justice which Augusto Boal lay the groundwork for in *Legislative Theatre*. It is rooted in the Marxist philosophy of the crack and Holloway's 'No'. It engages the apathy produced by the neoliberalism that produces necropolises, transforming the Global South into death-worlds to be pushed out of sight and out of mind by the Global North. Even the affective power of Rau's performances is rooted in what could be described as the negative emotions of anger and outrage. These alternatives act as annoyances or irritations to the present – a liminal deviation from the established order that acts like an irritating grain of sand in the system. However, it is rooted in the immense (perhaps naïve) optimism of hope that fuels all calls for justice:

> [H]istorically and practically speaking, almost all calls for justice have been experienced by many as annoying, at first. The reasons are simple. Calls for justice imply the change of an existing order, they imply accusations, they demand the uncovering of what had been disguised, they seek the people and other legal subjects or persons, are held accountable – they will not let bygones be bygones. In a sense, these calls connote a principle, stubborn, relentless 'no'. The annoyance

> concerns all parties, moreover, from those who do not want to be bothered with things that happened in the past to those seeking justice by returning to that past. [...] their ultimate goal is to find a confirmation that things can be put in order, be restored, that the pain that has been inflicted and the damage that has been done may at least be acknowledged, perhaps compensated, or sufficiently repaired. Eventually, those who seek justice seek a 'yes'. (Korsten 1)

It is this confirmation and desire for a 'yes' that is at the heart of the prefigurative quality of *Congo Tribunal* and the reforming impulse of *Moscow* and *Zurich Trials*. What we see in these projects, is an affective engagement with existing judicial systems. Not just the performance of justice, but the formation of a caring, engaged (but liminal) jurisdiction that considers the needs of the immediate future and reimagines institutions of the present: A *pre-formation*.

Works cited

"A Concise Introduction to Bertolt Brecht." *Digital Theatre +*, 11 Feb. 2021.

Arendt, Hannah. *The Human Condition*. University of Chicago Press, 1998.

—. *The Life of the Mind: The Groundbreaking Investigation on How We Think.* Harcourt inc., 1971.

—. *The Portable Hannah Arendt*, edited by Peter Baehr, Penguin books, 2000.

Barbour, Charles, and Magdalena Zolkos. "Action and Appearance: An Introduction." *Action and Appearance: Ethics and the Politics of Writing in Hannah Arendt*, edited by Anna Yeatman et al., Bloomsbury Academic, 2011, pp. 1-9.

Boal, Augusto. *Legislative Theatre: Using Performance to Make Politics*. Translated by Adrian Jackson. Routledge, 1998.

Brennan, Andrew and Jeff Malpas. "The Space of Appearance and the Space of Truth." *Action and Appearance: Ethics and the Politics of Writing in Hannah Arendt*. Continuum, 2011, pp. 39-52.

Cohen-Cruz, Jan. *Engaging Performance: Theatre As Call and Response*. Taylor & Francis Group, 2010.

Dean, Jodi. "Crowds and Power: Notes Toward a Performative Theory of Assembly by Judith Butler." *Cultural Critique,* vol. 98, 2018, pp. 335-342.

Duncombe, Stephen, and Steve Lambert. "The Art of Activism." *Truth is Concrete: A Handbook for Artistic Strategies in Real Politics*, edited by Steirischer Herbst and Florian Malzacher, Sternberg Press, 2014, pp. 26-35.

Gardner, Lyn. "Protest Performance: Theatre and Activism." *Digital Theatre +*. 23 May 2019.

Gunsilius, Maike. "Perform, Citizen! On the Resource of Visibility in Performative Practice Between Invitation and Imperative." *Performing Citizenship: Bodies Agencies, Limitations*, edited by Paula Hildebrandt et al., Palgrave Macmillan, 2019, pp. 263-278.

"Hearings/The Banro Case: The responsibility of multinational corporations and the World Bank." 2017.

"Hearings/The Bisie Case: The responsibility of the EU and its member states." 2017.

"Hearings/The Matarule Case: The responsibility of the NGOs and the UN." 2017.

Holloway, John. *Crack Capitalism*. Pluto Press, 2010.

Knauer, James. "Motive and Goal in Hannah Arendt's Concept of Political Action." *The American*

Political Science Review, vol. 74, no. 3, 1980, pp. 721-733.

Korsten, Frans-Willem. *Art as an Interface of Law and Justice: Affirmation, Disturbance, Disruption*. Hart Publishing, 2021.

Landry, Olivia. *Theatre of Anger: Radical Transnational Performance in Contemporary Berlin.* University of Toronto Press, 2021.

Léger, Marc James. *Vanguardia: Socially Engaged Art and Theory*. Manchester University Press, 2019.

Le Roy, Frederik. "The Documentary Doubles of Milo Rau & the International Institute of Political Murder." *Etcetera*, 27 April 2017. Accessed May 25, 2017.

Malzacher, Florian. "Putting the Urinal back in the Restroom: The Symbolic and the Direct Power of Art and Activism." *Truth is Concrete: A Handbook for Artistic Strategies in Real Politics*, edited by Steirischer Herbst and Florian Malzacher, Sternberg Press, 2014, pp. 12-25.

Marchart, Oliver. "Zietschleifen. Politisch-theoretische Überlegungen zu Preenactments und Realen Utopien." *Performance zwischen den Zeiten. Reenactments und Preenactments in Kunst und Wissenschaft*, edited by Adam Czirak et al., Transcript Verlag, 2019, pp. 129-139.

Mbembé, Achille. "Necropolitics." Translated by Libby Meintjes. *Public Culture*, vol. 15, no. 1, 2003, pp. 11-40.

Montenegro, Marisela, et al. "Bordering, Exclusions and Necropolitics." *Qualitative Research Journal*, vol. 17, no. 3, 2017, pp. 142-154.

Ngai, Sianne. *Ugly Feelings*. Harvard University Press, 2005.

NTGent Team. "Ghent Manifesto." *Globaler Realismus / Global Realism*, edited by Milo Rau. Translated by Lily Climenhaga. Verbrecher Verlag, 2018, pp. 279-281.

Prentki, Tim. "Fool's Play or Juggling with Neoliberalism." *Applied Theatre: Development*. London: Bloomsbury, 2015, pp. 56-89.

Rau, Milo. "Affirmation." Interview with Rolf Bossart. *Wiederholung und Ektase.* Ästhetisch-politische Grundbegriffe des International Institute of Political Murder, edited by Rolf Bossart and Milo Rau, Diaphanes, 2017, pp. 11-19.

—."Das Symbolische zeigt sich hier als das Konkreteste." Interview with Andreas Tobler. *Das Kongo Tribunal*, edited Milo Rau, Verbrecher Verlag, 2017, pp. 20-32.

—."In My Projects, There is No As-If." Interview with Rolf Bossart. *Globaler Realismus / Global Realism*, edited by Milo Rau. Translated by Lily Climenhaga. Verbrecher Verlag, 2018, pp. 198-204.

—."'Man muss neue, utopische Institutionen vorbereiten.' Milo Rau im Gespräch mit Harald Welzer über die ‚General Assembly'." Interview with Harald Welzer. *General Assembly*, edited by Milo Rau, Merve Verlag, 2017, pp. 10-43.

—."Mitleid (1)." Interview with Dominikus Müller. *Wiederholung und Ektase.* Ästhetisch-politische Grundbegriffe des International Institute of Political Murder, edited by Rolf Bossart and Milo Rau, Diaphanes, 2017, pp. 105-115.

—."Pussy Riot's Moscow Trials: Restaging Political Protest and Juridical Metaperformance." *Anthropology, Theatre, and Development: The Transformative Potential of Performance*, edited by Alex Flynn and Jonas Tinius, Palgrave McMillian, 2015, pp. 279-285.

—."The Art of Resistance." *Theatre is Democracy in Small*, edited by Milo Rau, EPO, 2022, pp. 17-55.

—."The Congo Tribunal." Interview with Peter Kümmel. Theater der Welt, 8 June 2017, MS Stubnitz, Hamburg, Germany. Discussion.

—."The Truth of Circumstances." *Theatre is Democracy in Small*, edited by Milo Rau, EPO, 2022, pp. 57-70.

—."Why Art? Milo Rau in conversation with Marijn Lems." Interview with Marijn Lems. *Theatre is Democracy in Small*, edited by Milo Rau, EPO, 2022, pp. 73-166.

—."Zukunft (1)." *Wiederholung und Ekstase.* Ästhetisch-politische Grundbegriffe des International Institute of Political Murder, edited by Rolf Bossart and Milo Rau, Diaphanes, 2017, pp. 234-241.

Read, Alan. *Theatre & Law*. Methuen Drama, 2016.

Schneider, Rebecca. "Opening Space in Time. Gestures of Pre- and Re-Enactment." *Performance Zwischen den Zeiten. Reenactments und Preenactments in Kunst und Wissenschaft*, edited by Adam Czirak et al., Transcript Verlag, 2019, pp. 121-126.

—. *Performing Remains: Art and War in Times of Theatrical Reenactment*. Routledge, 2011.

Silberman, Marc. "Bertolt Brecht, Politics, and Comedy." *Social Research: An International Quarterly*, vol. 79, no. 1, 2012, pp. 169-188.

Taylor, Diana. *¡Presente!: The Politics of Presence*. Duke University Press, 2020.

Thompson, James. *Applied Theatre: Bewilderment and Beyond*. Peter Lang, 2003.

Van de Sande, Mathijs. "The Prefigurative Politics of Tahrir Square – An Alternative Perspective on the 2011 Revolutions." *Res Publica*, vol. 19, 2013, pp. 223-239.

Walter-Jochum, Robert. "(P)Reenacting Justice. Milo Raus Tribunale als Theater der Empörung." *Performance Zwischen den Zeiten. Reenactments und Preenactments in Kunst und Wissenschaft*, edited by Adam Czirak et al., Transcript Verlag, 2019, pp. 159-176.

Notes

1. But art will never be power politics. The question 'What do you have to do to change things' is a question for the power political. Art cannot answer this question pragmatically, only symbolically. The artist is a visual guide, a preparer, but not a politician. Art and power cannot be united, that is the cruel truth.] (my translation.
2. When we talk about the power structures quick to dismiss art as just art, we are frequently referring to democratic and non-authoritarian states, because, in authoritarian states, art is frequently both a powerful tool of resistance for artists and heavily censored by the state. Ironically, this state-controlled censorship is exactly the logic behind *Moscow Trials* and the multiple in-performance disruptions at Sakharov Center by the Russian government.
3. There is a more nuanced discussion to be had – à la Audre Lorde's famous essay "The Master's Tools Will Never Dismantle the Master's House" – about government-funded cultural institutions that profit from colonial and neocolonial inequalities producing transnational political actions. For a more detailed discussion of this within Rau's NTGent conflict zone productions and its more problematic assertions, see: Lily Climenhaga, "Reclassifying Neoliberalism: A Critical Look at Milo Rau's Postcolonial Reclassifications," *Theater Symposium*. Vol. 30, 2022, pp. 14-28.
4. Following along the line of Boal's spect-actors, Frederik Le Roy notes that the audience members of Rau's staged tribunals "are no longer passive spectators: they are interrogated as active witnesses of conflict between incommensurable perspectives on reality. The theatrical framework does not relieve them of their real responsibility to actively judge what is in front of them" (Le Roy). So instead of taking the actively intervening role described by Boal, Rau's spectators instead take on an active judgmental role in the staged tribunal.
5. Admittedly, *The Zurich Trials* sits somewhat uncomfortably within this reactive and preenactive distinction. It must also be said that these distinctions should be understood as more fluid than concrete; both *Congo Tribunal* and *Moscow Trials* (the two clearest examples of these respective forms of theatre) contain elements of the pre- and re- in their performance. While *Moscow* stays more focused on the failures of the past, *Congo* reaches towards the potential promise of the future. I situate *Zurich* more within the reenactive category because it is not engaging with a systemic problem within all of Switzerland (like the ongoing conflict in the DRC), but with a single media outlet.

Empathy at the Crossroads

–– Shlomit Cohen-Skali (TEL AVIV UNIVERSITY)

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.

Keywords: Legal-Documentary, empathy, theater, law

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' (Enfühlungstheater) (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 others[4] 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 live' 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 *Kastne*r 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 process[12] 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 hearing[13] 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 plays[15], 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.

Works cited

Agranat, Schimon. Criminal appeal 232/55 A.G. vs. N.Grinwald, Padi 12 (3) (1958), 2017.

Bilsky, Leora. *Transformative Justice: Israeli Identity on Trial*. University of Michigan Press, 2004.

Blank, Jessica, and Erik Jensen. "The Uses of Empathy: Theatre and the Real World." *Theatre History Studies*, vol. 25, 2005, pp. 15-22.

Bloom, Paul. *Against Empathy: The Case for Rational Compassion*. HarperCollins Publishers, 2016.

Bloom, Paul. "Empathy and its Discontents." *Trends in Cognitive sciences*, vol. 21, no. 1, 2017, pp. 24-31.

Boal, Augusto. *Theatre of the Oppressed*. Translated by Charles A. McBride and Maria-Odilia Leal McBride. Theatre Communications Group, 1985, pp. 102-115.

Brecht, Bertolt (1936). *Brecht on Theatre: The Development of an Aesthetic*. Translated and edited by John Willett. Hill and Wang, 1994.

Breithaupt, Fritz. *The Dark Sides of Empathy.* Translated by Andrew B. Hamilton. Cornell University Press, 2019. Accessed June 4, 2023.

Colby, Thomas B. "In Defense of Judicial Empathy." *Minnesota Law Review*, 2012, pp. 1945-2015.

Cummings, Lindsay B. *Empathy as Dialogue in Theatre and Performance*. Palgrave Macmillan, 2016.

Decety, Jean., and Keith J. Yoder. "Empathy and motivation for justice: Cognitive empathy and concern, but not emotional empathy, predict sensitivity to injustice for others." *Social Neuroscience*, vol. 11, no. 1, 2016, pp. 1-14.

Eisenberg, Nancy and Natalie D. Eggum. "Empathic Responding: Sympathy and Personal Distress." *The Social Neuroscience of Empathy*, edited by Decety Jean and William Ickes, Cambridge, Mass, 2013, pp. 71-48.

Garrett, Major. "Obama Pushes for Empathetic Supreme Court Justices." *Fox News*, May 1, 2009.

Glynn, Adam N. and Maya Sen. "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" *American Journal of Political Science*, vol. 59, no. 1, January 2015, pp. 37–54.

Hoffman, Martin L. "Empathy, Justice, and the Law." *Empathy: Philosophical and Psychological Perspective*, edited by Amy Coplan and Peter Goldie, Oxford Academic Publishing, 2011, pp. 230-254.

Korsten, Frans-Willem. *Art as an Interface of Law and Justice: Affirmation, Disturbance, Disruption*. HART Publishing, 2021.

Koss, Juliet. "On the Limits of Empathy." *The Art Bulletin*, vol. 88, no. 1, 2006, pp. 139-157.

Lampert, Khen, *A Language of Empathy* [Hebrew]. Ram Publishing Tel-Aviv, 2022.

Laor, Dan. "The Changing Image of the Holocaust in Israeli Literature." *Catedrah*, no. 69, 1993, pp. 160-164.

Lerner, Motti. *Kastner*. Directed by Ilan Ronen, performance 1985, The Cameri, Tel Aviv, Israel.

Lerner, Motti. *Kastner* [Hebrew]. Or-Am, Tel-Aviv, 1988.

Maibom, Heidi L. *The Routledge Handbook of Philosophy of Empathy*. Routledge, 2017.

Michaeli, Merav. [Eulogy for the actor Oded Teomi]. *Facebook*, 1 Mar, 2019.

Nagid, Haim. *Against the Illusion: Hebrew Documentary Drana* [Hebrew]. Safra, 2009.

Norton-Taylor, Richard. "Richard Norton-Taylor." *Verbatim Verbatim. Contemporary Documentary Theatre*, edited by Will Hammond and Dan Steward, Oberon Books, 2008.

Posner, Richard A. *How Judges Think*. Harvard University Press, 2008.

Raz, Gal and Moran Ovadia. "Brain, Film, Empathy." [Hebrew] *Takriv*, 11 Dec. 2017.

Sagiv, Lilach, and Sari Mentser. "Empathy, values and Moral Judgement." *Walking in Someone Else's Shoes, Empathy in History, Society and Culture* [Hebrew], edited by Noga-Banai Galit, Amos Goldberg, Ariel Knafo-Noam, and Sagiv Lilach, Magnes press, 2023, pp. 72-92

Segev, Tom. *The Seventh Million – The Israelis and the Holocaust*. Keter Publishing, 1991.

Semal, Nava (1998). "Kastner on the timeline – a conversation with the playwright Motti Lerner." *Covert Memory, Open Memory, Holocaust Consciousness in the State of Israel*, edited by Yoel Rafel, Ministry of Defense – Publishing House, Mashuah – Institute for Holocaust Studies, 2018, pp. 159-167.

Shamay-Tsoory, Simone G. "The Neural Bases for Empathy." *The Neuroscientist*, vol. 167, no. 1, February 2011, pp. 18-24.

Sheklar Ayala, "Collective memory - subjective memory." *Hayohaya - history Journal,* vol. 8, 2011, pp. 7-31.

Taylor, Diana. *The Archive and the Repertoire: Performing Cultural Memory in the Americas*. Duke University Press, 2003.

Tindemans, Klaas. "The Dramaturgy of Law. Legal Structures and Performative Strategies in Contemporary Performance." *Théâtre: esthétique et pouvoir. Tome 2: XX3 et XXIe siècles*, Le Manuscrit, 2016, pp. 363-382.

Renana, Raz. *The Hearing,* Directed by Renana Raz, performed by Renana Raz, Ofer Amram, Amitai Yaish ben-Ozilio, Naomi Promowitz, premiered at the "Theater in the Living Room" festival in Jerusalem 2015, Israel.

Wardlaw, Kim M. "Umpires, Empathy, and Activism: Lessons from Judge Cardozo." *Notre Dame L. Rev*, vol. 85, 2010, pp. 1629-1662.

West, Robin. "The Anti-Empathic Turn." *Georgetown Public Law and Legal Theory Research*, 2011, pp. 11-97.

Yablonka, Hanna. *The State of Israel vs. Adolf Eichmann*. Mishkal Publishing House, 2001.

Yozfovsky, Florina, Dana Katsuti, and Ariel Knafo-Noam. "The biological basis of empathy and the development of empathy throughout life" *Walking in Someone Else's Shoes, Empathy in History, Society and Culture* [Hebrew], edited by Noga-Banai Galit, Amos Goldberg, Ariel Knafo-Noam, and Sagiv Lilach, Magnes press, 2023, pp 10-34.

Zilberg, Daphna. *Demonstrate (tadgimi)*. Directed by Daphna Zilberg. Tel Aviv, 2017.

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 tin 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)

Legitimately Incongruous: Exploring Artistic and Legal Interplays in *A Game of War* (2021)

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This essay examines the filmed mock trial *A Game of War* (2021) by TWIIID, a Flemish legal soundboard for the arts, and its contribution to the discourse on appropriation art and the parody exception in copyright law. By focusing on the case of the (mock) trial between Samson Kambalu and Gianfranco Sanguinetti, the article delves into the intricate legal and artistic aspects within this specific context. While not comprehensive of the entire contemporary discourse on copyright and appropriation art, this case serves as a microcosm for examining and understanding major themes and issues. The essay argues that *A Game of War* functions as both a re-enactment and pre-enactment, acknowledging the limitations of conventional jurisdiction while closely adhering to established legal precedents. In doing so, the film highlights the temporal fluidity of p(re) enactments and the dynamic nature of temporality in law and performance. The explicit intertwining of past, present, and future emerges as a shared characteristic of both (p)re-enactments like *A Game of War* and court trials, wherein the past is reconstructed and potential futures are envisioned

within the 'now' of the trial. Furthermore, by employing artistic methodologies such as p(re)enactments to enrich the imaginative capacities of the legal realm in the context of appropriation art and copyright issues, *A Game of War* compellingly expresses the potential for art and law to mutually inform and enhance one another. Consequently, the film opens new avenues for dialogue and fosters a deeper understanding of the intricate interplay between artistic expression and the complex web of legal frameworks.

Keywords: (p)re-enactment, mock trial, appropriation art, copyright law

The primary focus of this essay is the film *A Game of War: Sanguinetti v Kambalu Trial at Ostend* (2021), which is readily accessible on YouTube with a few simple clicks. The film's availability amidst the vast array of user-generated content aligns perfectly with its central themes of gift-giving, challenging established paradigms of authorship, and the dissemination of knowledge. Upon pressing play, the film opens with white text displayed against a black background, providing crucial contextual information about the positions of the defendant, Samson Kambalu, and the plaintiff, Gianfranco Sanguinetti. Approximately forty seconds into the film, a sentence appears, incorrectly stating that the case was re-examined in a Belgian court in Ostend on August 6, 2020, under the framework of continental law pertaining to authors' rights and parody. It is important to note that no actual legal proceedings took place in Belgium between Samson Kambalu and Gianfranco Sanguinetti. The trial depicted in the film is staged but based on a real trial that occurred between Kambalu and Sanguinetti in Venice in 2015 (Minio). Following this erroneous introduction, the screen transitions to a frontal view of

the courtroom's bench in Ostend, accompanied by the sound of a bell ringing and a clerk announcing the arrival of 'the chairman,' prompting everyone present to rise. Over the course of the next two hours, the fictional trial unfolds between the contemporary artist Samson Kambalu and writer Gianfranco Sanguinetti.

A Game of War was conceived by Twee-Eiige-Drieling (TWIIID), a Flemish collective of legal professionals, who serve as a bridge between the legal and artistic domains, paradigms, and discourses.[1] They aim to provide accessible legal knowledge and support to practitioners in Flanders' creative sector and refer to themselves as a 'legal sounding board for the arts.' This concept of a 'sounding board' relates to a group that acts as a platform for testing and evaluating ideas or opinions. TWIIID accomplishes this by actively engaging in ongoing conversations with the Flemish arts field through residencies, workshops, and various collaborative endeavours. *A Game of War* aptly aligns with the reflective aspect of TWIIID's undertakings. Following this process, TWIIID endeavours to delve deeper into the intricate interplay between the realms of art and law. This pursuit is achieved by engaging in debates, producing (scholarly) texts, providing informative resources, and, for the first time, venturing into the filmic medium with *A Game of War*.

The objective of this essay is to examine how *A Game of War* highlights the interplay and divergences between artistic and legal discourses regarding copyright, and how it relates to theories of p(re) enactments in courtroom dramas. By centring on a single case, this paper offers a detailed analysis of the legal and artistic intricacies of a specific context – the (mock) trial between Samson Kambalu and Gianfranco Sanguinetti. While it does not encompass the entirety of contemporary discourse on copyright and appropriation art, this case does serve as a microcosm through which major themes and issues can be examined and understood. The structure of this essay revolves around three key components: the 'past' of the mock trial (its historico-legal sources of inspiration), the filmed mock trial itself, and its subsequent aftermath. This structure allows for a comprehensive exploration of the interplay between past, present, and future within the context of both the film and the broader p(re) enactment practice.

Sanguinetti versus Kambalu and the © of commodification

Internationale Situationniste (1957-1972)

Gianfranco Sanguinetti was a prominent member of the art and ideological movement *Internationale Situationniste* / *Situationist International* (1957-1972). The *Situationist International* (SI) stood at the intersection between the field of far-left political groups and artistic avant-gardes (Trespeuch, "L'Internationale situationniste"). Guy Debord – one of the SI's founders – is considered one of its most influential theorists. Debord helped shape the strand of Marxist social criticism that would become a significant part of the SI from the '60s onward (Briziarelli and Armano; Trespeuch-Berthelot, "Les vies successives de La Société du spectacle de Guy Debord"). In 1967, his now world-famous book *La Société du Spectacle* was published. Here, Debord, in 221 theses, expounds how contemporary society is characterized by alienation through spectacle. According to Debord, in societies "dominated by modern conditions of production, life is presented as an immense accumulation of *spectacles*" (21). With the now infamous phrase, "Everything that was directly lived has receded into a representation" (ibid.), he concludes his first thesis. According to Debord, the spectacle is not a "collection of images," but "a social relation between people that is mediated by images"(22). Hence, it does not refer to a specific visual culture or particular aesthetics, rather to interpersonal relationships and how they are mediated by images (Debord and Knabb 7).

Besides its critique of estrangement in the society of spectacle, additionally the SI strongly opposes widespread commodification while dismissing the concept of intellectual property.[2] This stance is clearly articulated in a prominent sentence from the second issue of their magazine, *Internationale Situationniste* (in December 1958): "tous les textes publiés dans INTERNATIONALE SITUATIONNISTE peuvent être librement reproduits, traduits ou adaptés, même sans indication d'origine." With this sentence, the authors grant others permission to use the text without any concern for copyright. It constitutes an essential part of the discourse embraced by the members of the *Internationale Situationniste*. However, while it shapes an idiosyncratic artistic discourse on authorship, it does not fully align with legal discourse on authorship.[3]

The SI was explicitly anti-authoritarian, aiming to reject any form of power (Angaut 150). It refused to be seen as a doctrine and thus abhorred the designation 'situationism' (IS, June 1958). In contrast, it promoted the idea of a society in which pleasure, playfulness, and genuine 'living together' were paramount (Hemmens 161). One of the artistic strategies deployed by the SI to extricate art from the spectacle is the *détournement*, in which existing images are 'formally' duplicated while their content or connotation is altered. A *détournement* turns 'the spectacle' against itself because its critical power relies on its hypervisibility and ocularcentrism. In 1972, Debord and Sanguinetti, the two remaining members of the 'organization', dissolved the SI. Sanguinetti continued to publish anti-capitalist critiques, including the pamphlet *Rapporto Veridico sulle ultime possibilità di salvare il capitalismo in Italia* (1975, under the pseudonym 'Censor') and the book *Del Terrorismo E Dello Stato. La Teoria E La Pratica Del Terrorismo per La Prima Volta Divulgate* (1980).

Sanguinetti sells his archive to the Beinecke Library (2013-2015) and Kambalu visits the library (2014-2015)

In 2013, slightly over forty years after SI's dissolution, Gianfranco Sanguinetti sold his archive to the Beinecke Rare Book and Manuscript Library, while retaining the intellectual property rights to it.[4] This transaction prompted a strong reaction from Bill Brown, Sanguinetti's English translator, who had been translating SI texts into English for years ("Samson Kambalu" 24; "Bill Brown Breaks off Relations With Gianfranco Sanguinetti"). On its homepage, the website of Bill Brown, *Not Bored!*, is described as "an autonomous, situationist-inspired, low-budget, irregularly published journal" ("Not Bored!"). Through this website, Brown posits preserving the spirit of the SI, which he believes is betrayed by Sanguinetti's sale.

Both Brown and Samson Kambalu identified a notable incongruity between the considerable profitability of the archive sale and the subsequent restriction of access to it to a privileged group consisting solely of students and researchers. This incongruity was perceived as inconsistent with Sanguinetti's (former) endorsement of open licensing. From a technical standpoint, the sale of the archive adhered to the requirements of legal validity, thereby legitimising Sanguinetti's actions despite their deviation from his previous ideological stance. Nevertheless, the legitimacy conferred by legal compliance fails to

diminish the outrage expressed by Kambalu and Brown. Their critique diverges from an examination of the sale's conformity to legal parameters, instead scrutinising Sanguinetti's (former) ideological positioning and artistic practices. This observation underscores the inadequacy of law alone in fully legitimising or delegitimizing action. In the court of public debate, a legal transaction can be interpreted and characterized as illegitimate.

During a research stay at Yale, Kambalu stumbled upon the archive. He photographed every piece of Sanguinetti's archive in a way that his hands were in view most of the time. In the background of these *dé*tourned photographs, glimpses of architectural snippets of the library can often be seen. Around the same period, curator Okwui Enwezor invited Kambalu to exhibit at the 56th edition of the Venice Biennale (2015), as part of the exhibition *All the World's Futures*. Kambalu decided to integrate the détourned photographs into an installation he called *Sanguinetti Breakout Area*. The installation consists of the détourned photographs of Sanguinetti's archival documents at Yale University's Beinecke Library, a collection of furniture objects based on Debord's board game *Le Jeu de la Guerre* (1965), a display vitrine, and a wall plastered with an enlargement of Brown's letter to Sanguinetti.[5]

The installation spans multiple surfaces, occupying three walls in Venice. One of the walls is painted in red and black, reminiscent of the anarchist flag, while the other walls are covered with a large wallpaper displaying an angry letter written from Brown denouncing Sanguinetti for his alleged betrayal. The walls are adorned with around one hundred photographs framed in black of varying sizes, ranging from A5 to A3. These photographs depict Kambalu's hands manipulating letters, photographs, and papers from Sanguinetti's archive in the Beinecke Library ("Nyau Philosophy" 48). At the center of the installation, there is a large, red, bound volume titled *Sanguinetti Theses*. This massive book, approximately 3000 pages, contains all the photographs Kambalu took of the Sanguinetti archive in Beinecke. Visitors to the installation were encouraged to share photographs of it on social media using the hashtag #SanguinettiBreakoutArea.

Kambalu invokes Debord's artistic tactic of *détournement* to motivate the appropriative nature of *Sanguinetti Breakout Area* ("Why

Figure. 1. Samson Kambalu, Sanguinetti Breakout Area – Installation View (2016). Courtesy of the artist and Kate MacGarry, London

Situationism" 1). "Detournement [*sic*]", Kambalu writes in his doctoral dissertation, "is where the Situationists treated all culture as common property and played with canon transgressively" ("Nyau Philosophy" 44). He explicitly connects *détournement* with the idea of a copyright-free cultural repertoire and playfulness.[6] According to Kambalu, *détournement* is one of the "playful creative devices" developed by IS members, "in which the gift could be given without incurring a debt" ("Why Situationism" 1). Kambalu contends that genuine giving should be devoid of any expectation of reciprocity or financial transaction, underscoring that a gift is defined by its detachment from (monetary) obligations.[7]

The Venetian trial (2015)

In reaction to Kambalu's installation *Sanguinetti Breakout Area* at *All the World's Futures*, Sanguinetti initiated legal proceedings for alleged copyright infringement. This propelled the work – and the discourse around the work – into a legal context. A Venetian court settled the charges and did not rule in Sanguinetti's favor. The trial revolved around the issue of whether the installation could be considered a parody, as parody is one of the possible exceptions to copyright under European law. Accordingly, if the work is qualified as parody, the creator can invoke an exception. In contrast to Belgian law, the parody exception is not incorporated as such in Italian intellectual property law (Minio; Spina Ali). Nonetheless, a clarification from the Grand Chamber of the European Court of Justice (C-201/13) concerning the exception of parody, confirms that "the concept of 'parody' [...] is an autonomous concept of EU law" (C-201/13). The clarification has additionally had a significant impact in defining 'a parody'. It stated that "the essential characteristics of parody are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery" (C-201/13).

This European homogenization of the interpretation of the parody exception establishes a wide scope of what parody is, thereby raising concerns about the legal certainty of appropriation artists. The lack of clarity regarding what is permissible and not in terms of creatively reusing existing images makes it challenging for artists to anticipate the legality of their actions. Furthermore, the subjective nature of the second criterion set forth by the European Court of Justice adds to the complexity. The legality of the artistic intervention is contingent upon the artist's intention. This conflicts with the artistic practice of some appropriation artists, who resist assigning a specific – discursively formulated – intentionality to their work.[8] In this regard, Kambalu enjoys an advantage over artists who anchor their work and practice to a lesser extent or a lesser degree within a discursive framework.

The Venetian judge, Luca Boccuni, grounded the verdict on the aforementioned provisions, concluding that the work does constitute parody.[9] *Sanguinetti Breakout Area* indeed fulfills the two conditions put forth by the European Court. In terms of form, the artwork exhibits noticeable differences from Sanguinetti's archive while

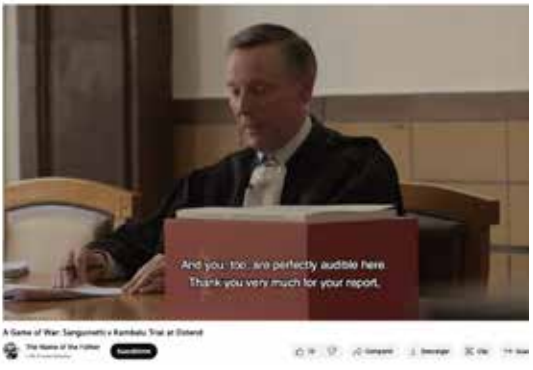
still evoking it. The verdict argues for this formal differentiation by referring to Kambalu's visible hands in the photographs of the individual pieces from Sanguinetti's archive (Boccuni). Additionally, the judge points to the wall on which an enlarged version of Brown's letter is displayed, alongside a few détourned photographs. In terms of content, the judge repeatedly argued that the satirical and critical tone was highly evident in the various components of the work. To support this claim, he also relies on the artwork's title, "considering its double meaning of an installation devoted to the critical 'counterattack' to Sanguinetti or also an installation committed to the 'escape' of Sanguinetti from his situationist ideal" (Bucconi, Order). However, the reference is used to contextualise rather than as legal substantiation. Nonetheless, Kambalu ventured in an interview that he was "[...] sued by Sanguinetti, but he lost because the archive is full of advocacy that there should be no copyright" ("Scholar and Slacker" 6). With such statements, Kambalu perpetuates the perception that the case was conducted based on moral-aesthetic arguments, and not according to the legal rules of the game. Consequently, in the discourse Kambalu adopts concerning the court case, legal and artistic discourse are conflated.

A Game of War (2020-2021)

A Game of War as an inquiry

Upon the discovery of the trial between Kambalu and Sanguinetti, TWIIID was intrigued by the question of how the case would unfold within the Belgian legal context. Like numerous other European countries, Belgian copyright legislation suffers from a lack of clarity and certainty (Daem 264). *A Game of War* emerges within this context of inquiry, presenting the argument that an extensive dialogue between artistic discourse, artistic practice, and legal discourse is necessary when evaluating whether an artwork can be classified as a parody. Consequently, it recognizes that an understanding of artistic discourse should be integrated into the legal procedure.

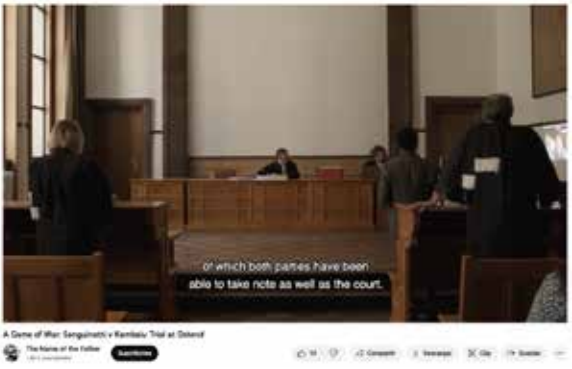
TWIIID initially planned to present a fictional but realistic trial as a live performance, drawing on the tradition of 'mock trials' or 'moot courts'. However, due to the Covid-lockdowns, it became impractical to proceed with a live performance, prompting the decision to film the



Screenshots of *A Game of War* taken between 00:04:17 and 00:06:15.
From left to right: still 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

trial instead. This shift to the medium of film allowed for a seamless transition from the courtroom setting to Mu.ZEE, the museum of contemporary art in Ostend, where the *Sanguinetti Breakout Area* installation was being exhibited at the time. Such a location change would have been unfeasible in a live mock trial. Additionally, unlike a mock trial 'in the flesh', a film offers the advantages of portability and easy sharing, as highlighted by Van Lathem, which was beneficial for the film's subsequent *afterlife* and educational purpose.

The film still retains visual elements reflecting its initial conception as a mock trial. For instance, the majority of the film was shot in a single location, maintaining a deliberate simplicity in camera work and editing, as Tobias Van Royen explained. Out of six hours of video footage, the creators edited a two hours and ten minutes film. The entire filming took place within a single day, with the intention of capturing scenes in one take whenever possible. A second take was utilized to incorporate different perspectives on screen, ensuring dynamic imagery and avoiding excessive static shots. While there were some outdoor shots, they were ultimately excluded from the final film as they overly fictionalised its content, as noted by Van Royen. The film was shot in colour using a digital camera, resulting in high-resolution material. *A Game of War* does not directly reference either Kambalu's experimental cinematographic work or that of the SI, but rather alludes to the sober visual language found in human interest documentaries and similar forms.



At times, there is a frontal perspective from a distance (still 3), with slight zooming in and out. Additionally, there are frequent close-ups of the actors, focusing on their heads or specific details (as seen in still 4 and 10). Notably, when examining stills 5 and 11, one can observe the restrained camerawork, as these stills appear nearly identical despite not being captured simultaneously. The conversation with scholar Sven Lütticken, who provides historical context for SI, took place via video call, and the film does not conceal this mediated aspect in the editing process. The grainy, poor quality of the image during the conversation is maintained, contrasting the much sharper image of what unfolds in the courtroom (as seen in stills 6, 9, and 12). Additionally, photos are occasionally integrated into the film in a straightforward manner (as seen in stills 7 and 8). These photos are examples of détourned *photos* from *Sanguinetti Breakout Area*, displayed against a black background. While the sound from the courtroom remains audible, only the photo on the black background is shown.

Although it harnesses the specificities of the filmic medium, *A Game of War* leans closer to the adaptation of a live performance than an artistic film that fully explores the potential of the medium itself. While acknowledging that *A Game of War* is not a *live* mock trial (as it is primarily presented and utilized as a film), its clear association with the performative tradition of mock trials allows for an analysis that draws upon research on theater and law. Mock trials are not a theater genre, but a performative exercise for law students where they participate in a fictitious trial. They represent a concrete link between performing arts and the legal domain, where, like court-

room dramas, there is no coercive power at play. Instead, moot courts resemble a game of improvisation, often marked by intense competition ("Enacting law").[10]

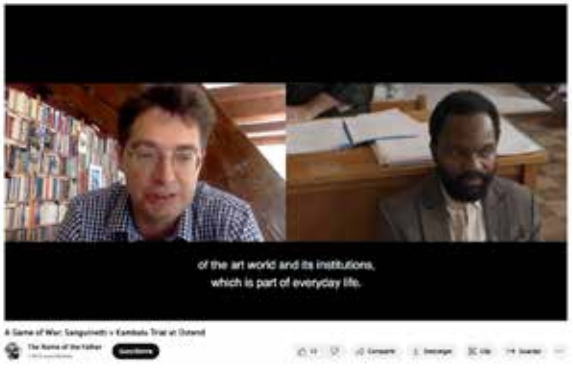
In his study of contemporary theatrical tribunals, Steff Nellis observes two categories of contemporary courtroom dramas, each with a distinct interweaving of temporalities and intentions. The first category is "re-enactments of preeminent lawsuits" and the second "performative pre-enactments of futuristic trials" ("Enacting law" Preface). By considering these categories, we can further examine and situate *A Game of War* within the broader context of performative legal practices.

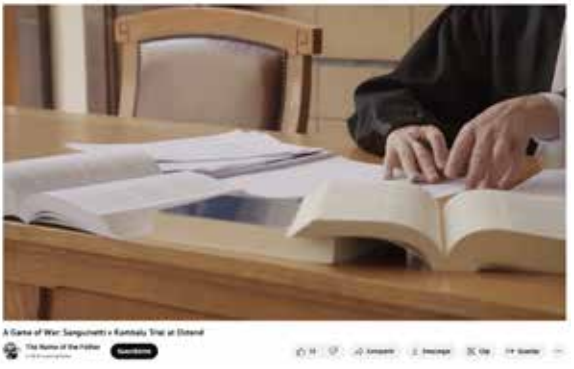
A Game of War strongly connects to three temporalities: the past, present, and future, making it a site of "temporal entanglements" (Oberkrome and Straub 9). The film's inherent connection to 'the past' is evident through its extensive preliminary research and grounding in a previously contested lawsuit.[11] On the other hand, it is also a futuristic proposition that addresses the limitations of jurisprudence concerning the exception of parody and appropriation art(ists). In this sense, it is a pre-enactment of what a lawsuit regarding similar issues could look like in future jurisdictions. It "responds to the shortcomings of regular jurisdiction" ("Enacting law" Pre-Enacting Justice), but does so by closely adhering to existing structures, legal precedents, and 'legal dramaturgies'. Importantly, *A Game of War* does not challenge the validity of the law itself concerning matters of intellectual property, authorship, and appropriation art. While

Nellis's definition of pre-enactments emphasizes their futuristic nature, portraying them as courtroom dramas depicting trials that are either yet to occur or impossible due to systemic shortcomings, *A Game of War* highlights that a pre-enactment can also thoroughly build upon a 'precedent lawsuit' to shape an 'unprecedented lawsuit.'

It can be argued that a legal pre-enactment can *always* be viewed as a form of re-enactment, as it engages with and builds upon existing and previously repeated legal dramaturgies – the broader scripts and structures of lawsuits and legal procedures. As Rebecca Schneider's quote ("Opening Space in Time: Gestures of Pre- and Re-Enactment"), cited in Nellis ("Enacting Law", Re-Enacting Law), underlines: "In looking backward, reenactment looks forward. In looking forward, preenactment looks back" (124). As Straub and Oberkrome point out in their exploration of "the shifting temporal dimensions of the concept [(pre)enactment]" (10), just like re-enactments, p(re) enactment scenarios encompass both a retrospective dimension and a prospective dimension. TWIIID and Kambalu's perspective on the *future* is informed by the shortcomings they encountered in their examination of the *past*.

The project's position in the present is more complex than its connections to the fluid notions of the past and future, primarily due to the inherent ambiguity of the concept of presence within the field of performance studies. The issue of temporality, particularly the notion of 'presence', has been at the center of extensive discussions regarding the essence of performance. These discussions were further intensified





by the pandemic, which disrupted the shared physical co-presence that many consider essential to the performing arts.[12] This unforeseen parameter also influenced the development of *A Game of War*.

During the theater lockdowns, theater practitioners experimented with combinations of livestreaming and pre-recorded material, or made their repertoire available through online video recordings. Peggy Phelan famously defined 'the ontology of performance' in relation to its transience (146). However, the notion of 'presence' in cyberspace – through which the *theater of lockdown* (Fuchs) circulated – has a different relation to transience than in 'material life'. In a live mock trial, a shared present of actors and viewers would have been more tangible. Yet, in the context of the filmed trial, the trial itself and the viewing experience are asynchronous, and the film serves as a trace of a past event. In this temporal framework, it is not the mock trial but rather the viewing experience that represents the 'present'. As argued by Pietrzak-Franger et al., in this context "liveness is [...] to be regarded as a 'condition of viewing'" (3). The viewing experience can take place individually in front of a screen, or collectively within the context of a classroom screening or TWIIID event.

In *Performing Remains*, Schneider further highlights how the practice of re-enactment – and therefore, to some extent, p(re)enactment – disrupts the idea that "live performance disappears," as these methodologies emphasize that "to the contrary, the live is a vehicle for recurrence – unruly or flawed or unfaithful to precedence as that recurrence may threaten to be" (29). The interwoven temporal

leaps in *A Game of War* highlight the non-linearity of time, how the present carries repetition, disruption, and anticipation. The film exemplifies how "the live is a vehicle for recurrence" (ibid.), not only through the methodology of p(re)enactment. For example, by including previous arguments from the Situationist International (SI) and new arguments from Kambalu's and Sanguinetti's lawyer. Kambalu defends himself by seeing Sanguinetti's sale as a betrayal of his previously expressed principles, implying that ideological stances should remain historically steadfast. Conversely, Sanguinetti's defence posits that opinions can be jagged and non-linear.

Moreover, the graininess of the video call alludes to the visual characteristics of footage made by early cameras and of PCs from the 2010s. The video call is a reminder of the exponential boost that video calling platforms received during the Covid-19 lockdowns. The détourned photos allude to the time shown in the photo, while Kambalu's visible hands refer to a moment beyond the image, the people, and things in the photo. The embedding of these pictures in a video that can be viewed from behind a computer screen brings the photos into the 'now' of the viewing experience.

An explicit intertwining of temporality is shared by both p(re) enactments and court trials. In a court trial, the past (the crime) is reconstructed ("Enacting Law"), and potential futures are envisioned. In the 'now' of the trial, debates move from diverse versions of the past to different possible futures that the verdict should define. The complex interplay of past, present, and future within *A Game of*

War highlights the multifaceted understanding of temporality and its connection to (the) performance itself.

A Game of War *as a dialogue*

An important aspect of TWIIID's work, as emphasized by Van Royen (2023), is to bridge the gap between the language of the arts and that of the law. However, no compromises were made to make the legal language in *A Game of War* more accessible to non-speakers. The film's 'actors' were not cast as *actors* but as experts in their respective fields, speaking in their own specialised jargon. There was no script for the process, mirroring the absence of fixed dialogue in a real trial. The 'actors' were prepared as they would be in a genuine trial, relying on written preparations and a thorough understanding of both the legal framework and the context of this fictional dispute, as well as the original litigation upon which the project was based. The lawyers, judge, and clerk thus used the language typically employed in similar contexts, as illustrated in the following paragraph from the mock trial (1:56:19-1:56:56):

> De verwerende partijen bij monde van hun gemeenschappelijke raadsman voeren als verweer dat de vordering onmogelijk gegrond kan worden verklaard, omdat, in hoofdorde, eiser "geen auteur van het archief" zou zijn, nu door verweerders beweerd wordt dat "het gros van het materiaal van derde partijen" afkomstig is; In ondergeschikte orde stellen verweerders dat de heer KAMBALU slechts gebruik gemaakt heeft van een zogenaamd "open licentie"; In verder ondergeschikte orde beroepen verweerders zich op de exceptie van parodie.[13]

Previous research has shown that lawyers (and other litigants) often fail to recognize the language used within a legal work context may not be intelligible to laypeople (Azuelos-Atias; Martínez et al.). Data from various studies suggest that linguistic interventions, such as avoiding complex syntax (e.g., center embedding and passive voice) and replacing low-frequency words with more common ones, could enhance intelligibility (Chovanec; Martinez et al.). In *A Game of War*, the statements by the judge, lawyers, and clerk are characterized by syntactic complexity and the use of low-frequency words. In this

case, "uitgesproken door" (*uttered by*) could replace the archaic "bij monde van" (*by the agency of*) without any substantive consequences. Furthermore, the first sentence (beginning with "De verwerende partijen" and ending with "afkomstig is") is a complex passive construction that could have been re-written to become active and clearer.[14] Additionally, this paragraph contains words or concepts that allude to specific legal notions. For example, the term "in hoofdorde" (*in main order*) is used to rank the claims. The subordinate order, therefore, includes the less prioritised claims of the defendants. Although commonplace in legal proceedings, "in hoofdorde" could be replaced with a more general term like 'primary'. On the other hand, the notion of the 'exception of parody' directly references a legal article (WER, Art. XI. 190, 9°). Modifying this formulation would indeed have a substantive impact and jeopardise the precision of the implementation of a statutory provision.

Van Royen justifies this choice by stating that "having them speak a different 'language' would have compromised the spontaneity of the process." Yet, allowing them to use their jargon may diminish the intelligibility of their arguments. In our interview, Van Lathem indicates that TWIIID has never received feedback from artists in the audience of *A Game of War* screening regarding the complexity of the legal language. However, he also notes that they have never directly asked about it. The unintelligible nature of some legal texts also poses a challenge to legal accessibility and, thus, legal protection. In a court, one cannot rely on the argument of being unaware of the law; that is the essence of 'ignorantia juris non excusat' (*ignorance of the law excuses not*) principle. Yet, how can the law be known if its intricacies are sometimes unintelligible to laypeople (including non-legally educated artists)? This gap in legal certainty is neither explicitly addressed nor named in the film. In fact, the film fully embodies the law's extreme formality.[15]

The movie's afterlife: from court to auditorium to black box (2021 - ...)

The film's afterlife takes place in spaces that balance between law and art. It has been included in three recent exhibitions featuring Kambalu's work: *New Liberia* at Modern Art Oxford in 2021, *Fracture Empire* at Culturgest in 2021-22, and *Globalisto. A Philosophy in flux* at the Musée d'art moderne et contemporain de Saint-Étienne

Métropole (MAMC+) in 2022. However, when the film is displayed in an artistic context, some viewers may misunderstand its fictional nature. For example, a reviewer at *The Guardian* seems not to have realized that *A Game of War* does not capture a real court case. "Even though the case's outcome was far from certain (the artist's nervousness is evident in the recording) it is no spoiler to say that that [sic] Kambalu won the case in the Belgian court" (Searle). He is not the only one: the trial is seen as 'real' in several reviews of the exhibitions of Samson Kambalu's work wherein the movie was screened (Bay; White Box Art Channel). Given the emphasis on play and playfulness that Kambalu places in his practice and discourse, it is not surprising that the film is mistaken for an actual trial.

Understanding the partially fictional nature of *A Game of War* can be challenging without proper context or legal knowledge. It requires viewers to have an a priori distrust of the film, which is not necessarily a common spectatorial attitude. The use of ostensibly lawful language in the film may contribute to its perceived legitimacy, as fictional courtroom dramas often simplify or dilute legal language (Schwitalla 41). This linguistic simplification is also observed in courtroom dramas. Regarding Milo Rau's *The Congo Tribunals*, Nellis notes how "one sees a theatrical attempt at rapprochement with the legal system by means of the appropriation of court proceedings on stage, but also a removal of its rigorous, punitive, and defined legal procedures" ("All Rise" 168). Furthermore, the growing publicity of court cases (Mulcahy and Leiboff 6) – both in the press and media – normalises the presence of filmed court proceedings. Therefore, the mention of directors in the movie credits does not necessarily create a sense of fictionality, as courtroom reality TV shows and news coverage of trials also have directors.[16]

A Game of War's duration differs significantly from the usual proceedings of Belgian courtrooms. In 'real' court settings, multiple cases are addressed within a single day, and legal professionals are expected to have informed themselves in advance about the context of the case. With a pinch of cynicism, it could be argued that the length of what is captured on film is the most 'unrealistic' element of *A Game of War*. However, this extended duration allows the film to comprehensively showcase the various legal provisions, doctrines, and tests regarding the parody exception. This aspect of the film holds significant pedagogical value.

TWIIID has shared the film with lawyers (in training), which, as reported by Van Royen and Van Lathem, has generated diverse reactions. Despite recent clarifications and additions to copyright laws regarding potential exceptions, there remains room for judicial interpretation. This interpretative space accounts for the varying responses among these soon-to-be legal professionals. Within this realm of interpretation, judges bear the responsibility of maintaining a fair balance between the freedom of artistic expression and the intellectual property rights of the parodied author. *A Game of War* suggests that highlighting the importance of artistic practice and discourse *alongside* legal language may contribute to preserving this delicate equilibrium.[17]

Conclusion

Two visual interventions in *A Game of War* underscore the makers' attempt to foster a dialogue between legal and artistic research in appropriation art disputes. Firstly, three books are positioned in front of the judge, with the customary inclusion of a law code at his side and two books by Samson Kambalu on his left.[18] This arrangement symbolises TWIID's attempt to position the discourse regarding the intention behind the disputed artwork on par with legal principles. Secondly, the film depicts the 'judge' delivering the verdict both in the courtroom and in front of the artwork at MuZee. The verdicts in MuZee and the courtroom are edited to alternate with each other, visualising the interaction between court and art space. However: although both the law code and Sanguinetti's books visually appear to stand on equal footing, they are not equal before the law. Legally, only the verdict in the courtroom carries weight, and the verdict must be an interpretation of rules prescribed by law codes rather than 'by art books'. These asymmetrical power dynamics between the legal and artistic domains pose a significant obstacle in establishing a meaningful dialogue between their respective discourses.

Through the thought-provoking filmed mock trial *A Game of War*, TWIIID aims to initiate a stimulating discussion on appropriation art and the parody exception within copyright law. *A Game of War* serves as both a re-enactment and a pre-enactment, acknowledging the limitations of conventional jurisdiction while closely adhering to existing legal precedents. The interwoven temporal leaps in *A*

Game of War underscore the non-linear nature of time, encompassing themes of repetition, disruption, and anticipation. This explicit intertwining of temporality is a shared characteristic of both pre-enactments like *A Game of War* and court trials, where the past is reconstructed and potential futures are envisioned within the 'now' of the trial. By employing artistic methodologies such as p(re) enactments to enhance the imaginative capacities of the legal realm in the context of appropriation art and copyright issues, *A Game of War* demonstrates the potential for art and law to mutually inform and enhance one another. It opens up new avenues for dialogue and fosters a deeper understanding of the complex interplay between artistic expression and legal frameworks.

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Works cited

Abbing, Hans. *The Changing Social Economy of Art: Are the Arts Becoming Less Exclusive?* Palgrave Macmillan, 2019.

A Game of War: Sanguinetti V Kambalu/Mu.ZEE / *TWIIIID*.

"A Game of War: Sanguinetti V Kambalu Trial at Ostend." *YouTube*, 30 May 2021.

Ali, Gabriele Spina. "The (Missing) Parody Exception in Italy and Its Inconsistency with EU Law." *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, vol. 12, no. 5, 2021, pp. 414-438.

Angaut, Jean-Christophe. "La fin des avant-gardes : les situationnistes et mai 1968." *Actuel Marx*, vol. 45, no. 1, 2009, p. 149.

Arfara, Katia. "Aspects of a New Dramaturgy of the Spectator: Rimini Protokoll's "Breaking News"." *Performance Research*, vol. 14, no. 3, 2009, pp. 112–118.

Azuelos-Atias, Sol. "Chapter 5. Making Legal Language Clear to Legal Laypersons." *Pragmatics & Beyond New Series*. Edited by Dennis Kurzon and Barbara Kryk-Kastovsky, vol. 288, John Benjamins Publishing Company, 2018: pp. 101–16.

Barrett, David. "Samson Kambalu." *Art Monthly*, no. 400, 2016, pp. 24–25.

—. "Scholar and Slacker. Samson Kambalu interviewed by David Barrett." *Art Monthly*, no. 434, 2020, pp. 1–7.

Bay, Andrew. "New Liberia." *Writers Mosaic*, n.d. Accessed 3 July 2023.

Becker-Ho, Alice, and Guy Debord. *A Game of War*. Atlas Press, 2007.

Biennale Channel. "Biennale Arte 2015 - Samson Kambalu." YouTube, 10 May 2015.

Boccuni, Luca. "Court of Venice. Division specialised in Business matters. Docket Number 5668/2015 – Judge Luca Boccuni." Accessed 10 July 2023.

Boudou, Karima. "Brushing History Against the Grain: Samson Kambalu and Vincent Meessen." *Mousse Magazine and Publishing*, 20 May 2020.

Briziarelli, Marco, and Emiliana Armano. "Introduction: From the Notion of Spectacle to Spectacle 2.0: The Dialectic of Capitalist Mediations." *The Spectacle 2.0: Reading Debord in the Context of Digital Capitalism*. Edited by Emiliana Armano and Marco Briziarelli, University of Westminster Press, 2017: pp. 15–47.

Brown, Bill. "Bill Brown Breaks off Relations With Gianfranco Sanguinetti." *Not Bored!*, 20 Dec. 2013. Accessed 8 Mar. 2023.

—. "Clarifications Concerning Samson Kambalu." *Not Bored!*, 19 Nov. 2015. Accessed 8 Mar. 2023.

—. "Not Bored!" *Not Bored!*, n.d. Accessed 8 Mar. 2023.

Chovanec, Jan. "Grammar in the Law". *The Encyclopedia of Applied Linguistics*. Edited by Carol A. Chapelle. Blackwell Publishing Ltd, 2012: pp. 1-8.

Daem, Elisabeth. "Auteursrechtelijke Grenzen Aan de Vrijheid van Appropriation Artists." *Intellectuele Rechten - Droits Intellectuels*, no. 4, 2017, pp. 263-270.

Debord, Guy. *The Society of the Spectacle*. Translated by Ken Knabb. Rebel Press, 2005.

Fuchs, Barbara. *Theater of Lockdown: Digital and Distanced Performance in a Time of Pandemic*. Methuen Drama, 2022.

Hemmens, Alastair, ed. "Guy Debord, the Situationist International and the Abolition of Alienated Labour." *The Critique of Work in Modern French Thought*. Springer International Publishing, 2019: pp. 137–66.

Internationale situationniste. Bulletin central édité par les sections de l'Internationale situationniste, no. 1, June 1958.

Internationale situationniste. Bulletin central édité par les sections de l'Internationale situationniste, no. 2, December 1958.

Judgment of the Grand Chamber of the European Court of Justice (Case 201/13). 3 Sept. 2014. Accessed 8 Mar. 2023.

Kambalu, Samson. *Nyau Philosophy: Contemporary Art and the Problematic of the Gift – a Panegyric*. PhD thesis, University of the Arts London, 2016.

—. "Why Situationism? Why Sanguinetti Breakout Area? Nyau", *Samson Kambalu*, 27 Oct. 2015.

Lütticken, Sven. "Guy Debord and the Cultural Revolution". *Grey Room*, no. 52, 2013, pp. 108–27.

Martínez, Eric, et al. "Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language." *Cognition*, no. 224, 2022.

Minio, Federica. "Riflessioni in tema di tutela giuridica dell'appropriation art in ambito figurative." *Aedon* 3 (2019): pp. 260–67.

Modern Art Oxford. "A Game of War: Kambalu V Sanguinetti Trial at Ostend, 2021." *YouTube*, 17 June 2021.

Mulcahy, Sean, and Marett Leiboff. "Performing Theatrical Jurisprudence: An Introduction." *Law Text Culture*, vol. 25, 2021, pp. 1-21.

Nellis, Steff. "All Rise! Jurisdiction as Performance/Performative Language." *Forum Modernes Theater Themenheft: Text, Image, Performance*, vol. 32, no. 2, 2021.

—. "Enacting Law: The Dramaturgy of the Courtroom on the Contemporary Stage." *Lateral*, vol. 10, no. 1, 2021.

Oberkrome, Friederike, and Verena Straub. "Performing in Between Times: An Introduction." *Performance Zwischen Den Zeiten*, edited by Adam Czirak et al. Transcript Verlag, 2019: pp. 9–22.

Pietrzak-Franger, Monika, et al. "Editorial: Presence and Precarity in (Post-)Pandemic Theatre and Performance." *Theatre Research International*, vol. 48, no. 1, 2023, pp 2–8.

Phelan, Peggy. Unmarked: The Politics of Performance. Routledge, 1993.

Schneider, Rebecca. "Opening Space in Time: Gestures of Pre- and Re-Enactment." *Performance Zwischen Den Zeiten*. Edited by Adam Czirak et al. Transcript Verlag, 2019, pp. 121–26.

—. *Performing Remains: Art and War in Times of Theatrical Reenactment.* Routledge, 2011.

Schwitalla, Johannes. "Die Inszenierung von Gerichtsverhandlungen im Fernsehen - "Streit Um Drei"(ZDF) und "Richterin Barbara Salesch" (Sat. l)." *Sprache und Recht*, De Gruyter, 2002: pp. 39–53.

Searle, Adrian. "Samson Kambalu: New Liberia Review – All Hail the Elephants of Hope." *The Guardian, 19 Oct. 2022.*

Trespeuch, Anna. "L'Internationale situationniste : d'autres horizons de révolte." *Matériaux pour l' histoire de notre temps, vol. 94, no. 2, 2009.*

Trespeuch-Berthelot, Anna. "Les vies successives de La Société du spectacle de Guy Debord." *Vingtième Siècle. Revue d'histoire, vol. 122, no. 2, 2014, p. 135.*

TWIIID. "Over Ons." *TWIIID*. Accessed 8 Mar. 2023.

Van der Perre, Katrien. *Cursus Media-en auteursrecht*, UGent, 2022.

Van Lathem, Jens. Interviewed by the author, on 13 March 2023.

Van Royen, Tobias. Interviewed by the author, on 20 January 2023.

Wetboek Van Economisch Recht / WER. 8 Mar. 2023.

What's in the White Box. "Samson Kambalu and the New Liberia at Modern Art Oxford." *White Box Art Channel, 31 May 2021. Accessed 8 Mar. 2023.*

WIPO. Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886). Accessed 8 Mar. 2023.

Notes

1 Consisting of Jens Van Lathem and Tobias Van Royen at the time of the creation of *A Game of War*.

2 It is beyond the scope of this article to delve deeper into this topic, but an individualistic approach to authorship, as commonly embraced by European copyright law and intellectual property, remains linked to the market logic of (late) capitalism, a system that both the SI and Kambalu resist (Abbing 86-9).

3 Copyright arises automatically: it is produced "by the mere creation of a work" (own translation of the Dutch original; Van der Perre 197). One of the fundamental principles of the Berne Convention, which laid the foundation for the European copyright system, is the "principle of 'automatic' protection" (Summary Berne). In this regard, the convention explains that copyright protection should "not be conditional upon compliance with any formality" (art. 5 Berne Convention). Currently, according to the Belgian copyright system, you cannot fully waive your moral rights (Wetboek Economisch Recht / WER Art. XI. 165 § 2) – they have an inalienable nature – but you can waive or transfer your economic rights (thus fully relinquishing your economic rights regarding your copyright-protected creation) or licence them (either with a "normal" or an "exclusive" licence) (WER Art. XI. 167 § 1). With regard to the aforementioned statement, Kambalu's lawyer argued that "By inviting third parties to appropriate their own works in order to overcome the concept of art commercialization and barriers to the diffusion of ideas, legally speaking they offer everyone a free and non-exclusive licence for the reproduction of the works themselves (according to the scheme of pubblic [*sic*.] offering pursuant to art. 1336 of the Italian Civil Code)" (Boccuni). However, it is important to note that Sanguinetti never explicitly expressed the alleged call for a free licence in relation to his – sold – archive, as he retained both moral and economic rights upon its sale. Therefore, the statement of Kambalu's lawyer should be read with a grain of salt .

4 The Beinecke Rare Book and Manuscript Library is part of the Yale University Library.

5 The rules of this 'war game' were later established by Alice Becker-Ho and Guy Debord in the book of the same title, *Le Jeu de la Guerre* (1987). While Debord is often regarded as a central figure of the Situationist International (SI), it is worth noting that both Becker-Ho and Michèle Bernstein also played significant roles within the movement.

6 The element of play is prominent in the works of both the SI and Kambalu. While an extensive exploration of this topic exceeds the scope of this article, it is worth quoting a brief excerpt from the first *Internationale Situationniste* of June 1958, in which Debord sketches a "Contribution à une définition situationniste du jeu" – a sketch that serves as a concise introduction to the Situationist's vision of play as a politico-artistic practice: "Le jeu est ressenti comme fictif du fait de son existence marginale par rapport à l'accablante réalité du travail, mais le travail des situationnistes est précisément la préparation de possibilités ludiques à venir." (*Play is felt as fictional due to its marginal existence in relation to the crushing reality of work, but the work of the situationists is precisely the preparation of future playful possibilities*). For discussions on Kambalu's 'playfulness,' I refer to his doctoral dissertation, as cited in the list of references.

7 In response to accusations, including those made by Bill Brown ("Clarifications Concerning Samson Kambalu"), of incoherency, Kambalu stated: "I believed that within the liminal spaces of the commercial world it was still possible to give a gift" ("Why Situationism" 3). In other words, he believed that the commercial structure – and thus the entrance fee – of the Biennale was not contradictory to the emphasis he placed on the notion of 'gift-giving' within his work, particularly regarding *Sanguinetti Breakout Area*. However, there is indeed an inconsistency in the emphasis placed on the 'non transactional' nature of 'gift-giving' when making this 'gift' available only after purchasing a ticket – thus, after a transaction. Nevertheless, in his discourse surrounding this specific work, Kambalu seems to focus more on the symbolism of 'gift-giving' rather than the mere act of giving something 'freely without expecting anything in return'. The gift he wanted to achieve with *Sanguinetti Breakout Area* was a "taking of the archive back to Italy" ("Why Situationism" 2-3) that would be his "gift to Sanguinetti". Following this line of reasoning, the mere fact that the installation was in Italy (during the Biennale) was sufficient for it to be labelled a gift. Still, spaces like biennials are inherently exclusive and do not cater to, metaphorically speaking, the entirety of Italy. Kambalu's gift, represented by *Sanguinetti Breakout Area*, was primarily accessible to a privileged group of individuals who possess a certain amount of cultural and/or economic capital.

8 In the interview with the author, Jens Van Lathem mentions that this was brought up by some artists during screenings. They indicated that the legislation, as well as TWIIID's proposal, obliges them to formulate a discursive intention about their work, which should demonstrate that the work is intentionally "critical or humorous". However, they do not consider the aforementioned parameters as quintessential for their work – or for 'art' in general.

9 Boccuni: "The whole installation has its creative consistency and is a message of sarcastic criticism clearly coming from Kambalu, thus it cannot be considered a mere counterfeiting or a [*sic*] plagiarism of Sanguinetti's works or of part of them as the presence of the aforesaid creativity constitutes the parody exception, according to the principles stated in the decision of the European Court of Justice n. 201 of 3.9.2014 (C-201/2013), being parody clearly recognized as a constitutional right according to art. 21 and 33 of the Constitution".

10 Nellis ("All rise! Jurisdiction as Performance/Performative Language") discusses the "intricate role of language" (159) in court cases and their fictional counterparts, and foregrounds the importance of language within the paradox he distils from his analysis of courtroom dramas that strive to attain a reality effect while lacking the coercive power of real courtrooms.

11 As Nellis ("Enacting law") notes, re-enactments in this sense often draw inspiration from "twentieth-century documentary techniques for the dramaturgical approach artists use within current court case performances" (Re-Enacting Law) or the tradition of "document-based practice" (Arfara 112). This documentary tendency is also visually conveyed in the film by occasionally interspersing photographs from *Sanguinetti Breakout Area* within the diegetic storyline in the courtroom. Furthermore, photographs inherently reference something that is past, thereby highlighting a double temporality – now and then – through their presence in the film.

12 As expressed by Pietrzak-Franger et al. in their editorial "Presence and Precarity in (Post-)Pandemic Theatre and Performance" (2023, 2): "The pandemic struck at the heart of theatre and performance – their liveness [...] Its very presence had to be redefined."

13 My own translation from the Dutch original: "The defendants through their joint counsel argue as a defence that the claim cannot possibly be upheld because, in the main order, the plaintiff would "not be an author of the archive", as it is alleged by the defendants that "the bulk of the material is from third parties";

In subordinate order, the defendants argue that Mr KAMBALU had only used a so-called "open licence";

In further subordinate order, the defendants invoke the exception of parody."

14 My own translation from the Dutch original: "The defendants through their joint counsel argue as a defence that the claim cannot possibly be upheld because, in the main order, the plaintiff would "not be an author of the archive", as it is alleged by the defendants that "the bulk of the material is from third parties".

15 It is important to note that not only the legal language but also Kambalu's discourse in *A Game of War* may be inaccessible to those unfamiliar with the art (historical) references he makes. He refers to philosophers such as Nietzsche and Debord, mentions names, artistic concepts, and covers multiple angles. In contrast with the absence of efforts to make the legal language in the trial more intelligible, the intervention of the expert – Sven Lüticken – on the SI enhances the intelligibility of Kambalu's artistic discourse.

16 The end credits of the film mention that it is "directed by" Tobias Van Royen, Samson Kambalu, and Jens Van Lathem (02:10:25).

17 While the analysis primarily emphasizes Kambalu's perspective and the importance of freedom of expression protected by the parody exception, it is crucial to consider the need for a balance between this freedom and the economic and moral rights of copyright holders. Exploring Sanguinetti's perspective could provide valuable insights to ensure a more comprehensive approach to copyright protection.

18 The white book that lies above *Sanguinetti Theses* is *Capsules, Mountains and Forts* (2016). That book, designed by graphic design company *Fraser Muggeridge Studio*, includes a selection of legal material concerning his trial with Sanguinetti.

The Resilience of Borders:

Law and Migration in Contemporary Performances

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Legal philosopher Hans Lindahl argues that the regulation of immigration is, above all moral considerations, a political issue. When one tries to assess the problem of territorial boundaries – and their transgression – as a question of distributive justice, political philosophers easily mix, not even surreptitiously, *moral* arguments with political and legal considerations. Lindahl refers to Michael Walzer, who asserts the primacy of the community and consequently bounded justice, and to Jürgen Habermas, who's idea of boundless justice makes the notion of a nation-state irrelevant: one world polity has, by definition, no boundaries and thus no immigration issues. But Lindahl replies that law, and immigration law in particular, is forced to create boundaries by its very nature. After all, law structurally defines diverse groups of interest, and the actions of individuals – belonging or not belonging to one group or another – are always placed or misplaced, i.e. situated inside or outside the realm of the law. Even a world legislature and a universal jurisdiction would have to decide who can claim her/his rights, or who cannot. But since law is also, by definition, contingent – it can be changed in any direction –

the claim of distributive justice, as a form of *moral* pressure, cannot be discarded easily. It shouldn't be discarded, to be sure, it should be politicized. In recent performances about immigration, the moral indignation has clearly had the upper hand, sometimes with a touch of cynicism. In *Necropolis,* Arkadi Zaides creates a fictitious city of the dead, where only those who died in their attempt to reach Europe are allowed. From a massive collection of data about the victims of Fortress Europe, his performance transforms into a horrifying portrait of their 'human remains'. *Het Salomonsoordeel,* a documentary, participatory monologue by Ilay den Boer involves the audience in the moral dilemmas of the 'decider' of the Dutch immigration and asylum agency, where den Boer worked as an intern. In *The Voice of Fingers,* Thomas Bellinck confronts his friendship with asylum seeker Said Reza Adib with the harsh reality of migrants as 'data subjects', identified by their fingerprints. The question arises of whether artistic representations of immigration issues sufficiently tackle the political challenges of global mobility – in this collapsing world of (civil) wars, climate disasters, and economical inequalities – and the challenges it poses for the affluent societies we are living in. Is it possible, or even meaningful, for theater-makers to try to relate their compassion – as a moral sentiment – to the frameworks of contingent policies and, subsequently, to the strict taxonomies of legislation?

Keywords: migration law, migration policy, asylum seekers, human rights, documentary theater, Arkadi Zaides, Ilay den Boer, Thomas Bellinck

In her video installation *Guided Tour of a Spill (CAPS Interlude)* (2021), Moroccan artist Meriem Bennani invents a story about a new kind of transatlantic migration, from Morocco to the USA: no stowaways on cargo ships, no forged passports, but teleportation, à la *Star Trek*. The response of U.S. Customs and Border Protection is drastic. They build an island in the middle of the Atlantic that plucks the capsules of teleporting Moroccans out of the sky. But many migrant trekkies escape this maneuver and succeed in crossing. Bennani's video is a mixture of digital animation and edited found footage of violence at hyper-secure borders. The symbol of this fictional project is a crocodile from a children's movie, but that doesn't immediately brighten the tenor of the video. It is an indictment of a global (anti)migration policy that forces absurd solutions. The tactics of people smugglers on the Mediterranean – 750 people in a fishing boat – or of Tunisian border authorities – dumping West Africans in the desert – are no less absurd, but they are real.

It results in moral outrage in news reporting and analysis, as well as in artistic satire. But do the two have anything to do with each other? How does this moral disgust, in artistic guise, provoked by an artistic gesture, relate to thorough criticism of a deadly migration policy? Is this policy the result of democratic politics, and how does the artist respond to the supposed consensus (at least among a large majority in parliaments) that designs this policy and allows it to be applied? What about the law that draws borders and makes migration a cross-border phenomenon, in more ways than one? That is what I want to find out in this article, using some recent and representative theatrical performances, which attempt to give explicit shape to the moral as well as political indignation about the ever-higher walls around Fortress Europe. Three productions will be analyzed in more detail in the process: *Necropolis* by Arkadi Zaides (2020), *Het Salomonsoordeel* (*The Solomon's Judgment*) by Ilay den Boer (2020), and *Simple as ABC #7: The Voice of Fingers* by Thomas Bellinck (2023). All three address the tension between bureaucratic procedures and migrants' human rights: assessing narratives (den Boer), establishing identity (Bellinck), counting the dead (Zaides). All three refer, one more directly than the other, to a basic, always unanswered question of Hannah Arendt: who guarantees the right to have rights? (Arendt, 1973, 343) It is therefore obvious to turn to the legal-political context of migration, and its development in recent decades, to inform these analyses. From an abstract, legal-theoretical approach, this framework evolves into more concrete dilemmas: this is how I arrive at representations about concrete people.

Part I: Law, Politics and Theory

Boundaries are inevitable

The regulation of (im)migration is primarily a political issue, which does not necessarily coincide with a moral problem, argues Hans Lindahl. When trying to assess the problem of territorial borders – and their crossing – as a question of distributive justice[1], political philosophers easily (and often openly) mix moral arguments with political and legal reasoning. This is problematic because politics implies an asymmetrical relationship between citizens and aliens: the former set the rules, and the latter are merely subject to them. Morality, however, assumes a principle of reciprocity and, by extension, pursues distributive justice. Migration is first and foremost a political problem because it always violates seclusion from the political community – in the form of the nation-state – and forces it to redefine 'inside' and 'outside' with respect to the (legal) subjects who challenge it, and who therefore qualify as 'aliens' (as opposed to 'citizens'). The question of distributive justice – the principle of 'to each his own' – follows only afterwards (Lindahl, 2009, 137-138).

Incidentally, Hannah Arendt is also aware of this logic when she speaks of the 'right to rights,' and notes that the nation-state as the source of those rights seems inescapable, no matter how subjectively one conceives of those (human) rights (van Roermund, 2009, 169). Lindahl compares two approaches to migration, as a political-philosophical problem. While Michael Walzer emphasizes the primacy of community and thus of bounded justice, Jürgen Habermas posits an idea of boundless justice that makes the concept of the nation-state irrelevant. After all, a political community on a global scale has no borders and thus no migration problems in a legal-political sense. Walzer argues that the collective identity of a nation honors the bond between population and territory. That community becomes politically active from the consciousness of shared values. Thus arises, for the members of that community, the privilege of determining which aliens can be admitted and on what terms. Moreover, the term 'naturalization,' as the end result of integration, suggests that citizenship is considered a natural attribute, an identity that is not the result of the nation-state – that would simply be membership, as of an association – but rather a premise for the cohesion of that nation-state (Stolcke, 1997, 72).

Lindahl responds to Walzer that the emphasis on collective identity – shared values, i.e., a moral attribute – threatens to remove the contingency of the political decision of inclusion/exclusion from politics itself. The closure of the nation-state is a very political decision, and thus always subject to change (Lindahl, 2009, 140). But even with a world government, as Habermas suggests, inclusion/exclusion will every time be a concrete issue for a legal and political order, because a space will always have to be determined that is 'inside', which is dependent on defining this 'inside' from an 'outside.' Moreover, this must be done in a temporal perspective: the space of the law is constantly changing. 'Each his own' also means 'each his place,' even if that place is not definitively fixed, as the reality of migration demonstrates again and again (Lindahl, 2009, 147-155). Underlying this political need to define inclusion/exclusion is an even more fundamental fact, namely the impossibility of making an individual a subject of law without taking into account the institutional environment – the political community, to begin with – in which this individual comes into the world.

Politics is necessary

So, if one were to re-politicize migration, from these legal-theoretical insights, what conceptual difficulties does one encounter? Seyla Benhabib observes that here, both in public policy and in jurisprudence, the paradox of democratic legitimacy emerges, namely that any right to inclusion, the human right to freedom of movement[2] can never be enshrined in a law made by those most directly affected, namely the migrants themselves (Benhabib, 2004, 206). In her view, legislation and policy on migration is indeed the crucible for the functioning of democracy, precisely because, as a matter of principle, no alignment is possible between the humanitarian (and therefore political) demand of those who may be subject to the law and the legal affirmation of those who enact it. In other words, popular sovereignty and democracy never coincide perfectly, because there will always be excluded subjects of law (Benhabib, 2004, 20). Benhabib also notes that in the reality of the globalized world, the sovereignty of states today is not only factually but also legally constrained. The Universal Declaration of Human Rights is the historical tipping point in this regard (Benhabib, 2004, 3, 10). That evolution, however, begins, philosophically speaking, as early as Immanuel Kant's Zum ewigen Frieden. Kant posits, as *Definitivartikel* (ground rule): "das

Weltbürgerrecht soll auf Bedingungen der allgemeinen Hospitalität eingeschränkt sein." (Kant, 1983 [1795], 213)[3]. This 'hospitality' is not an act of charity, but it is indeed a right, namely the right not to be met with hostility when visiting another country. Kant is not suggesting a right of residence, the criterion remains whether the foreigner would 'perish' if refused entry, but this norm is very similar to current asylum law, especially since its normative status – enforceable law or morally binding agreement? – is equally unclear (Benhabib, 2004, 29).

At the same time, this theoretical basis of freedom of movement exposes a new paradox. The more clearly that a political community assigns itself a political identity – political freedom in the antique sense[4] – the more the community ("we, the people") will also shut itself off, or as Benhabib puts it, "Empires have frontiers, while democracies have borders" (Benhabib, 2004, 45). Frontiers are centrifugal boundaries that open perspectives, for conquest but also for peaceful displacements, while borders only include and exclude. Arendt's question about the basic 'right to rights' stems from this democratic impasse. The refugee flows of the early twentieth century left the Tsarist Empire and arrived in the democratic West, which felt threatened. Those democracies, according to Arendt, were mentally prepared for that movement by colonial imperialism, which relegated humans to in-humans ('savages') (Arendt, 1973, 188-197, 296-297). The step toward disqualifying destitute refugees could thus be taken relatively easily. How then can a right to citizenship – as a potentially democratic extension of freedom of movement and (Kantian) hospitality – still be justified, after totalitarianism, after the illusion that the 'nature of humanity' is the source of human rights? Or, as Benhabib restates the question: how can the right (to rights), which is indeterminate and indeterminable, be reconciled with the rights (to which one would thus be entitled), which are fixed within a legal-institutional framework and thus in principle enforceable?

The determinacy of rights presupposes a form of membership, of a political community in the form of a nation-state, and thus depends on its recognition. But the right in 'right to rights' should precede that recognition: for Arendt, membership in humanity is the elementary justification and not, as with Kant, the limitations of the earth as a territory. Arendt rejects the idea that the circumstances

of one's birth establishes one's membership in the political community. She argues, on the contrary, that one's political and social actions should be determinative (Benhabib, 2004, 57-59). Because the super-diversity in twenty-first century society which, among other things, increasingly complicates the idea of a common history and because a strict territoriality also provokes more and more critical situations, Benhabib proposes to think about a different (post-national?) concept of sovereignty that knows how to deal with opposing historical narratives (Benhabib, 2004, 64-67). Now, while international law may, to some extent, honor refugees' freedom of movement – enforcing it is something else … – admission to forms of citizenship remains a carefully cherished privilege of individual nation-states. A starting point might then be to link a potentially universal moral obligation (freedom of movement/hospitality) to the political observation that global economic interdependence is increasingly undermining sovereignty. There is a certain logic in this, since the current institutional architecture (such as the WTO) is partly responsible for this inequality and thereby causes, directly or indirectly, migration (Pogge, 2002, 117). Whether political will can accompany that, however, is highly questionable.

Elspeth Guild notes as early as 2001 that, both with member states and the EU as a whole, migration policy has been 'outsourced,' and thus removed from politics. Individual decisions are no longer taken from the center of power but often by private actors or extraterritorial bodies. These include consular services of member states that issue visas, moving the border abroad. But a refugee wants to leave his country urgently, of course, and preferebly undetected. But with that, strictly speaking, he cannot qualify for refugee status, because the Geneva Convention requires that he has crossed the borders of his country (Guild, 2001, 53). If national governments would then start requiring legal documents from asylum seekers, then refugee status becomes an empty shell altogether. Another form of outsourcing are the assessments of potential employees who are not EU citizens by the human resources department of the hiring company. The safeguarding of a country's sovereignty (and thus its borders) is never the concern of a private company, except perhaps in a protectionist reflex that is commercially rather than politically motivated. Moreover, there is rarely any alignment between European governments and companies, so that workers from so-called 'high-risk' countries, for instance, which are subject to strict visa

requirements, gain access to Europe very easily through this route. This produces economic migration based on demand (Guild, 2001, 70).

The background to these developments is a fundamental paradox in European migration policy. The EU, in the spirit of an 'ever closer union,' has been committed to a progressive dismantling of internal borders, especially since the 1990s. But that dynamic, concretized in the Schengen Convention (1985), which has been part of the acquis communautaire since 1999, simultaneously strengthened Fortress Europe and its external borders up to and including the creation of the Frontex agency in 2004. Frontex coordinates surveillance, in principle a competence of member states with such an external border, and since 2016 it has been expanded into an independent border guard service. Schengen also requires countries to recognize, respect, and enforce each other's entry criteria: those denied/granted entry in one country must also be denied/admitted in other Schengen countries (Guild, 2001, 21). This evolution has been followed with suspicion, not only because of the criteria for migration, and a fortiori for asylum. It thus remains that eminently national competences and the member states absolutely want to keep it that way, but also because of the scandals with which Frontex has been confronted (Holding Frontex to Account, 2021). On the other hand, the European Court of Human Rights (ECtHR), whose jurisdiction covers a wider area than the EU, applies a broader concept of the right of residence, even though it continues to recognize that (national) asylum law can impose stricter conditions, at least if they are thoroughly examined on a case-by-case basis (Battjes, 2007). Combined with the Schengen treaty, which allows only exceptional internal border controls, this implies that a generous right of residence, according to the standards of the European Convention on Human Rights (ECHR), should be applied throughout the Schengen zone: respect for each other's rules, which, moreover, are tested against human rights. The reality on the ground is different.

Migration policy becomes security policy

The politicization – actually the de-politicization – of migration politics in Europe is a serious game on different, sometimes contradictory, sometimes overlapping, levels: the Council of Europe (ECHR and ECtHR), the European Union plus Schengen, and the national (member) states. The International Covenant on Civil and Political Rights

(1966) – the concretization of the Universal Declaration of Human Rights – serves as a guide, as Weltbürgerrecht (world citizenship), as Kant put it. The fundamental, constitutive, and constitutional prerogative to draw borders is the focus of most debates, but since the late 1990s an all-important paradigm has been added, which today is taken for granted, as if it had always been there: security policy. Underlying this is another factor that continues to influence this intimate relationship between migration and security largely unconsciously, namely the processing of the colonial past in the immigrant countries. In a theoretical approach, the 'percolation' of a security discourse can be explained from two types of logic. On the one hand, a logic of exceptional measures, interventions necessary to ensure the safety of the population in an emergency situation, emerges. But this logic unwittingly becomes itself the justification of a mainstream policy. As a result, the exceptionality of the policy disappears, or rather the exception becomes the basis of the entire political-legal system[5]. On the other hand, a logic of unease may explain the application of this security discourse. Political and official professionals qualify certain persons and groups as causes of unease, they exclude them because they would pose a security risk or they admit them, after it has been established that this risk does not exist (Bourbeau, 2011, 133-134).

What security is at stake, anyway, in this evolution toward 'securitized migration?' What is threatened by immigration? The risk to public health – HIV, for example – is an argument that crops up only sporadically, among politicians and in the press; the terrorist threat, on the other hand, is an argument that has been growing in pertinence since September 11, 2001. But much more systematic and at the same time much less precise is the alleged threat to European civilization, which is said to be under attack with the increase in influx. It is a dormant story, rarely told directly by politicians or opinion makers, at most as an echo of public opinion, but in this very way it contributes greatly to the self-evident securitization of migration policy. This is how the Copernican revolution succeeds: the exception – the dangerous migrant – becomes the rule, the generalized touchstone in every admission procedure. Once this intellectual and moral hurdle has been overcome, it is no longer even important which threat will be averted by a more restrictive immigration policy. Securitization becomes an end in itself, and this is most striking in the 'Australian model,' where border security

has become an ideologically (and legally) coherent paradigm. The Australian Border Force is always expanding its territorial authority at sea through 'security zones,' and any refugee they find there is either pushed back or deported to an extraterritorial camp where they can start the asylum process. With one very severe restriction: these asylum seekers will never be able to stay on Australian soil, even with recognized refugee status. In Peter Chambers's analysis, border security is a social system that reproduces itself within an imaginary frame of reference, and that frame of reference is the border that guarantees Australia's sovereignty (Chambers, 2018, 2). That border is on the one hand very well-defined – the Australian continent, surrounded by an internationally recognized 12-mile zone – but on the other hand more fluid: the security zone in the open sea, where pushbacks take place, and the extraterritorial places where asylum requests of 'illegally arrived' refugees are processed. For registration, special zones have been given offshore status (Christmas Island). For the unlimited waiting period for recognition, places are (or were) rented in neighboring foreign countries: Manus, part of Papua New Guinea (now closed), and the island state of Nauru – an archipelago of Guantanamos for asylum seekers.

The specter of (post)colonialism

Seyla Benhabib already referred to Hannah Arendt, who explained the suspicion of refugees, in the early twentieth century, through colonial racism (Benhabib, 2004, 51). The evolution towards securitization outlined earlier may have had an important influence, as it appeared to be able to put into practice a far-reaching othering of asylum seekers: Fortress Europe exists. Homi Bhaba sees this othering as a recovery of place and time from a colonial era, but in an unmistakable present that is grimly close – the neighbors, as it were. The historically oppressed come to avenge themselves (Bhaba, 2004 [1994], 241-242), and he quotes from *The Satanic Verses* of Salman Rushdie:

> These powerless English! - Did they not think that their history would return to haunt them? – 'The native is an oppressed person whose permanent dream is to become the persecutor' (Fanon) [. . .] He would make this land anew. He was the Archangel, Gibreel – And I'm back. (Rushdie, 1988, 353)

A pertinent observation, but not a political statement. The European refugee policy that emerged during the twentieth century, especially with the acceleration following World War II, has always had a tendency to de-politicize: the Universal Declaration of Human Rights was regarded as a morally high-minded document, whose main purpose was to embody moral indignation ('never again') as well as resourcing. The declaration could guide politics but was certainly not intended to create subjective rights for which legislators had to vouch and which could lead to enforceable results. Tellingly, nowhere in the texts was colonialism, as an institutionalization of 'racial' superiority, condemned (Mayblin, 2017, 119). It is only twenty years later, with the International Covenant on Civil and Political Rights in 1966, that it becomes possible, as a legal subject, to invoke human rights, although real legal protection is not as strong everywhere, if it exists at all.

Such legal protection does exist in Europe, with the ECHR (1950) and the ECtHR (1959), and since then the legal protection of human rights in legislation and jurisprudence has been strengthened, also regarding refugees. But at the same time there is a restrictive movement in asylum policy, which wants to leave out as much as possible the context of the asylum seeker – motives, situation in the country of origin, etc.: this is also a form of de-politicization (Mayblin, 2017, 119). The decisive distinction between forced and voluntary refugees, politically and officiously translated into 'political' versus 'economic' refugees, is an essential tool here, which precisely allows the individual context of the asylum seeker to be minimized (Mayblin, 2017, 31). A story becomes a qualification. Politically, this can be explained from the logic of global capitalism, which permanently seeks the most profitable allocation on a global scale, especially in the labor market. Uncontrolled migration thwarts this 'management,' and a neocolonial security discourse – "European culture is under threat" – is a working rhetorical argument in this regard. Colonial relations, including racial prejudice – rendered somewhat invisible – are thus restored in another form (Ibrahim, 2005, 172).

The colonial past, which is structurally based on a racialized image of man, reappears as soon as global relations are threatened by social, economic, and ecological shifts. The formation of international human rights intentions and regulations reveals more than once that delays – sometimes for decades – are just about always related to

this racialized view of man and the world. For example, it has been suggested by official bodies that the recognition of other cultures as equal, in terms of human rights, would mortgage modern progress with the West leading the way (Mayblin, 2017, 108-110). Not surprisingly, then, this hegemonic mindset – overt in discourse, covert in policy – continues to influence, if not dominate, the treatment of asylum seekers.

Part II: Theater, Document and Politics

In the first part of Arkadi Zaides's *Necropolis*, one watches a multitude of images of places where refugees died and were buried. As these images fade out, some words appear on the black screen, taken from Walter Benjamin: "[Ein Kulturgut] ist niemals ein Dokument der Kultur, ohne zugleich ein solches der Barbarei zu sein" (Benjamin, 1980, 696)[6]. This statement is the core of the seventh *geschichtsphilosophische These*, and can only be confirmed after seeing these images as well as what follows. But the eighth Thesis is also relevant here:

> Die Tradition der Unterdrückten belehrt uns darüber, dass der „Ausnahmezustand", in dem wir leben, die Regel ist. Wir müssen zu einem Begriff der Geschichte kommen, der dem entspricht. Dann wird uns als unsere Aufgabe die Herbeiführung des wirklichen Ausnahmezustands vor Augen stehen; und dadurch wird unsere Position im Kampf gegen den Faschismus sich verbessern. Dessen Chance besteht nicht zuletzt darin, dass die Gegner ihm im Namen des Fortschritts als einer historischen Norm begegnen. (Benjamin, 1980, p. 697).[7]

If we replace *Faschismus* with 'securitized migration,' this is precisely what is at stake in performances like those of Arkadi Zaides, Ilay den Boer, and Thomas Bellinck, who each show in their own way that a phenomenon of crisis – namely, unpredictable migration – was considered politically exceptional, as a state of emergency in the Schmittian sense, and then transformed into the normality of the political approach to non-citizens, regardless of how they entered the territory. Security and sense of security – two different things – that is all that matters. The 'real state of exception' that Benjamin

believes must be shown is the death city under the Mediterranean (Zaides), the formatted narrativity of asylum officials (den Boer), or the identitarian absoluteness of fingerprints (Bellinck). Moreover, Benjamin blames the wound on a crucial flaw of modern thinking: progress as a historical norm, both in the representation of the past, and in the justification of current political action. This leads, not necessarily to a moral impasse when contemplating the horror of the Mediterranean crossing, but above all to a political cry for help. But is that cry for help political enough in the performances cited?

Access to the City of the Dead

Necropolis (Zaides & Dubricic, Necropolis, 2019) is part of an extensive project that UNITED for Intercultural Action, a network of human rights organizations, has been setting up for 25 years to build a horrific archive. An archive that documents the (life) stories of refugees, especially those refugees who paid with death for their attempts to build a (legal) existence in Europe. They drowned in the Mediterranean or the English Channel, they were mortally wounded by border guards or other police, they killed themselves for fear of deportation, they languished in misery in the city gutter. A growing archive of those who are denied entry to Fortress Europe because they are never able to assert their 'right to rights,' should they have any. Unless they are already dead, and even then it is not obvious. Zaides situates the project within the framework of counter-forensics, a form of forensic anthropology that does not focus only on criminal qualification and legal causality but connects the search for and exhumation of the victims of (collective) violence with a discourse around human rights, often against official attempts at historical oblivion. It also aims to be an alternative to the publication, by governments, of forensic material designed to deter migration (Keenan, 2018, 50). The idea is that the dead must speak, when the living are silenced, due to the disqualification of their stories. Around the archive of United fIA, Zaides creates a poetic fiction: the city of Necropolis, to which one can only gain access if one has not survived attempts to obtain residency. Acceptance as a 'citizen' of Necropolis is thus the mirror image of Europe's fundamental rule: only those who succeed in obtaining a residence permit are entitled to citizenship, that is, to the protection of the law and the rule of law.

Figure 1.
NECROPOLIS
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Croisements

In a dark room are a table with two computer screens and, in the background, a metal cart covered with shapeless objects, while a projection screen fills the entire back wall. A text appears on that black wall, which also sounds through the speakers. Igor Dubricic's voice gives a clinical description of the fictional city of Necropolis, which welcomes all the victims of the failed crossing, a morbid world in another dimension, without the connotations of the popular imagination about the undead:

> As we keep moving above, around and through Necropolis, let us not forget : Everything that we see in this landscape of death is made of ourselves – from the North: a crumbling glacier of border regulations and bureaucratic classifications; from the West: a narrow gorge of falsified history, of conquest and enslavement, of abuse and exploitation, of greed and betrayal; in the East: a dry wilderness of abandoned declarations, of fantastic expectations and malicious misinterpretations; in the South: a sinuous, living assemblage of rotting flesh resurrected forensically into a pulsating anatomy of cavernous orifices, temporary dugouts and tightly sealed voids; a dark, warm, dump network of underground passages interrelating decomposing leftovers, assembling all the corpses, hundreds, thousands of them, into a sprawling landscape made of hardened cartilage and leathered skin, into a raising architecture built on bones, one shared organism, promise of an eternal life as exuberant and exhilarating as a violent death at sea: the Leviathan opens its mouth. (Zaides & Dubricic, Necropolis - voiceover, 2019, pp. 1-2)

This is at once a statement about a world order, which reduces law and its application to its essence: inclusion and exclusion, who may enter and who may not, who has rights and who does not – stripped of all empathy. Mere human existence does not suffice in the real world, and for access to Necropolis the perverse opposite applies: one obtains civil rights when no longer alive, existing only as biological remnants, insofar as they have not decayed. The collective identity of these dead citizens is clear: everyone was once fleeing to trans-Mediterranean Europe. And it is also clear who sets the rules: the 'recognized' dead refugees.

After this introduction, two individuals, Emma Gioia and Arkadi Zaides himself, take their seats behind computer screens, backs to the audience, still in semi-darkness. A moving map, a modified Google Earth, appears on the screen, searching for the places where these victims are actually buried: this is the opposite of fiction. A dark sound (sound design by Aslı Kobaner) accompanies the wordless movements of the map. The image starts at the scene of the theater, then the 'viewpoint' – not a character, but also not an anonymous camera – zooms out. The viewpoint rises into the sky, zooming in again at pointy red dots and gradually their names become visible. They are the names of refugees who killed themselves before being deported, of victims of police bullets and other government violence. When the viewpoint 'lands', one hears footsteps on gravel paths. A long walk, which leads to the far corners of the cemetery: most victims of the closed borders are buried where it is difficult to find them, and usually without a tombstone. First the sites are quite far apart in northwestern Europe, then the viewpoint moves to the southern edges of Europe, around the Mediterranean. The movement of the viewpoint slows down and speeds up, tearing the map completely apart, the familiar Mercator projection no longer providing a reference point. The viewpoint arrives at places where there are dozens of red dots: the Greek islands, Sicily, Lampedusa. Here no longer just graves with a rained-out paper with a name, but a container, in which anonymous human remains, fished out of the Mediterranean, are stored, or a mass grave of concrete, with only a few names and otherwise only numbers. They still have the dubious luck of being given a grave, of having something of theirs entrusted to the earth. Who buried them? The architecture of these graves shows minimal respect for the unfathomable of everyone's fate, without decoration, just cement with black letters.

After traveling through the cartographic hell of Fortress Europe, everything goes black, just letters and a voice. One sees and hears reflections at these traces of inhumanity, not sentimental, but with restrained anger, leading to a conclusion: "How did we end up here?" Gioia and Zaides, meanwhile, have rolled an iron cart to their table, on which lie indistinct objects. Then light falls on them: they are human remains, sculpted hyper-realistically in plastic. Carefully, but without looking anyone in the eye, the performers show the objects to the audience. It takes a while before it dawns on the viewer what these objects represent. When there are limbs, hands, a shoe, on display, the

Figure 2. NECROPOLIS © Arnaud Caravielhe

silence in the room is deafening. Gradually and unobtrusively, they place the body parts/artifacts in precise places on the cutting table: a body shape, a reconstructed human being, emerges. But decay has destroyed much. The face is unrecognizable, body parts are missing, they are holes in the body. Whether all parts previously belonged to the same individual is unclear. Meanwhile, the same objects have appeared on the screen, lightly moving, illuminated from all sides: digital 3D animation in the service of forensic objectification. Once the plastic body table is assembled, the digital version also appears in full on the screen. The artificial body dances, that is, it rhythmically moves all body parts, just as living humans can. One might associate this 'choreography' with the agony of a drowning man, but the animated movements are arbitrary, they do not express cramps, this body is like a puppet that has lost its puppeteer. This body does not

mimic life, and the pure objectivity of plastic and pixels is at once the most lurid and the most faithful representation of what happens to people doomed to sink into the Mediterranean. Unlike the 'monster' manufactured by Dr. Frankenstein in Mary Shelley's novel, Zaides and Gioia do not want to suggest that new life can be made out of dead body parts. Death definitively belongs to another dimension, giving rise to the imagination of the living, but they cannot cross that boundary – a much more definite boundary than that between Europe and Africa. In Zaides's *Necropolis*, the borders are even more tightly guarded than those by Frontex, and the commentary voice makes this immediately clear:

> In order to gain the right to live in Necropolis, one has to die in an attempt to enter it. Citizenship is granted posthumously to dismembered, decomposing corpses. Everybody else, the others who are still alive but without documents, are kept outside, left to die beyond the entry points. They need to arrive at the gates – dead, in order to be processed. By our "deathright," being already citizens of the Necropolis, we are fateful guardians of its territory. (Zaides & Dubricic, Necropolis - voiceover, 2019, 1)

Necropolis deals with the foundations of the ethical choices made by states governed by law in Europe. The performance establishes, with a powerful metaphor – a body in a city of the dead – hard facts, namely that our 'civilization' relies on 'barbarism' as a mirror image, as Benjamin noted. Is that moralizing? *Necropolis* also opts for a radical inversion of the democratic aporia of migration politics, in which refugees, by definition, cannot have a say in the terms of their eventual reception, let alone their civil rights, much less the geographical boundaries drawn. Many of the victims Zaides mentions, such as Mawda Shawri, who was two years old when she was killed by a police bullet in Ghlin near Mons on May 17, 2018 – a so-called tragedy fatally forced to cross the line between life and death, because the line between legal and non-legal residence can be drawn in any place, including a highway parking lot between a police car and a van of traffickers.[8] That reversal of perspective, which has a solid emotional effect on a sometimes bewildered audience, could be an opening in a debate about a different politicization of migration policy. A debate that goes beyond the bitter

observation that hundreds of bodily remains land at the bottom of the Mediterranean every month. By turning them into fictional legal subjects in Necropolis, Zaides, through counter-forensics, gives them a figurative voice – which one does not hear in the performance. They are made of moving images, plastic objects, and accompanied by detached commentary. They feature numerous extraterritorial enclaves, in dozens of cemeteries across continental Europe. In this too, *Necropolis* is the distorted mirror of the inclusion/exclusion of migrants, who are 'treated' extraterritorially, in camps on remote islands, in consulates, or in corporate personnel departments. Those who perish in these circumstances, once admitted, incidentally possess unconditional civil rights in Zaides's Necropolis.

The Impossible Officious Judgment

In *The Solomon's Judgment* (den Boer, 2021) Ilay den Boer recounts, in detail, his experiences as a 'decision-maker' (*beslisser*) at the IND, the Dutch Immigration and Naturalization Service. The IND decides, subject to appeal to the District Court, on the recognition of asylum applicants as refugees. It does so on the basis of the Geneva Convention on Refugees and Article 3 of the European Convention on Human Rights, supplemented by (political) guidelines from the Dutch government. Den Boer went one step further, serving as a clerk-in-training at the Amsterdam District Court, where he oversaw the judge's decision-making process, regarding rejected asylum applications. The performance usually takes place in an intimate setting, rarely in a theater, for a limited audience, twenty people at most. Den Boer narrates and engages in conversation, and it is more akin to a seminar than a performance. He first explains in detail what a Solomon's judgment is: a decision in which the one in power tries to overcome the inescapable moral dilemma that such a decision entails, but with no guarantee that her or his decision is the most right one, factually and/or morally. The biblical King Solomon used a ruse to make a decision. Two women dispute the other's motherhood of a child, Solomon proposes to cut the child in half, Solomon assigns the child to the woman who refuses to accept the proposal. Whether the woman with the greatest moral indignation about his proposal is really the mother, Solomon has no such certainty, but the conscience of each is clear. The same moral (un)certainty, den Boer explains, also characterizes the decision about an 'asylum

permit' (*asielvergunning*), as it is called in the Netherlands, which is permission to reside in the country as a refugee, for a certain period of time, with all the rights attached.

He then explains the procedure. Den Boer emphasizes that the asylum seeker does not have to prove – as in criminal law, and usually in civil law as well – that her or his story is true, but he does have to make it 'plausible,' so that it is deemed 'credible.' This narrative review thus differs from the strict legal narrative requirements, as established notably in the law of evidence (de Jong, 2008). To test that plausibility, there is a civil service, the IND, which examines the narratives and, more essentially, the documents. The asylum seeker, whose nationality and origin must first be determined, must make two elements plausible. First, that she or he is in a certain position (e.g., sexual orientation) or has performed certain acts (e.g., organizing a demonstration against the government). Second, that that position or action has led to an action by government or society that has endangered or threatens to endanger the asylum seeker in the future. Perhaps a third element, that there is a 'plausible' causal link between the two: the causality requirement, an essential legal dogma, also in this context. One position never gives rise to asylum: economic conditions, even if they are arguably the result of local or global political-economic policy. Den Boer gives extensive examples; the participants/audience may ask additional questions. Each time, the obligation to protect the refugee – that is the *ratio legis* of asylum law – seems at first glance to be self-evident. Until 'details' emerge such as forged documents, a strange stamp, unusual travel routes, government actions that are highly unusual according to the country specialist (e.g., an unexpected release). Den Boer stresses that his mentor at the IND, a senior official, implored him not to look for the possibility of finding a 'yes' in the story, to suppress the tendency to erase the imperfections in the story while rationalizing. An official decision maker must judge in the context of a society, to which that asylum seeker may belong, at least if his story is 'plausible'.

As he explains all the possible dilemmas, a second storyline emerges in the performance: the moral transformation of den Boer, decision-maker-in-training. In fact, he begins to identify with his job. This is not submission to an official logic or political regime, but rather the creation of a necessary distance between compassion (which is

Figure 3. Salomonsoordeel © Prins de Vos

always his first reflex), and reasonable attention to the complex society in which he and the asylum seeker find themselves. But what does that complexity consist of? Den Boer tries to flesh out that question. Complex is at least the observation, against his own intuition of universal hospitality, that a numerically significant group of Dutch (and other Europeans) feel that the country is 'full,' that national identity is threatened. Complex, likewise, is the demand that countries that see the flood of refugees coming – Turkey, Tunisia, Chad, Niger, etcetera, none of them impeccable regimes – assume their responsibilities, and that Europe is willing to pay big money to do so. Further complexities surround the assumption, whether supported by real data or not, that there will never be support for universal hospitality, and even less for a universally enforceable right of residence. But does such a thing even exist – a 'support base'? Is it not up to politics to create one? Den Boer undertakes that thought exercise. He talks about the establishment of asylum seeker centers: at first there is suspicion from the local population, rebellion, after a few months of indifference, sometimes even understanding and solidarity. So the complexity is there, because a board must actively create the conditions to enable the transition from suspicion to empathy. These reflections become even more concrete when he recounts his friendship with Hassan, a Palestinian refugee from Gaza. This story puts all the roles den Boer has played – as a civil servant trainee, as a participatory observer, as a playwright – even more on edge, especially as Hassan's story, according to official criteria, turns out to have more and more holes. He leaves his audience with an existential question: what kind of world do we want to live in together? This is a slightly less fatalistic version of the question with which Zaides's *Necropolis* ended.

Questions linger. Should the official, the 'decision maker,' in whose place den Boer sat for months, perhaps first make friends with the asylum seeker whose case he handles? Of course, deontology forbids this, but the rather didactic exercise, that *The Solomon's Judgment* inevitably is, nevertheless raises reservations about the basis of such a deontological rule. Is the public servant's neutrality, experienced through the many files, reasonably paid and incorruptible, also not a form of bias, but of a kind that cannot be objectively determined? Den Boer further argues, referring to his mentor at the IND, an experienced 'decision maker,' that it is not the person, the asylum seeker, who should be judged, but his story. But to the extent that a

human being, a stranger, can still be judged by another human being, can he be judged in any other way than by the stories he tells? Or by the stories he creates, even without words or images, by behaving towards another human being in a certain way – all on the scale between intimate and distant. Should one not, if one allows oneself – and indeed the decision maker has the legitimate authority to do so – to assess and then judge a human being, assume that her/his stories coincide with her/his existence as a human being? Of course, there is a gap between a person's self and the stories a person tells, however credible and however reliable, and that is a paradox one encounters in a decision process. But the decision maker cannot afford to give up the illusion of identity. Otherwise distrust is the norm, and then either nothing more happens or violence breaks out.

Den Boer tells one striking anecdote in which that illusion seems to have been lifted. He met his friend Hassan when he had just learned of his rejection. The sparkles in his eyes had died out, his complexion had turned gray. The image he conjures up is very reminiscent of Giorgio Agamben's description, invoking testimonies of Shoah survivors Jean Améry and Primo Levi, among others, of the Muselmann. The Muselmann is the concentration camp inmate in the final stage, wandering in the twilight zone between life and death, physically incapable, contactless, trembling, and shriveled. For Agamben, this figure is the gruesome embodiment of the end of all ethics, of the definition rejection of all compassion, all hospitality (Agamben, *Remnants of Auschwitz*, 41-86). In that moment and in that hyperbole, story and real existence coincide, briefly, painfully, and beyond all hope.

With *The Solomon's Judgment*, den Boer sets out to depoliticize the issue of asylum, initially reducing it to the level of moral dilemma. But after this self-examination, in himself as well as in the viewer, he suggests (or at least allows the doubt) that moral doubt has a political foundation: the arbitrariness of drawing boundaries, the bias in the ordering of narrative elements (the separation or entanglement of police and army, for example), up to and including the very definition of 'the political,' such as the meaning of one's presence at a demonstration. The framing of narratives by of the specialists of the IND – concerning a region, culture, and religion – does not go entirely unmentioned. But whether in doing so he completely strips the debate of an overly gentle moral sensibility is not entirely sure.

Figure 4. Salomonsoordeel © Prins de Vos

Body, Technology, and Identity

The European Commission often publishes 'communications' to the European Parliament and the European Council, intended to spark political debate around a more or less important policy issue. But the *Communication from the Commission to The European Parliament and the Council - Stronger and Smarter Information Systems for Borders and Security* caught the eye of theater-maker Thomas Bellinck, especially this wording:

> The existence of large-scale information systems also implies potential privacy risks, which need to be anticipated and addressed appropriately. The collection and use of personal data in these systems has an impact on the right to the privacy and the protection of personal data, enshrined in the Charter of Fundamental Rights of the European Union. All systems need to comply with data protection principles and the requirements of necessity, proportionality, purpose limitation and quality of data. Safeguards must be in place to ensure the rights of the *data subjects* in relation to the protection of their private life and personal data. Data should only be retained for as long as necessary for the purpose for which they were collected. Mechanisms ensuring an accurate risk management and effective protection of *data subjects' rights* need to be foreseen. (Communication on Stronger and Smarter Borders, 2016, 4)

The text is actually quite innocuous, but the notion of a data subject – my italics in the quote – aroused his surprise, if not his suspicion. The performance *Simple as ABC #7 The Voice of Fingers* (Bellinck & Reza Adib, 2023) begins with an attempt to create empathy on the part of the viewer, followed by a conversation about the limits of the official's moral responsibility. To what point is the latter willing to be complicit in the risk of inhumane treatment? It is a somewhat dubious mode of narration, mixing feelings, moral reflection, and political implacability. This happens even more emphatically when one hears the life story of Francis Galton, told, to Bellinck's toddler daughter in the form of a long bedtime story. The polymath Francis Galton made the first scientific weather maps, developed and promoted eugenics (he coined the term), and discovered that

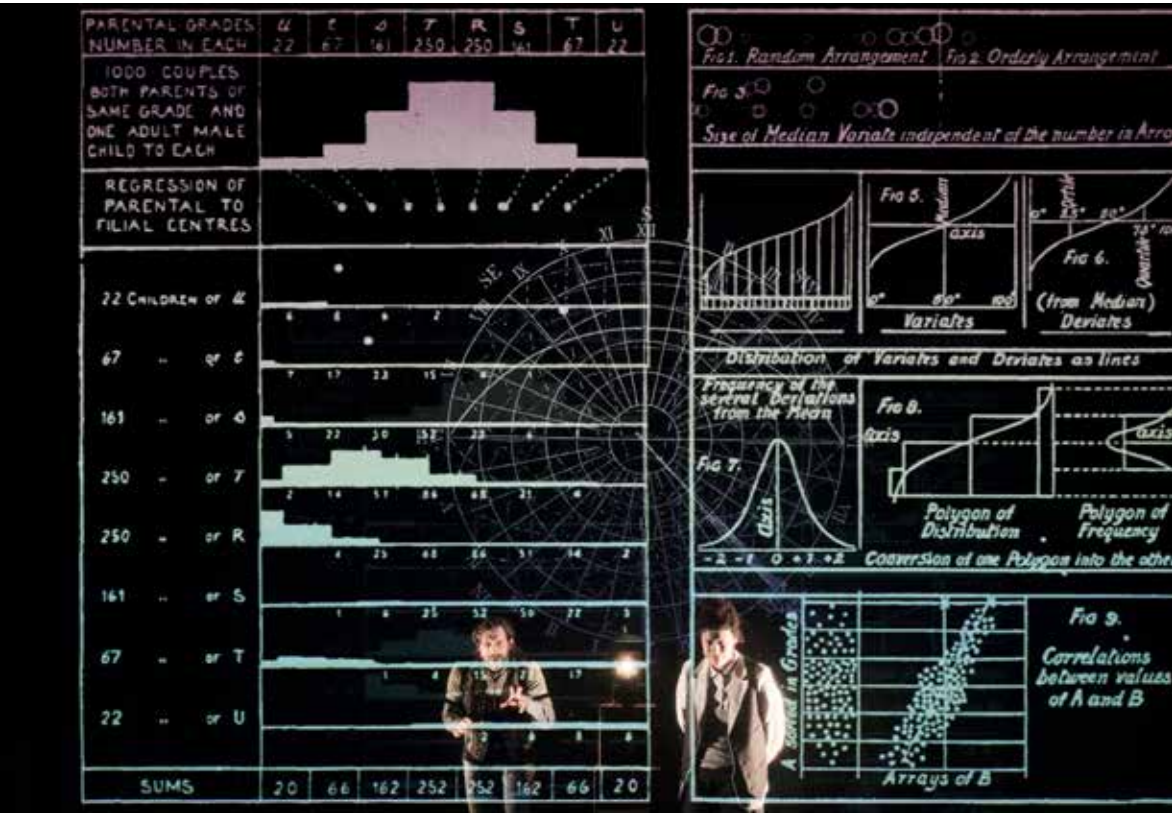

Figure 5. The Voice of Fingers © Nathan Ishar (Studio Pramudiya)

fingerprints are a unique means of identification. He also translated that knowledge into practice.

Two actors, Musia Mwankumi and Jeroen Van der Ven, tell this story, behind a gauze screen – in front of projections of old maps and statistics – and sparsely lit. They speak with empathy, while their static position, elevated above the stage floor, rather creates distance. The story they tell of the inveterate imperialist Galton does not end with his death in 1911, as a knighted Member of the British Empire, he lives on as a ghost. And this ghost saw how his classification of people into *desirables*, *passables*, and *undesirables* degenerated into man-hunting and genocide, and how fingerprints became the instrument to regulate inclusion/exclusion in the Europe of Schengen. The


So much gel has
that it feels as if the

Figure 6. The Voice of Fingers © Nathan Ishar (Studio Pramudiya)

former with horror, the latter perhaps with approval. After this long story, one hears a child's voice counting to one hundred, which will repeat frequently, remembering Galton's motto: "Whenever you can, count." The players enter the stage floor, full of small holes, where they plant (plastic) tulips, hundreds of them. Meanwhile, relieving each other, they tell the story of Said Reza Adib, with all the details and with all the sentiment. The dozens of times Said has to have his fingerprints taken form the refrain of this narrative: as a young rebel in Iran, as a refugee to Afghanistan, as an illegal returnee to Iran, as an asylum seeker in Turkey, Greece, and finally Finland, where he is still stuck in a gray zone. It ends with a conversation in the family about a poem by Afghan poet Mohamed Ibrahim Safa that describes red tulips as a symbol of freedom: "I was born free, I will die free" (Bellinck & Reza Adib, 2023, 57).

Simple as ABC is the heading under which Thomas Bellinck and allies make performances, performances, installations about borders, violence, and migration. ABC stands for Automated Border Control, the technology that has been developed worldwide to combat 'unwanted' migration, and with which the securitization of migration policy seems to be definitively anchored both politically and practically, through a decision-making process that is quite opaque (Gunnarsdóttir & Rommetveit, 2017). Meanwhile, since 2009, eight episodes have been shown, starting with a zero version in which hunger-striking asylum seekers – wearing white shirts and black suits – sing the Belgian national anthem on Place Monnaie in Brussels. A political and humanitarian demonstration that did not actually want to be a performance but was perceived as such and selected for the prestigious Theater Festival, which led to some awkwardness on Bellinck's part. Since then, his research has dealt with both structural elements and intimate personal testimonies. In *Man vs Machine (#1)*, an audio-performance with hyper-realistic décor deals with the architecture and cutting-edge technology at Frontex headquarters, in *The Museum of Human-Hunting (#4 and #6)*, also a set of audio-performances, he focuses on the actors in human-hunting, both the hunters and the hunted, inspired by Grégoire Chamayou's philosophical-historical analysis of the phenomenon of human-hunting, in all its literalness (Chamayou, 2010). Chamayou sees human hunting as an extreme variant of Michel Foucault's concept of biopolitics, in which human life and territorial claims (sovereignty) are intimately linked. For *Keep calm & validate (#2)*, he

chooses the form of a 'documentary musical' to expose the bureaucratic process of digitized border control. This too is a hyperbole for biopolitics, in which a supposedly neutral and pragmatic security discourse is made to sound grotesque by an apparently misplaced pathos – in musicals one sings for no reason. Real security policy, on the ground, is perhaps equally grotesque.

Bellinck's documentary, an almost academic discourse/performance on the structurally violent border control through identification, does possess a certain pathos, and in the projects based more on migrant testimonies, that empathy takes on a melodramatic color, with a clear moral good-and-evil. The performance *The Wild Hunt (#3)* presents a sequence of testimonies, without the mediation of actors. Through editing and pitching, this is at once a soundscape and a series of stories, and the two spheres increasingly merge. A painting with a hunting scene and a bust of Aristotle complete the image of an intimate room in an old museum. Bellinck gives a short lecture, from a bench like the ones in museums facing a work of art, on the narrative bias of historiography. People are classified into hierarchical orders and victors hold the pen. Then he retreats and one hears the forbidden, hushed, repressed stories of hunters and hunted. Individual voices, arousing anecdotal empathy, thus gradually turning into an amalgam of sound. It enhances the emotional impact, but it does not really strengthen the political statement. One might wonder the same about *The Voice of Fingers*. The gripping story of Said Reza Adib sounds like an odyssey, except that he did not have to come home, where someone was faithfully waiting for him, but instead had to go away, to and from unreliable destinations. Behind this emotional, sad, infuriating account does lie a sharp and detailed historical and political analysis. That analysis translates in the interview with the EU official, and in the sleep-soft narrative about Francis Galton, which tries to appeal to the tactics of Tahar ben Jelloun, who explained racism to his daughter in a way that should have been absolutely clear to any other reader as well (Ben Jelloun, 2018 [1998]) . Sentiment and sober communication constantly collide, but there is rarely any clear politicization – assuming that this would be the theater-maker's ambition.

As a whole, the entire cycle *Simple as ABC* takes shape as an extended political essay, constantly exposing the pain points of securitization, subjectively, and objectively. That sentimental undertones in the

unvarnished stories are also moralizing is inevitable: one does not remain cold at the frustration over the failed storming of the Greek border, where hundreds of adults as well as children were stunned by tear gas. That sentiment provides little political benefit, but combined with progressive digressions on security technology, a narrative can emerge that contrasts the postcolonial and securitization aspects of the existing (anti)migration regime. Whether the moral outrage that Bellinck (rightly) provokes advances his political communication remains an open question. In that communication, however, on the basis of a thorough deconstruction of both the rhetoric and practice of the European refugee policy, he poses particularly uncomfortable questions to policymakers. Ilay den Boer, in *The Solomon's Judgment*, hinted that a concrete friendship can profoundly influence the perspective on migration issues – and on the stories that emerge in the process. *The voice of fingers* also departs from the personal and vulnerable friendship of Bellinck with Said Reza Adib – the obligatory distance between Belgium-Finland is more than a nuisance. Without immediately generalizing here, the thought exercise can be considered, in contrast to Carl Schmitt's *Feindsetzung* (definition of the enemy) as a political benchmark, to take friendship as the starting point for a policy that reconciles the logical-legal necessity of inclusion/exclusion and boundary-setting with strong moral demands, with generously interpreted human rights.

Part III: Identity, Law and Theater

Legal identity as theatrical identity, and vice versa

The way in which, certainly in the last 30 years, the anomalies of a migration policy under cyclical, short-term oriented, economic pressure has been transformed into a security policy, is certainly akin to the legal dehumanization or de-subjectification that characterized a past of slavery and colonialism. These developments, past and present, are accompanied by a series of rituals designed to reinforce the belief in the rightness and inevitability of de-subjectifying policies characterized by an 'obscene theatricality': everything visible serves as a mask for the darkness of legal nihilism (Read, 2016, 59). The rhetoric of slavery as a 'positive good,' which grafted itself onto the many manifestations of patriotism in the southern states of the USA between 1831 and 1860, is a good example, because it

places the 'incidents' as well as the moral justification of slavery in a continuity of 'manifest destiny' (Howard & Brophy, 2019). In times when the mediatization – that is, theatricalization – of supposedly fundamental policy choices, such as the securitization of migration policies, is immediately global and proceeds at a much faster pace, this rhetoric takes on a different form. The creation and later strengthening of Frontex, which is rarely confronted with the effectiveness of its actions, is a good example. Even the communication about the damning report by OLAF, the EU's anti-fraud agency, and the reaction to it by Frontex itself excel in "obscene theatricality" (OLAF Final Report on Frontex, 2022; Statement of Frontex, 2022).

The presence of refugees at Europe's borders has evidently created the (only figurative, not physical) space to create non-right subjects, which precede Arendt's 'right to rights.' A new identity is constructed for them as absolute others: post-colonial beings, security risks, victims of human trafficking, and ultimately data-subjects. Authorities employ the same logic of humiliation, less explicit but as stressful as for enslaved people, back in the day. The 'Australian model' goes furthest in this, definitively stigmatizing boat refugees as subjects who may never set foot on Australian soil, who are nowhere near a form of civil rights. But the 'spontaneous' (and recently bureaucratic and politically backed) condemnation of a category of unregistered asylum seekers – all the single males – in Belgium as lumpenproletariat is not much less questionable. One might say that theater-makers such as den Boer, Zaides, and Bellinck engage in a similar exercise, but with a very different outcome. They provide the building blocks for an alternative identity, which can be straightforward or ambiguous.

In *The Voice of Fingers*, Bellinck shows how the biometric identity with which official migration practice begins, not only forces the barely recognized legal subject – the arriving refugee – into a mechanism that promises straightforwardness but, ultimately, ends up in increasing arbitrariness. Moreover, this identity is anything but neutral, because of its past history, because of the implied conception of the human race, because of the disruptive social existence that results from it. Thomas's letter to Reza seems for a moment to set a tone in which their friendship transcends everything, but that would suggest that this whole agony does not matter. The taking and checking of fingerprints has become a mode of existence that mortgages and damages friendship, in any guise. The existence of

an 'unfinished' legal subject – an asylum seeker, he has not found it yet – reduces him to a moral subject who is difficult to approach, who remains a stranger even in the face of the most unconditional and empathetic activist that Bellinck is, despite outspoken affection. Yet Bellinck remains hopeful that that bond will blur digital identity, "until the day we shake hands again and our fingertips touch again." The last sentence, however sentimental, confirms the principled equality of both as subjects, as well as it reinforces their belief in the feasibility of this ideal. Friendship guarantees a perspective, a counter-identity, against all odds.

The identity of the asylum seeker, in *The Solomon's Judgment*, is composed of narrative data, of a story that must be 'plausible'. This requirement comes on top of biometric identifiability. At the same time, den Boer deconstructs this plausibility in his performance by repeatedly raising moral dilemmas in the reconstruction, by the asylum seeker himself and by the decision-makers. If someone ends up in an economically hopeless situation because of the social injustice installed by an undemocratic regime,what weighs most heavily? The oppression of this regime (a ground for asylum), or the economic motive to emigrate (not a ground for asylum)? Inevitably, such considerations are tested against a view of humanity, and against an ideologically not-so-neutral assessment of the impact of socioeconomic relations. That estimate is then used as a parameter for the possible legal subjectivity of the asylum seeker. Den Boer's suggestion that friendship decisively influences these and other assessments puts considerable pressure on the foundations of that legal subjectivity, and undermines it itself. The decision-maker deploys his own identity to assess the story, plausible or not, which must result in an existential decision. Only once the refugee has an asylum permit is he a full legal subject, albeit with a precarious status. But unlike the fingerprint, this 'narrative identity' is not stable. Indeed, a granted nationality – the final stage, namely full citizenship – can be revoked, albeit in principle only in the case of dual nationality, but an 'innate' citizenship cannot be erased at all. Indeed, statelessness must be avoided at all costs (European Convention on Nationality, 1997, art.4).

The most radical form that legal de-subjectification can take is civil death, the erasure of (most) legal subjectivity, an ancient and medieval punishment that in Belgium has been abolished by the Constitution and cannot be reintroduced (Grondwet, 1994, art.18).

Figure 7. The Voice of Fingers © Nathan Ishar (Studio Pramudiya)

Civil death, the legal degradation of the human person, is at the same time also the most radical legal fiction, as Alexis de Tocqueville noted about slavery in America (de Tocqueville, 2012 [1840], 327). In *Necropolis*, Zaides connects the reality of the de-subjectification of migrants – who are not only civilly dead, but also physically dead before achieving citizenship in Europe – with an even more far-reaching legal fiction, namely the citizenship of the dead. Only those who can prove that their death was directly or indirectly caused by their situation as refugees are granted access to the Necropolis. Their 'identity documents' consist of dates, a name, a date, a cause of death. "Necropolis has no other body than a body of data: an ever-expanding archive made of what is meticulously extracted from the rotting remains and inscribed across the landscape" (Zaides &

Figure 8. Salomonsoordeel © Prins de Vos

Dubricic, Necropolis - voiceover, 2019, 1). The figurative gatekeepers of Necropolis thus demand evidence about the causal link between flight and death; a 'plausible' story is not enough. Zaides is stricter than the politicians and their agencies. On the other hand, migration is always about territories and territoriality, about hard borders that are physically demarcated, that cannot be crossed by living bodies except in exceptional cases. And it is precisely this physical logic that Zaides breaks through, in which he is less strict: Necropolis is a virtual city, connected only to points on a digital map, even if they are effectively visible in the images of cemeteries and memorial plaques. One hears and sees the footsteps of Zaides, the traveler, the visitor, who in this way acknowledges their existence and their identity: they exist in his gaze, which is the gaze of the camera.

Against the denial and erasure of (legal) subjectivity in the prevailing migratory regime – a grim form of deconstruction – these artists place ambiguous identities: sentient fingers, alternative interpretations of narratives, dead people with civil rights. And they add an affective element: friendship, with the man wandering through the bureaucracy, with the narrator of an incoherent story, with the fatal victims on the escape routes. This could be a step toward politicization.

Beyond moral outrage

From the aforementioned confrontation of the legal-political approach to migration policy and some documentary theater productions on the practice of this policy, some conclusions can be drawn. An increased de-subjectification of refugees attempting to reach a place of asylum, unpredictably, is a constant in the policies of the 'white' forts. The refugee who emerges preferably has as few subjective rights as possible, barely even 'right to rights,' in the Australian model. In their performances, Zaides, den Boer and Bellinck/Said Reza Adib seek, in very different ways, to restore the migrant's identity as a (legal) subject. The cold materiality of the dead, the structural suspicion towards the narrator, the supposed objectivity of fingerprints, in each case there are signs of de-humanization that require a recalibration of human dignity, in their eyes. Empathy can be a response, like the friendship suggested by den Boer and Bellinck, but also the morbid idea of civil rights in the political community of the dead, a community Zaides creates on the servers at his disposal. These responses express moral outrage, are in line with Habermas's universalism that starts from the premise of moral integrity that justifies civil rights for every human being, including a principled freedom of movement. Whether this is also followed by a political response, a politicization that involves submitting these moral demands to a political community in the form of political decision possibilities, is less certain. Now obviously theater cannot be required to make workable political proposals, quite the contrary, but documentary theater can design a counter-universe, and test it against an audience without having to be immediately workable.

Some point to a risk that arises from an overly accurate reconstruction of the legal-political system responsible for the dehumanization of migrants. Courtroom drama thus reconstructs the paradox of a

system that both legally oppresses and simultaneously gives legal weapons to those who fight that oppression. Research shows that invoking rights that the oppressive system itself makes available can not only provide reparations to irregular litigants – not often, but still – but moreover has an emancipatory effect, especially when class actions are involved (Guterman, 2014, 149). That sense of liberation is ideal material for community-based theater because it allows for the development of narratives that subtly undermine dominant legal narratives. But, at the same time, and this is the risk, such a strategy – both in the real courtroom and on the theatrical scene – affirms the authority of the law and of those who enact it. Those who, in harsh reality, are able to make an alternative legal rhetoric succeed have forced themselves to control and even internalize the prevailing rhetoric. By invading the law and allowing, conversely, that law to invade itself in that move, the law, even in which it continues to enforce systemic oppression, is strengthened – so the reasoning goes (Guterman, 2014, 152). To be clear, the representations analyzed here do not do this, although *The Solomon's Judgment* seems to go a long way with the IND's official guidelines that speak, in bandaged terms, of a balancing of the national interest and the (plausible) interest of the asylum seeker. The requirement for a decision, surely the cornerstone of this permit system is not questioned by den Boer. Bellinck and Zaides do not go along with this dominant logic. On the contrary, they reject it radically and with emotional theatricality, but each by very different means: sad stories of frustrated friendship and a choreography of mortal remains.

Completely beyond moral outrage and like a poison arrow at the heart of fascistoid politics once stood Christoph Schlingensief's project, *Bitte liebt Österreich - Erste österreichische Koalitionswoche* from 2000. On Vienna's Herbert-von-Karajan-Platz, Schlingensief built a container village which functioned according to the rules of the then-popular *Big Brother* television format. Inside, he brought twelve 'asylum seekers' together, installed a web television where viewers could vote for the deportation one resident each day: out of the container and out of the country. The 'winner' of this reality show could stay in the country, at least if an Austrian citizen wanted to marry him or her. At the time, to the dismay of all of political Europe, Austria was led by a government coalition with Jörg Haider's far-right FPÖ, which had grown to become the country's second-largest party through an outright racist election campaign. The right-wing

Figure 9. NECROPOLIS © Eike Walkenhorst

tabloids and, of course, the FPÖ itself screamed blue murder against this, in their eyes, anti-national and money-grubbing 'so-called art project.' The far-left also took aim at the provocative slogans and undertook an attempt to free the asylum seekers.

It has been said of the original *Big Brother*, as conceived by John de Mol, that the format redefined the value of television programs as commodities, repackaging the flat reality of the residents as a 'documentary of ordinary life' (Corner, 2002). The market value of *Big Brother* is determined by the value of the currency 'traded' in the program, and that currency is the residents. Schlingensief argues that asylum seekers, to the extent that the political debate also functions as a market (in the media), could also be considered cur-

rency. Their value is determined by the racism that can be projected onto them or, for the *Gutmenschen* (do-gooders), the compassion an asylum seeker can generate. This may be a very cynical view of the debate, but by descending to this bottom, Schlingensief exposes the moral bankruptcy of neoliberal class society – which denies itself by erasing the concept of class. Racism is the only capital that the new lumpenproletariat can invest and the political regime collects that investment, suggests Carl Hegemann – who helped ideologically guide *Bitte liebt Österreich* (Hegemann, 2000). Seyla Benhabib may argue that asylum and migration is pre-eminently an area where democratic politics must pass a trial by fire, but with Schlingensief, that trial has long since passed – and it ended badly. His 'asylum seekers' – he deliberately cast doubt on whether they were 'authentic' or stage actors – were still allowed to perform in a puppet theater, cheap Kasperle drama with a script by Elfriede Jelinek. In the real world, perceptions of migration – 'the hordes' – have become resounding currency on the political market, borders are sold to and bought off by questionable regimes. This has not changed since the *Koalitionswoche* in Vienna in 2000; quite the contrary.

Bitte liebt Österreich was visionary, already beyond moralism, while theater today sometimes makes an all too subtle plea to align moral universalism and political realism, starting by recognizing migrants and refugees as full subjects of law. Even Zaides's *Necropolis*, however morbid, depicts a kind of utopian community, entreating us to listen and look at everyone who is a living, human being and who has good or not-so-good reasons for crossing borders. He accomplishes this by showing just the opposite, namely, the dead as full citizens, dancing awkwardly. These are worthy thoughts, but there is little reason for optimism. The borders are immovable, impenetrable, and they are reinforced again and again thanks to what is supposed to be a democratic consensus. It is not that asylum seekers languish at the gates of Fortress Europe. There are pseudo-objective procedures which test the 'plausibility' of their stories, of their experiences, there are (too few) shelters, there are civil society organizations that oscillate between elementary hospitality and complicity in securitization. And there are theater-makers who demonstrate this incapacity, who cloak their indignation in beauty, who suppress their cynicism through imagination. But there is also the law, and the support, the 'bearing surface' for the law. Though no one can tell who bears this surface.

Works cited

Agamben, Giorgio. *Remnants of Auschwitz. The Witness and the Archive.* Translated by Daniel Heller-Roazen. Zone Books, 1999.

—. *State of Exception*. Translated by Kevin Attell. University of Chicago Press, 2005.

Arendt, Hannah. *The Origins of Totalitarianism*. Harcourt Brace & Co, 1973.

Battjes, Hemme. "Straatsburg en het migratierecht. Recente ontwikkelingen in de EHRM-jurisprudentie over asiel en gezinshereniging." *NCJM-Bulletin*, vol. 32, no. 3, 2007, pp. 274-298.

Ben Jelloun, Tahar. *Le racisme expliqué à ma fille. édition augmentée et refondue.* Seuil, 2018 [1998].

Benhabib, Seyla. *The Rights of Others. Aliens, Residents and Citizens.* Cambridge University Press, 2004.

Benjamin, Walter. "Über den Begriff der Geschichte." *Gesammelte Schriften* Band I.2, Suhrkamp, 1980, pp. 691-704.

Bhaba, Homi. *The Location of Cultures*. Routledge, 2004 [1994].

Bourbeau, Philippe. *The Securitization of Migration. A Study of Movement and Order*. Routledge, 2011.

Chamayou, Grégoire. *Les chasses à l'homme. Histoire et philosophie du pouvoir cynégétique*. La fabrique, 2010.

Chambers, Peter. *Border Security. Shores of Politics, Horizons of Justice*. Routledge, 2018.

Communication to The European Parliament and the Council. Stronger and Smarter Information Systems for Borders and Security. European Commission, 2016.

Corner, John. "Performing the Real. Documentary Diversions." *Television & New Media*, vol. 3, no. 3, 2002, pp. 255-269.

de Dijn, Annelien. *Freedom. An Unruly History*. Harvard University Press, 2020.

"De gecoördineerde Grondwet." Federale Overheidsdienst Justitie, 17 February 1994. Accessed 27 August 2023.

de Jong, Ferry. "Tussen schuld en waarheid: narrativiteit." *De waarde van waarheid. Opstellen over waarheid en waarheidsvinding in het strafrecht*, edited by Jan Crijns, Patrick van der Meij and Jeroen ten Voorde, Boom, 2008, pp. 207-235.

de Tocqueville, Alexis. *De la démocratie en Amérique*. Institut Coppet, 2012 [1840].

"European Convention on Nationality." Council of Europe, 6 November 1997. Accessed 27 August 2023.

Guild, Elspeth. *Moving the Borders of Europe*. Publicaties Faculteit der Rechtsgeleerdheid, KU Nijmegen, 2001.

Gunnarsdóttir, Kristrún and Kjetil Rommetveit. "The biometric imaginary: (Dis)trust in a policy vacuum." *Public Understanding of Science*, vol. 26, no. 2, 2017, pp. 195-211.

Guterman, Gad. *Performance, Identity, and Immigration Law. A Theatre of Undocumentedness.* Palgrave Macmillan, 2014.

Hegemann, Carl. "Spekulation mit Ausländern." *Schlingensiefs Ausländer Raus*, edited by Matthias Lilienthal and Claus Philipp, Suhrkamp, 2000, pp. 34-37.

Het Salomonsoordeel. By Ilay den Boer, directed by Paul Koek, Utrecht, June 2021.

Holding Frontex to Account. ECRE's Proposals for Strengthening Non-Judicial Mechanisms for Scrutiny of Frontex. ECRE, 2021. Accessed 5 August 2023.

Howard, Thomas and Alfred Brophy. "Proslavery thought." *Educated in Tyranny. Slavery at Thomas Jefferson's University,* edited by Maurie D. McInnis and Louis P. Nelson, University of Virginia Press, 2019, pp. 140-170.

Ibrahim, Maggie. "The Securitization of Migration: A Racial Discourse." *International Migration*, 2005, pp. 163-187.

"Internationaal verdrag inzake Burgerrechten en Politieke Rechten." Informatie van de Vlaamse overheid, 1966. Accessed 26 July 2023.

Kant, Immanuel. "Zum ewigen Friede. Ein philosophischer Entwurf." *Werke*. Band 9. Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik, edited by Wilhelm Weischedel, Wissenschaftliche Buchgesellschaft, 1983 [1795], pp. 191-250.

Keenan, Thomas. "Getting the dead to tell me what happened: justice, prosopopoeia and forensic afterlives." *Forensis. The Architecture of Public Truth*, edited by Forensic Architecture, Sternberg Press, 2018, pp. 35-55.

Lindahl, Hans. "Breaking Promises to Keep Them. Immigration and the Boundaries of Distributive Justice." *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, edited by Hans Lindahl, Hart Publishing, 2009, pp. 137-159.

Mayblin, Lucy. *Asylum after Empire. Colonial Legacies in the Politics of Asylum Seeking*. Rowman & Littlefield, 2017.

Necropolis. By Arkadi Zaides and Igor Dubricic, directed by Arkadi Zaides, Lyon, 19 December 2019.

"OLAF Final Report on Frontex." FragdenStaat, 13 October 2022. Accessed 25 August 2023.

Pogge, Thomas W. *World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms*. Polity Press, 2002.

Read, Alan. *Theatre & Law*. Methuen Drama, Bloomsbury, 2016.

Rushdie, Salman. *The Satanic Verses*. Viking, 1988.

Simple as ABC #7 - The Voice of Fingers. By Thomas Bellinck and Said Reza Adib, directed by Thomas Bellinck, Arsenaal/Lazarus, Mechelen, 24 May 2023.

"Statement of Frontex Executive Management following publication of OLAF report." Frontex, 14 October 2022. Accessed 25 August 2023

Stolcke, Verena. "The 'Nature' of Nationality." *Citizenship and Exclusion*, edited by Veit Bader, Macmillan, 1997, pp. 61-80.

Tindemans, Klaas. "Theatrale straffeloosheid. Is het proces over de dood van Mawda Shawri een tragedie?" *Collateral Collision*, vol. 63, 2021.

Ulpianus. "Imperatoris Iustiniani Institutionum." *Legal History Sources*, 529. Accessed 26 July 2023.

"Universele Verklaring van de Rechten van de Mens." United Nations - Office of the High Commissioner for Human Rights, 1948. Accessed 26 July 2023.

van Roermund, Bert. "Migrants, Humans and Human Rights. The Right to Move as the Right to Stay." *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Peace,* edited by Hans Lindahl, Hart Publishing, 2009, pp. 161-182.

—. *Zwarte Socrates. Gesprekken over recht, tijd en verzoening.* Gompel&Svacina, 2018.

Zaides, Arkadi and Igor Dubricic. "Necropolis - voiceover." 2019. unpublished script.

Notes

1 In Western philosophy, since Aristotle, the distinction has been made between *distributive* justice and *retributive* justice, the former defining a general principle ("to each his own," *suum cuique tribuere*, noted by Ulpianus in the *Institutiones*, part of Emperor Justinian's *Corpus Iuris Civilis* (Ulpianus, 529, I.I.3)), and the second implies the redress of prior injustice, including possible retaliation (van Roermund, 2018, p. 44).

2 Freedom of movement is a human right: the right to move freely within a country, and the right to leave and return to one's country (Universele Verklaring van de Rechten van de Mens, 1948, p. art. 13; Internationaal verdrag inzake Burgerrechten en Politieke Rechten, 1966, art. p. 12).

3 "world citizenship should be limited to conditions of general hospitality"

4 The ancient Greek concept of freedom implied first and foremost self-government, not submission to foreign rulers, and not (negative) freedom as protection against government interference. This idea only really gained ground after the French Revolution and later took shape as "inalienable individual rights" (de Dijn, 2020,pp. 1-5).

5 The use of the state of exception (*Ausnahmezustand*) as a political justification originated in its modern form during the French Revolution, but was elaborated on philosophically by Carl Schmitt, who saw it as the essence of "the political". According to Schmitt, the power to declare the state of exception defines power *tout court*. The concept takes on a totalitarian connotation, as evidenced by Schmitt's debates with Walter Benjamin and Hannah Arendt, among others, both of whom were also fascinated by the (exceptional) revolutionary *momentum*. This does not prevent renewed recourse to the exception-as-normality as justification for example the US Patriot Act (2001) which followed the attacks on the New York Twin Towers (Agamben, *State of Exception*, pp. 1-31).

6 "[A cultural asset] is never a document of culture without at the same time being one of barbarism."

7 "The tradition of the oppressed teaches us that the 'state of exception' in which we live is the rule. We must arrive at a concept of history that corresponds to this. Then our task will be to bring about the real state of exception, and this will improve our position in the struggle against fascism. Its chance consists not least in the fact that the opponents meet it in the name of progress as a historical norm."

8 A so-called tragedy (Tindemans, 2021).

Law and Theater

Creating Spaces in Law as a Practice of Theatrical Jurisprudence

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Theatrical Jurisprudence tends to be thought of as a practice of law in its most visible setting – law displayed in the courtroom and rendered live and lively. Theatrical Jurisprudence, however, operates in a different register, a practice that animates the practice of law as something more than bare interpretation, making live and lively the unconscious interventions deployed by lawyers or judges to animate the bare and abstract forms of legal method found in legal doctrine, principle, or rule. Yet most lawyers and judges would vehemently deny that they do anything other than assess, analyse, or apply the law using those rigid reasoning techniques. In this essay, I suggest that law has to theatricalize in order to open up new spaces for justice and uncover some examples of the subtleties of that theatricalization – both good and bad.

Keywords: Theatrical Jurisprudence, law and the body, cabaret, 1977, Street March Bans, the Go-Betweens

Come with me.

My overly abstract, nay, unlovely abstract – using words like jurisprudence, rigid reasoning, doctrine, principle, or rule – reveals the starkest of lawyerly language and thinking. As exciting as witnesses giving evidence in court can be, and the drama and tension of the courtroom scene, these words and concepts are far more in tune with the nuts and bolts of lawyering, which has very little in common with popular ideas of law. What Theatrical Jurisprudence does is stretch and trouble key assumptions bound up in legal thinking – that instead of this thinking being perfectible and based entirely in logic and reason, it is bound up in the people behind the law, their formation, their presumptions, and the unconscious images they deploy to animate and make sense of abstract rules. In shaping it, I turned to the approaches of post-dramatic theater and their challenge to the strictures of Aristotelean dramatic forms, most particularly the early work of Jerzy Grotowski (Leiboff, *Theatrical Jurisprudence*; "Theatricalizing Law"). Law operates as if it were playtext, especially so for case law (central to common law practice), due to the intricate account of facts, narratives and legal reasoning it holds. Intended to guide future cases and to be interrogated for gaps and lacunae, case law and the complex of interpretative methods appear to work as a *deus ex machina*. Yet, like the emperor's new clothes, law says it is doing one thing, but it is really doing something else entirely. And that is what this article will do as it unfolds. In a nutshell, Theatrical Jurisprudence confronts, as a practice that shows and does, in order to reveal the fallacy of assumed practice and to prod and challenge just what we, as lawyers, bring to that bare interpretation. The piece is a practice that confronts expectations, like a piece of post-dramatic theater, to challenge both bodily and intellectually. It finds ways to trouble and disrupt the apparently smooth practice of reasoning and interpretation of law, whose interpretative gaps and lacunae are left wide open, leaving unruly spaces that are filled in by lawyers and judges, particularly in new and different situations. Most of them turn to their own lifeworlds, imaginations and assumptions to generate meaning (Leiboff, "Ditto"; "Stir Up the Australian Youth"), operating like a bodily memory in the Grotowskian sense, but without the training and rigour of theater practice. As an aporetic space that simply is assumed not to exist, the end result can deny justice.

What this means, is that the pictures, images, and worldviews already held by lawyers and judges have a real effect on law and justice ("Ditto"). So Theatrical Jurisprudence sounds nothing like the standard images of law in a courtroom, because it uses theater practices, broadly conceived, to find ways to get lawyers and judges to *notice* something about themselves – what they assume, what they know, how they think, and most challengingly of all, how they deploy their assumptions, both good and bad, in the shaping of argument (by lawyers), and challenges to those arguments and the shaping of judgment and precedent (by judges) (Leiboff, *Theatrical Jurisprudence*). It operates prior, not a literal theater *per se*, but through the shaping and framing of an entire legal argument, ranging from choices about which areas of law and precedents are most relevant, whether cases go to court or not, to the claims that might help produce new precedents, and – for judges – the carving out of legal meaning and new precedents. Law assumes this all happens at a high level of intellectual rigour. Theatrical Jurisprudence instead says that these practices are far more attenuated than law thinks – that lawyers are beholden to their bodies, through the triggers and fall-back positions already held in them. Suzie Miller's play *Prima Facie* (2019), about a woman barrister who is changed utterly through her sexual assault, is a case in point, but even more so through the changes in bodily responses of lawyers who have seen the play, to notice what hadn't been apparent before. The play has had a practical effect, leading to changes in directions to jurors by judges and providing ideas for working parties of lawyers seeking to create change more broadly. Theatrical Jurisprudence is much broader than the written word of the play though, traversing dramaturgy, the interplay of spectator and actor, the breadths and depths of training beyond law, and the depths to which reading of judgment as precedent should be carried out (Janusiene). Its *deus ex machina*, that ghostly presence, is inevitably the self who forms it, contrary to the assumptions of law.

Though it is also a practice, Theatrical Jurisprudence is jurisprudence as legal theory or philosophy. All jurisprudential traditions, from the most conventional to the most critical, are largely grounded in the assumption that the mind and intellect are operative, even in those fields that seek to bring different lives and experiences to the forefront of law and legal thinking, like the law and literature movement. Theatrical Jurisprudence assumes that we proceed before thought, capturing what comes next; there is no possibility

of recapturing that moment, a hugely challenging idea in a field that far prefers the existence of something preformed, able to be pored over, precisely because a training in the mind does nothing to generate an active response in a field like law, which valorises and applauds abstraction and rationality over anything else. That is why lawyers who encounter Theatrical Jurisprudence are as likely to reframe it through the medium of dramatic or playtext, because the immediacy of the theatrical is overwhelming.

Let me use another small example before I go further, a dumb show if you like, to capture the challenge to conventional ideas of law that Theatrical Jurisprudence offers, because the main game is some way ahead. A few years ago in Australia, a scandal blew up involving the mistreatment of elderly people in aged care homes by carers, supported by vision captured through hidden cameras set up by family members concerned about their relative's treatment. In some cases, criminal proceedings were brought against staff members involved. In one case, the staffers were acquitted, and one was found guilty. Heard and decided in the lower courts in different states with different laws, in the case where the carers were acquitted, the magistrate said the carers were dealing with a violent person so were found not guilty. The woman they were caring was in her 90s and had dementia along with a broken leg, which the carers picked up and dropped onto the bed, the woman screaming in pain. She lashed out. It isn't clear if the magistrate saw the vision, but it is horrible viewing. He seemed to have created an image of the elderly woman as some kind of inmate in a prison, and not a paying client of an aged care facility.

I used this story in a law class, showing part of the documentary. Some simply said the magistrate was right because that was what he decided, that he had found the woman violent, even choosing not to watch the footage. Those with elderly relatives in care recoiled, horrified by what they saw, while those who had broken bones in the past winced, knowing how painful this was. Simple but revealing, and not the purpose of the class at all, it underscored in the starkest way what is at stake here, particularly in those who agreed with the magistrate. On a simple level, it would seem that those who expressed sympathy for the elderly woman were beholden to their bodies, but it is the other way around. It is those who responded by simply being beholden to an image - captured through the word

'violent'. Whatever the lady looked like, whatever the circumstances, nothing would shift that image. I haven't named the program or circumstances, which might seem strange, but I need to keep the story vague as it doesn't have ethics approval, but it shows just what the space of Theatrical Jurisprudence can reveal and open up. And in an utterly devastating follow up, in May and June 2023, the world was gripped by the horrendous situation of a New South Wales police officer tasering a 96-year-old lady – the image of 'violence' denying the reality of her 46kg weight and her walking frame. Her violence? That she had a knife, a steak knife. Her skull fractured, she died a week later, and the police officer was charged with criminal offences. The awful truth? That there was a precedent, of a kind, in the magistrates' decision that suggested that force could be applied to old, violent people.

What this underscores, is that lawyers and judges are only human, and whether they are aware of it or not, move into positions based on their own experiences, however limited or expansive they might be. It has become apparent that when gaps and lacunae exist, abstraction and rationality are left without tools to work out what to do next, as Dutch jurist and legal theorist Jeanne Gaakeer so brilliantly discerns in *Judging from Experience: Law, Praxis, Humanities* (2021). Her remedy to that denial of human awareness is literary, through the field of law and literature, a jurisprudence that turns to the humanising role that literature can play on the harshness of law and its rules, as a practice of narrativity. My position is that something more has to happen to enable our minds to respond and notice. *Noticing* is central to Theatrical Jurisprudence, but we can only notice through training, producing something in the body that enables lawyers to prick up their ears, that causes them to lean forward in recognition, that generates a smile or frown (Leiboff, *Theatrical Jurisprudence*), as experienced by the lawyers who were changed by Suzie Miller's play. Without the ability to notice, lawyers and judges inevitably fall back on their own lifeworlds, affecting interpretation and, by extension, justice to make sense of abstraction. Abstraction, law's preferred method, is too porous, too open, too beholden to do this work. For Danish Sheikh, this extends to an act of repair through theater ("Staging Repair") - but repair itself requires that we notice before anything more can happen.

This matters, because law is assumed to be a closed and perfectible text, as playtexts were once imagined: holding a complete and closed

meaning merely waiting to be revealed through study alone. As we know, this is no way to bring a playtext into being; rather, through practices of doing, theater challenges complacency, writing something new into our bodies and enabling us to notice, a 'something' beyond our own worlds and experiences rendered bodily. Law's texts are very different from the ideas most of us have about law played out in courtrooms. In common law systems, the decisions of the courts and the reasons they express hold the law they have found through interpretation. They are thought to be rational documents, but look carefully enough and we can find dramaturgical clues to the thinking of the courts. The cases tease out the realities and effects of doctrine and principle – from high ideals like justice, to broad concepts like freedom of speech and expression (in the pages to come), to bare words like violence, or TV programs, poems, films, sporting events. These traces act as a dramaturgical clue to the thinking of judges and lawyers but can only be decoded if legal readers know what they're referring to. In the common law tradition, legal readers are actively trained to sieve out these irruptions as irrelevancies (Leiboff, "Ditto"; "Stir up the Australian Youth").

What comes next is a form of writing that brings these irruptions to the fore, bodily, intentionally unfolding without apparent markers of logic or reason, as Theatrical Jurisprudence. I try not to explain as I go, as if we were brought into a theater space where we are challenged by the very lack of signposting, the markers and hooks that we expect in writing. This is Theatrical Jurisprudence in practice. Bear with me as I bring my bare abstract into being. It will all come together in the end, its seeming randomness creating precisely the kind of demands that gaps and lacunae place on, our expectations challenged, as an instance of Theatrical Jurisprudence.

Brisbane

Come with me to my place, to Brisbane in the State of Queensland in Australia. You will get to know Brisbane soon, because the Olympics and Paralympics will be held here in mid-2032. If you have children, you will know Brisbane as Bluey's home, though if you're not in an English-speaking country (and even if you are, because Australian accents are still routinely dubbed into American English) you might not hear us as we hear ourselves. If you've ever been to my

place, you might have been surprised that kangaroos are nowhere to be seen in its sprawling, mega-urban cities; that this continent that is both island and country, is so enormous its distances are unimaginable, taking four or five hours to fly across east to west and much the same, give or take, north to south. Images conform to expectations, like words: my French cousin's partner saw a small map, thinking the distance between Brisbane and Sydney was: "cent (kilomètres)?" No, 1000 kilometres. "Oh la!!!," he exclaimed. Images, like maps, can be deceiving, as can voices. We speak English in a range of accents, much more like Cate Blanchett, less so Paul Hogan (Crocodile Dundee). We come from everywhere, except for First Nations people, whose land the rest of us have taken, here for more than 60,000 years. Largely because of its so-called tyranny of distance, Australia looks outwards, once because of obeisance and inferiority, known as the 'cultural cringe', but since the 1960s and 1970s, it is because that is what we do, as the Men at Work song *Down Under* from 1980 told the world. Our law was still beholden to the UK until 1986, only after which the legal fiction and violence of the unforgivable doctrine of *terra nullius* was undone in 1992, but barely any of the damage of a violent colonial settler past. This means that most land has never been returned to First Nations people, all the while imaging a totally Anglo-Celtic ancestry across a bare period of 250 years of an Australian national identity.

I give you this impossibly potted history that tells nowhere near enough as it should to presage where I go next, to bring you to Brisbane and its place in the world. My Polish born French great-aunt, long dead, imagined us as *les sauvages*; her sophisticated sister, my grandmother, had seen Josephine Baker in Paris in the 1920s *en route* to Australia, having to endure an unlovely place without sophistication or toilet paper. In the early 1990s, I had brought her a tourist booklet of Brisbane, showing its high-rise buildings, and she was mollified. We weren't savages after all, but in a sense she was right, because Brisbane started its European existence as a penal colony for the worst of the convicts transported to Australia from Britain in the early nineteenth century. Its heat, humidity, sandflies, and mosquitos were punishment in and of themselves.

These kinds of details matter in this theatricalization. So, another image. Brisbane is located about 600 km south of the Tropic of Capricorn, becoming the capital city of the colony of Queensland in 1859. In 1901,

it became the state capital of newly federated Australia, but we need to know something more. Brisbane is tucked into the southernmost corner of an enormous, decentralised state, a part of Australia, but larger in size than all but 15 sovereign countries. And to confound: Brisbane is graced with some extraordinary architecture in stone, but so much of what had been here has been destroyed in the name of progress, hence its tall towers. And a nod to elsewhere, something much more familiar to European eyes: its Parliament House is a copy of parts of Le Louvre, but less so its first housing style called the Queenslander, built of corrugated iron and timber; some houses grand, others very modest, like Bluey's house, are now rarities.

So far from Europe in so many respects, this part of Australia remained beholden to it and its cultural norms and genres, at least until the 1970s, a time central to where I go next. This decade began to celebrate Australian cultural products and identity, with new plays and films and music that could only have come from Australia, and for the generation of adolescents (and, secretly, 20 somethings), a pop program called Countdown on the national broadcaster spread new Australian music far and wide. Yet we still looked outside for a core, from language learning (French and German), to the literatures studied, the histories taught in what seemed to be an extraordinary longing for somewhere else, all mixed together in the lives lived in the place that was Brisbane, a place of striped sunlight, a gorgeous phrase coined by the Brisbane band The Go-Betweens in 1978 to describe their music as *that striped sunlight sound* (Zuel; Regan 90-99).

A place of striped sunlight

Let me take you to a near windowless lower ground floor corridor of a building at the University of Queensland in Brisbane. It is high summer in February 1976, and I am leaning against a wall, about to enter my first ever lecture at university. It is the one I'm most looking forward to, the subject Drama 1A. It is closing on 3 pm, and in sub-tropical Brisbane at this time of year this means it is now the heat of the afternoon, with darkness closing in early, as it does in the tropics, around six or seven at night. Grant McLennan, a second year and soon to found The Go-Betweens with Robert Forster, leans against a nearby wall, stolidly plastered as any building conceived in the 1930s, and throws a shy grin my way through the stifling

unairconditioned torpor. The wafting floor and wood polish steams up through the intense humidity amplified by Brisbane's searing bleaching afternoon sunlight, slashing through the small, high windows nearby. It lands as striped sunlight in the soon to be crowded corridor filled with sticky bodies, for in Brisbane in summer you sweat from the humidity and are drenched in summer storms and cyclones, the rain smelling hot and loaded as it hits the ground. In the Brisbane of the 1970s, these storms would cool the air for just a little while before steaming back up again. It was like living in a pressure cooker, as we will see, in more ways than one.

Nearly fifty years on, that encounter, and parts of the first lecture is seared in my consciousness. The cramped and crowded lecture room, with its massive windows, glared bright in the afternoon sun, until the blinds were closed for a screening of *Un Chien Andalou* (Buñuel and Dali, 1929). Most of us gasped. It was boiling hot, and I remember next to nothing else, except for some Molière, mixing it up with the only other subjects that formed the Drama major I took as part of my Arts degree. In the circulating friendships of university at the time, I knew who Grant was but not Robert, but they met doing this subject, and the rest, as they say, is history. And oddly, I don't think I ever knew that they formed their band the next year, in 1977, or knew of the phrase *that striped sunlight sound* that graced The Go-Betweens' first recording, 'Lee Remick', of 1978, which both men would explain and re-explain over the years. Grant coined it, but none of these explanations referred to that corridor, so redolent of exactly what they thought the striped sunlight sound was (Cover reproduced in Regan [91]). They were to name a CD called *That Striped Sunlight Sound*, released in 2005. The next year, Grant died at the age of 47 (Boyd).

In the name of that first recording, 'Lee Remick', we also get a sense of their affections for an actor we all adored at the time, because our diet of films was nearly largely European art house cinema, mostly through seasons at the university theater, The Schonell, where Grant worked. This odd mix, a hefty dose of Brisbane streets, humidity and sunlight, and art house cinema spawned a world away, and a new recognition of place, the light and darkness that forms striped sunlight, underpins not only their work but all of Brisbane at the time. It suffuses their most significant song, one of Australia's 30 best songs ever, 'Cattle and Cane', an autobiographical piece written by Grant. I had the TV on, now in Sydney, with Countdown in the

background when it came out in 1983, absolutely captivated by this incredible sound of Brisbane. But what threw me more was seeing Grant, barely recognizing him from the shy boy who smiled years before. Memories are funny, but the smile, the smell, the sense of place evokes exactly what is meant, a place now long past, and only captured in words, pictures, some vision, even for those of us who still live here. Smell, sound, the sensation on that body – that does. It was written into the bodies of the denizens of then, because something matters here.

On its own, this is a story that goes nowhere, but what I haven't told you yet is that Brisbane was far from a safe and comfortable place in the 1970s. The suburban St. Lucia campus of the University of Queensland was a rare place of sanctuary in an impossible political climate at the time. The state was more or less governed as an autocracy, a police state, where, through a practice called gerrymandering, voting favoured people in the vast outback areas where one Brisbane vote was worth only ¼ - ½ of those held by voters in Queensland's vast regions, and its towns and cities. What this meant was that the ruling party, then known as the Country Party and later the National Party, held power with only 29% of the vote, and had established an extraordinary support mechanism – the police force, and in particular its own spying arm, a special branch. Law was more or less in the hands of the police, and the courts supported them. Years later, by the end of the 1980s and early 1990s, everything changed and legal norms and good governance were restored. Lots of us who had left a decade earlier slowly returned; me too, to finally do a law degree.

What none of us really knew at the time, though, was that political and police corruption on a massive scale was rife in the 1970s, exposed through a series of newspaper articles and a documentary called *The Moonlight State* in the 1980s. Eventually, the state Premier who had held sway for years was put on trial for corruption. His own party, through the good graces of a small cadre of men of good faith, reallocated electoral boundaries, all the while knowing that they would be defeated. That party did eventually regain power, but those in Queensland who had been there or had learnt from the experience, were alerted to the abuse of power decades later (Leiboff, "Challenging the Legal Self").

That was still years away. The year Grant and Robert created The Go-Betweens, 1977, things came to a head at Queensland University and in Brisbane, which was unimaginable to students who were there just a few years after. What mattered to students of the 1980s was police raiding the campus to remove condom vending machines; what happened in 1977 was a matter of times past. In the few short years, those students had changed too, as had the focussed, classically inflected schooling, now rightly bringing Australian and First Nations concerns to the fore. But what had also changed, was an inevitable smoothing out of our complexities and histories that had been taken for granted by those of us in the 1970s, including our cultural and historical touchstones.

I intimated earlier that the Brisbane of the 1970s and earlier is largely gone, with so many of its glorious timber houses replaced by concrete and glass apartment buildings, its grand old buildings demolished in midnight raids to avoid the strictures of law. Striped sunlight and all of its paraphernalia are so much harder to find now, that lecture theater repurposed, the library I knew replaced with something else. The Go-Betweens' - poet-musicians - were of Brisbane, and Robert Forster saw Brisbane turning to concrete, barely recognizable; the band is immortalised in an unlovely toll bridge, the Go-Between Bridge, made possible by stripping apart old areas of Brisbane (quoted in Zuel). As places reshape, what made them is also buried under concrete. Once gone, what mattered in shaping a place is gone, like law abstracted and stripped of everything that made it. Because along the way, the detail is lost, and what is thought to be important is re-cast in a few words on a page. This is what lawyers do: the past will be reordered and co-opted for an entirely new set of circumstances. Let me take you back to 1977 now.

Bjelke Bitter – A Premier Beer

In an essay like this, it can be hard to hold onto all the details. My sub-heading will be entirely meaningless without a little more explanation – quite intentionally. The state Premier whose power and corruption overwhelmed law in the state from 1968 until his removal in 1987, was a man called Johannes – Joh – Bjelke-Petersen. Of Danish heritage and born in New Zealand, he was of a staunchly Lutheran family of farmers and land clearers from a small town

called Kingaroy, inland and a few hours north of Brisbane. With only a modicum of formal education not unusual in Queensland at the time, Bjelke-Petersen somehow managed to exercise power absent law, aided by the gerrymander. His unlikely countenance and demeanour – barely comprehensible and prone to dismissing anything that challenged him, he nonetheless managed to produce a legal environment, in part through his appointments to the judiciary, that would sustain his political power.

Legal challenges were largely unsuccessful until a challenge to *The Moonlight State* of 1987, supported by areas like defamation law, allowed publication of information that once would have been suppressed. This was an intervention ultimately of the highest court in Australia, not Queensland, creating new principles that meant more information could be available to the public about the actions of the government, Premier and police. It was supported by a Queensland based commission of inquiry, The Fitzgerald Inquiry, which uncovered the most extraordinary detail of corruption and political harm, especially for anyone considered suspect by the government. It revealed that the so-called Special Branch had thousands of files on individuals, holding untold amounts of information on a range of people. I suspect, but don't know, that I had a file too, because the files, which were all to be preserved following the inquiry, were unlawfully destroyed. Those files held information that would mean that anyone who was considered suspect would not be employed in state institutions, such as state based public administration, teaching or health services. Since so many people who had these files were university educated, a rarity at the time, the files mattered to the polity at large. Striped sunlight hid a darkness whose effects were chilling.

Street March Ban 1977

In 2018, I googled 'Street March Ban 1977'. Google helpfully corrected me and told me I was actually looking for a 'Street March *band* 1977'. I know that's not what I'm looking for, for one simple reason – I know there was a Street March Ban in 1977, my second year of university. This matters, because I know that for recent generations of lawyers, unless something is identifiably recognizable through Google, events simply don't exist. By this, I also mean that the textures, complexities and more are stripped away, leaving very little behind.

I could have been more specific in my search, like adding in 'Brisbane' or 'the University of Queensland', but Google wasn't giving me much of what I really wanted to find. This search was piqued by the remarks of an activist Queensland trained lawyer, Aidan Ricketts, who had alluded to these protest bans when speaking of problematic New South Wales Environmental Protest Restrictions of 2018, that would limit environmental protest. That state, south of Queensland, has Sydney as its capital. Ricketts remarked that "the new regulations were bigger and broader than those imposed under the Bjelke-Petersen era in Queensland in the 1970s" (White & MacKenzie). His colleague Sue Higginson remarked:

> I see time and time again, the courts — generally speaking — have a real concern about having to penalise people who have found that they are in a position of having to break laws to stand up for an issue or to protect the environment or to protect a civil right.

While his purpose was to make a point – if that was bad, then this was even worse – I was wriggling with irritation about the call to the Bjelke-Petersen era. Because it wasn't simply a limitation on demonstration, including an infamous banning of street marches in 1977, but its entire apparatus of surveillance, control, secret files, and secret police – Special Branch – in the hands of a corrupt apparatus, largely unimaginable to anyone a few short years later. For the government, among the worst of all were university academics and students at a time when the University of Queensland, founded in 1909, was a rare institution of academic and political freedom. I did eventually find what I wanted, what I knew must have existed. I wanted images and visuals, because I knew what happened. And I also found things I never knew existed, which I will come to very soon. I wanted to be able to show other people, like the footage of the actions taken towards the elderly women, to show what really happened. But even then, footage like this is entirely dependent on so much more than its raw state permits. Just law without more. And here's what happened.

In September 1977, Joh Bjelke-Petersen announced: "The day of political street march is over. Anybody who holds a street march, spontaneous or otherwise, will know they're acting Illegally... Don't bother applying for a march permit. You won't get one. That's Government policy now" (Brennan 1). Street march protests had been

part of the political landscape, but now the police were given free rein. It might seem that this wasn't such a bad thing. The law itself wasn't named 'Street March Ban'. By and large these marches are held on public streets and disrupt traffic. Policing of streets and public order was entirely within the remit of policing. But this wasn't a regular policing environment: now, police with a political remit were controlling political speech in the form of protest marches, a concept that was still years away from protection by Australia's High Court, found implied in The Constitution for the whole of the nation. But there was something more. This new proclamation removed the chance of appeals to the courts; now, it was the police commissioner who decided appeals. In the hands of corrupt, political appointees, it would be apparent that there would be no chance of decisions being reconsidered. Father Frank Brennan SJ, a lawyer who wrote a detailed account of the bans and their legal implications, observed that this was police policy until April 1978, with prohibitions remaining in place until August 1979 (Brennan 2).

The rules worked like this. If three people stepped off the footpath at the same time, they were deemed to be engaging in an unlawful street march and could be arrested by police. It would seem reasonable enough – don't march and you won't be arrested. But in this political climate, protest was the only possibility: a protest about protest, as it were. So let me take you back to late 1977, nearing the end of the academic year (in line with the calendar year used in Australia). Student leaders challenged the ban, organizing a protest march from the St. Lucia campus, seven kilometres away, with a rally to be held in Brisbane's central King George Square. Thousands participated. I didn't march, not wanting to miss my art history class, catching a bus to meet the marchers at the rally at King George Square. I watched the marchers process on my way in, and so I had time, with others, to sit and wait, my eighteen-year old self swathed in Laura Ashley, big bag of library books by my side, sitting in the sun, a nice time of year in Brisbane, chatting to a friend. Hardly a picture of revolutionary fervour, I look up and a tall, burly man is standing over me and photographs me. He is police. This, along with petitions I sign, makes me think I had a special branch file. I stay for the speeches, then go as the crowd swells. I miss what happens next to friends and friends of friends, lecturers, and people I saw around campus. Hundreds were arrested as they moved down the steps of the Square, as they stepped off the footpath, more than three at a

time, into what became known as the Valley of Death. I would have loved to include images and some of the rare vision of the protests, but I can't. If you can, track down 4PR Voice of the People Street Marchs 1967-1977 of 15 February 2022, where you will be able to see some of what happened.

The minutiae of particular events are so easily lost. But look what happens when some of the minutiae is restored, as an act of theatricalization. Uniformed police who had removed their identifying numbers arrested the protestors, men and women alike, the children of Brisbane's elite including law students as well as my drama and English literature lecturers in their mix, into waiting paddy wagons. The law students risked admission to the profession. Law students had tried and failed to get the bans overturned as a matter of principle. The stories of their arrests were violent and bloody, captured by volunteer lawyers who took the role of observers on the streets and, as will be seen, written deep in their bodies. For newer generations of lawyers, it is inevitable that the bare legal accounts become a prime source of knowledge about the events, maybe supplemented by a description of the laws, some newspaper reports, and some recollections. The vision and photographs less so, and in any case without explanation, they are largely meaningless. In his account of these laws, Aidan Ricketts appears to have turned to Father Brennan's careful, cautious, lawyerly account of what happened. Without more, those words are like my intentionally stripped and meaningless abstract. Without being able to theatricalise the law, we fill the words in to make meanings. But the way that the words and experiences were filled in in 1977 were a world away from our readings now.

For lawyers of the time, radical connections and actions were a rarity, but it was a small group of lawyers associated with civil liberties that took the role of observers of events and legal advisors for those arrested. Many were associated with a community legal center established when earlier protests were subject to police brutality: Caxton Street Legal Centre. They assisted also by acting as witnesses, remembering that without the ability to film with ease, there would have been no one to corroborate or describe what happened, as film footage by TV crews did not necessarily offer a picture of what happened. There were no mobile phones to easily record events. Remnant footage is barely legible and mixed with

other events. One of those lawyers, Terry O'Gorman, well known as a defender of civil liberties and incidentally the brother of a police officer, knew just how important this kind of memory was – and is. Years after these events, he was to remark, in 2019 at the time of a new crackdown on protesters, that the radicals and civil libertarians of the 1970s, who became the leaders of a generation, had moved on, their institutional memories having gone with them. He remarked: "Those that were alive and politically active, among the 400 ordinary people who were arrested in one afternoon, many of them are dead or so old they no longer take part in the political process," saying: "When you forget history or conveniently airbrush it out, then you're destined to repeat history," (Smee).

His remarks, though, take us back to Theatrical Jurisprudence, not as a bare activity of history, but as a cue to ask how to generate responsiveness and awareness into new legal bodies, for new times. But what of those lawyers who knew that something mattered and was amiss in the 1970s? Without knowing it, they theatricalised as lawyers, and curiously, performers, using history to respond to what was happening around them. Just a little older than their younger peers who were still university students in 1977, they shared the same intellectual upbringing. They knew that what was happening in Brisbane in the 1970s held within it the traces of a far more violent regime in Europe 40 years earlier. The place might look different, the times themselves a world away, but theatricalization can show just what's at stake when law goes wrong or – perhaps more correctly – when there isn't any law operating properly in the first place.

Bjelke Bitter unravelled

At the University of Queensland Revue of 1977, a short film segment must have produced gales of laughter and an awful, frank awareness of what was happening in Brisbane around the time of the new Street March Ban. I don't know exactly when the revue was on, but it didn't need to refer to the street march bans to make its point. The short film, which I'd never seen before this research, was entitled *Bjelke Bitter – A Premier Beer* (1977). The beer coasters were well known, left all over campus, and one is even held now in the Queensland State Library. A mocked up bottle graced the short film, its name capturing just enough of a reference to the Queensland Premier's

Germanic sounding surname. Again, I can't show you the footage but it is readily available (Radical Times). As revues are wont, it was hardly subtle or – more to the point – it was obvious. Set in a beer garden of one of Brisbane's university pubs, it riffs off one extraordinary scene from Bob Fosse's 1972 filmed version of *Cabaret*, released just a few years before: the biergarten scene from the song 'Tomorrow Belongs to Me', John Kander and Fred Ebb's confection of popular lieder belying the vile agenda at hand.

Bjelke Bitter was shot on Super 8 and inevitably missing much of the filmic grammars of the film, where the central figure of the beautiful young boy whose singing and angelic appearance is slowly revealed through the full awfulness of a child of Nazism as his face hardens, before panning over the biergarten, the audience made up of the abject, the uninterested and the highly committed, before nearly everyone joins in. In the revue version, a flax-haired third year drama student, Malcolm Cork, takes the role, not in any kind of costume, but as an adult singing some of the song, beer stein in hand. A group of other students, lawyers and future lawyers and activists are his audience watching him, some in front, some behind, some seated, nearly all with beer steins in their hands and singing along. I recognize some of them, especially Cork whose classes I was in, and others whose identities I don't know for certain, and others who I think I recognize. The *Radical Times* says that among their number is a man called Wayne Goss, who 13 years down the track will become the first Labor Party premier to win the first free elections in Queensland in 1990, and a founder of 'Caxton Street', the volunteer lawyers whose work mattered so much in the street march arrests.

Apart from Malcolm, there is next to nothing in terms of acting or performance. It's just a group of people who look like they have been told to look at him, perhaps sing along and wave their beer steins along in time. Their ordinariness matters, of course, because the ordinariness of the people in the biergarten was what mattered too. They were there to admire, and to smile, to remind us that there is very little different about sitting around a beer garden in the casual garb of Brisbane in 1977, from a biergarten in Germany 40 years earlier. But without anything to explain this, it simply looks like a bunch of people who made a pretty ordinary, unimaginative film. What new audiences would make of it, without explanation, is

a practice of meaninglessness, of parody or pastiche perhaps or – problematically – of admiration. Time and place matter enormously.

And this is where things become complex. There is so much in *Cabaret* that these students knew that spoke of what was happening in Queensland in front of their very eyes. All that distance away from Europe, and there it was, in plain sight, happening right before our eyes, in the striped sunlight, which hid a disturbing undercurrent not visible on its face. For those lawyers knew that this mattered. And like Terry O'Gorman remarked, these people are now largely gone, dead, like Wayne Goss, taken by a brain tumour when he was still young, or retired. What was obvious to them of Brisbane and Queensland in the thrall of something dangerous and violent, is now largely gone. It is now about 40 years since the Street March Ban and the short film, between the events in Brisbane all those years ago and now. The smells, sound, and what lay beneath the striped sunlight stripped bare tells us absolutely nothing of what really happened. Here, on one side of the world and in Europe, in the US and everywhere else.

Works cited

Bjelke Bitter Beer Ad - Queensland Uni Revue 1977. Radical Times, https://www.youtube.com/watch?v=dX9bwamb1Ls.

Boyd, Brian. "Remembering a Great Song and Its Writer." *The Irish Times*, 12 May 2006, https://www.irishtimes.com/culture/remembering-a-great-song-and-its-writer-1.1002275. Accessed 12 Apr. 2023.

Brennan, Frank S.J. "Avoiding Too Much Order with Too Little Law: Reflections on the Queensland Experience." https://www.humanrights.gov.au/sites/default/files/HRC_assembly_Brennan.pdf.

Gaakeer, Jeanne. *Judging from Experience: Law, Praxis, Humanities*. Edinburgh University Press, 2021.

Janusiene, Aiste. "'Do You Understand How Much I Have Transgressed Here?': Interrogating Dynamics and Consequences of Noticing in the Post-Colonial Legal Self." *Law Text Culture*, vol. 25, 2021, pp. 53-82.

Leiboff, Marett. "Challenging the Legal Self through Performance." *The Oxford Handbook of Law and Humanities*, edited by Simon Stern et al., Oxford University Press, 2019, pp. 317-334.

—. "Ditto: Law, Pop Culture and Humanities and the Impact of Intergenerational Interpretative Dissonance." *Australian Feminist Law Journal,* vol. 36, no. 1, 2012, pp. 145-163.

—. "'Stir Up the Australian Youth to Merriment': A Midsummer Night's Dream, Summer 1989-1990 (Sydney, Australia) and the Theatrical Transmutability of Law's Texts." *As You Law it: Negotiating Shakespeare*, edited by Daniela Carpi and François Ost, Walter De Gruyter, 2018, pp. 247-268.

—. "Theatricalizing Law." *Law and Literature*, vol. 30, no. 2, 2018, pp. 351-367.

—. *Towards a Theatrical Jurisprudence*. Routledge, 2019.

Regan, Scott. *The Brisbane Sound.* 2019. Queensland University of Technology, Doctoral Thesis by Creative Works.

Sheikh, Danish. "Staging Repair." *Law Text Culture*, vol. 25, 2021, pp. 146-181.

Smee, Ben. "'Nothing Has Changed': Why Queensland's Protest Battle Has Raised Joh Bjelke-Petersen's Ghost." *The Guardian*, 1 Sept. 2019, https://www.theguardian.com/australia-news/2019/sep/01/nothing-has-changed-why-queenslands-protest-battle-has-raised-joh-bjelke-petersens-ghost. Accessed 10 Feb. 2021.

White, Leah and Bruce MacKenzie. "New Protest Regulations Labelled 'A Fundamental Attack on Democracy' Will Start in NSW from July 1." *ABC News*, 26 June 2018, https://www.abc.net.au/news/2018-06-26/new-protest-regulations-labelled-attack-on-democracy/9905676. Accessed 10 Feb. 2021.

Zuel, Bernard. "How Brisbane Formed the Striped Sunlight Sound of The Go-Betweens." *The Sydney Morning Herald*, 31 Jan. 2015, https://www.smh.com.au/entertainment/music/how-brisbane-formed-the-striped-sunlight-sound-of-the-gobetweens-20150121-12te5j.html. Accessed 2 June 2017.

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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Works cited

Ahmed, Sara. *The Feminist Killjoy Handbook*. Penguin, 2023.

—. *Living a Feminist Life*. Duke University Press, 2017.

Bakhtin, Mikhail. *Rabelais and His World*. Massachusetts Institute of Technology, 1968.

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

Christodoulidis, Emilios. *Law and Reflexive Politics*. Springer, 1998.

Cormann, Grégory, and Jeremy Hamers. "« Ce qu'il est con… » Des idées aux corps : Sartre, Baader et la grève de la faim." *Les Temps Modernes*, vol. 667, no. 1 (2012): pp. 31–59.

Cousins, Emily. "'He Obviously Doesn't Care about Antagonizing the Judge': Barbara Bellis' Challenge." *Connecticut Law Tribune*, 26 Sept. 2022. Accessed 26 Aug. 2023.

Dean, Jodi. "Same as It Ever Was?" *Sidecar*, 6 May 2022. Accessed 26 Aug. 2023.

Derrida, Jacques. "Force of Law, The Mystical Foundation of Authority'." *Acts of religión*., edited by Gil Anidjar. Routledge, 2002, pp. 230–258.

Eagleton, Terry. *Walter Benjamin: or Towards a Revolutionary Criticism*. Verso, 1981.

Gaufman, Elizaveta. "The Trump Carnival: Popular Appeal in the age of misinformation." *International Relations*, vol. 32, no. 4, 2018, pp. 410–429.

Goodrich, Peter. "Disciplines and Jurisdictions: An Historical Note." *English Language Notes*, no. 153, 2010, pp. 153-161.

Goodrich, Peter. "Introduction." *The Cabinet of Imaginary Laws*. Edited by Peter Goodrich and Thanos Zartaloudis. Routledge, 2021.

Guardian News. "Alex Jones Admits Sandy Hook Shooting Wasn't Faked: 'It's 100% Real.'" *YouTube*, 3 Aug. 2022. Accessed 26 Aug. 2023.

Hamers, Jeremy. "From Fritz Teufel to Leo Bassi: Happening and Provocation." *Prospero European Review Theatre and Research*, vol. 2, 2011.

Horsman, Yasco. *Theatres of Justice: Judging, Staging and Working Through in Arendt, Brecht, and Delbo*. Stanford University Press, 2010.

Hsu, Tiffany & Linda Qiu. "4 Takeaways From the Sandy Hook Damages Trial of Alex Jones." *The New York Times*, 22 Sept 2022. Accessed 26 Aug. 2023.

Hsu, Tiffany. "'Do These People Actually Think They're Getting Any Money?' Jones Denounces the Verdict, and Fund-Raises." *The New York Times*, 12 Oct. 2022. Accessed 26 Aug. 2023.

Huizinga, Johan. *Homo Ludens: proeve eener bepaling van het spel-element der cultuur. Tjeenk Willink, 1938.*

—. *Homo Ludens: A Study of the Play-Element of Culture*. Routledge & Kegan Paul, 1980.

Jones, Alex E. "Infowars, LLC; and Free Speech Systems, LLC, Appellants v. Scarlett Lewis, Appellee, 03-19-00423-CV." October 11, 2019. Accessed 26 Aug. 2023.

Korsten, Frans-Willem. "Besmirching Judges, Undermining Authority: Populists' Carnivalesque Play with Feelings of Law and Justice." *Feelings about Law/Justice – Rechtsgefühle*, edited by Thorsten Keiser, Greta Olson, and Franz Reimer, special issue of *Schriften des Rudolf-von-Jhering-Instituts Gießen*, vol. 3, 2023, pp. 191-214.

—. "Populists in Court: Wager, Match, and Chance Considered as Generic Forms of Playful Legalities." *Law, Culture, and the Humanities*, 2023, pp. 1-17,

Pekelder, Jacco, and Klaus Weinhauer. "Germany Confronts the Baader-Meinhof Group: The Stammheim Trial (1975–1977) and Its Legacies." *Terrorists on Trial: A Performative Perspective*, Leiden University Press, 2016.

Reiner, Rob, et al. *A Few Good Men*. Columbia Pictures, 1992.

Scarlett Lewis vs. Alex E. Jones, Infowars, LLC, and Free Speech Systems, LLC, D-1-GN-18-006623. September 27, 2021. Accessed 26 Aug. 2023.

Smith, J. & Andre Moncourt, *The Red Army Faction: A Documentary History. Volume 1: Projectiles for the People*. PM Press, 2009.

—. *The Red Army Faction, A Documentary History: Volume 2: Dancing with Imperialism*. PM Press, 2009.

Snodgrass, Erin, and Lloyd Lee. "Alex Jones Mocks $965 Million Sandy Hook Verdict: 'Do These People Acutally. Think They're Getting Any of This Money?'" *Insider*, 12 Oct. 2022. Accessed 26 Aug. 2023.

Sorkin, Aaron. *The Trial of the Chicago 7*. Netflix, 2020.

Stone Peters, Julie. *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe*. Oxford University Press, 2022.

Trump v. Clinton. 2:22-cv-14102, (S.D. Fla. Jan 19, 2023) ECF No. 302, at *6. Accessed 26 Aug. 2023.

United States, Congress, Texas Constitution and Statues. *Trial, Judgment, And Appeal*, 2011. Accessed 26 Aug. 2023.

Wacks, Raymond. *The Rule of Law under Fire?* Hart, 2021.

Winkler, Willi. *Die Geschichte Der Raf*. 2nd edition. Rowohlt Taschenbuch, 2008.

Winterberg Thomas, *Festen*. October Films, 1998.

Zeeuw, Tessa de. *Postdramatic Legal Theatres: Space, Body, Media and Genre.* PhD diss., Leiden University, 2021.

Zirin, J.D. *Plaintiff in Chief: A Portrait of Donald Trump in 3.500 Lawsuits*. All Points Books, 2019.

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.

Performing Institutions:

Trials as Part of the Canon of Theatrical Traditions

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In this article, I confront distinctions between fiction and reality in the Ixil Trial in Guatemala (2013), considering the relationship between theater, justice, and law. To this end, I argue that there is a parasitic relationship between theater and the law. Although theater has influenced the mechanisms of the judicial or accusatorial system in the twentieth century, trials, in themselves, constitute theatrical forms. Transitional justice, which limits my approach to a broad spectrum of judicial rituals, has shaped its very own canon. I argue that it is through an analysis of the theatrical elements of these trials that it is possible to unpack the distinctions between law and justice.

Keywords: theater, law, justice, actor, Ixil Trial.

This article challenges the dichotomy between reality and fiction that shapes discussions of transitional justice (hereinafter 'TJ') (Teitel, "Transitional Justice Globalized" 1). I focus my analysis on the genocide trial in Guatemala (hereinafter referred to as the 'Ixil Trial') a historic milestone, as this was the first trial to bring charges against a former head of state for committing crimes of genocide in a domestic court (Burt 144). Between March 23 and May 10, 2013, the *Sala de Vistas* (Courtroom) in Guatemala's Palace of Justice became the stage for the prosecution of former Dictator José Efraín Ríos Montt and his Intelligence Director, Mauricio Rodríguez Sánchez. The charges brought against them included crimes against humanity and genocide against the Ixil people.

On March 23, 1982, Ríos Montt seized power through a coup d'état, becoming a pivotal figure in the most violent period of the counter-insurgency war in Guatemala. Despite his relatively short rule, which ended on August 8, 1984, his actions left a lasting and devastating impact. While the Ixil region was not the sole area in Guatemala affected by genocidal policies, the trial specifically examined the events that occurred in this region, situated in El Quiché, north of the Guatemalan capital.

Ríos Montt's dictatorship is situated within the broader context of war in Guatemala. From the early 1960s until the signing of the Central American Peace Accords in 1996, the country was the scene of counterinsurgency warfare, inspired by the military actions carried out in the wars of Indochina and Algeria (Robin). These policies were modified and replicated through the National Security Doctrines in Latin America during the seventies and eighties (Drouin). In the case of Guatemala, the *scorched earth policies* were central for the execution of genocidal programs, proximate to other cases in the broader history of colonialism in the region.

After three decades of national and international efforts by various organizations, such as the Association for Justice and Reconciliation (AJR) and other plaintiffs in 2012, Ríos Montt lost his parliamentary immunity and the Judge Miguel Ángel Gálvez successfully opened the trial, a remarkable achievement in the prosecution of crimes against humanity. On May 10, Ríos Montt was convicted of both crimes, while his Intelligence Director was released. Ten days later, due to a ruling by the Constitutional Court – mediated by political

pressure from the economic elites – the conviction became *legally* ineffective. The economic elite (CACIF)[1] made their position clear in the press on May 13, 2013, stating that they were demanding the Constitutional Court to 'amend the judgment.' This public announcement showcased their opposition and desire to challenge the verdict through legal means.[2]

During the hearings and in the months leading up to and following the trial, the media played a critical role visibilizing the confrontation between different sectors of society for the public. Through the coverage of the trial and of the events leading up to it, journalists and media outlets provided a window into the complex dynamics of TJ and the challenges of pursuing accountability in post-conflict societies. The trial presents a unique opportunity to revisit and reconstruct events in recent history, as it involved the testimony of over a hundred witnesses and expert reports, shedding light on a devastating chapter of Guatemala's recent past. The lens through which this history was examined was the categorization of the crimes as genocide, adding a profound dimension to the understanding of the events. The statements made under the cross-examinations of witnesses and experts in this type of TJ trials, show the repressive patterns and systems of torture developed in many Latin American contexts: e.g., forced disappearances, massacres, forced displacements, executions, and the systematic rape of women and girls (FIDH 4).

The Ixil Trial as a lens of confronting the persistent dichotomy between reality and fiction

To confront the persistent dichotomy between reality and fiction throughout the theatricality of the Ixil Trial, I address the issue of anti-theatrical prejudice (Barish) in the first section of this paper. In the second portion, I shift my focus to the figure of the actor and the concept of 'action', drawing upon Derridean critique of Austin's exclusion of the actor's words from the realm of 'happy performative utterances.' I explore various aspects of the specificity of the TJ trials as a new technology, which can be understood as a distinct theatricality of law. Finally, I reconstruct key aspects of the Ixil Trial, focusing on the arguments presented in the media regarding the theatricality of the event. In this final section, I

draw on documentation from two Guatemalan print media sources, *ElPeriódico* and *Prensa Libre*, focusing on articles that covered the court proceedings (March-May 2013).[3] By analyzing the portrayal of the trial I demonstrate how the anti-theatrical prejudice against the theatricality of legal proceedings can be exploited by detractors of justice to delegitimize TJ processes, such as the Ixil Trial.

The concept of 'theatricality' is based on Diana Taylor's definition, which states that theatricality "sustains a scenario, a paradigmatic set-up that relies on supposedly live participants, structured around a schematic plot, with an intended (though adaptable) end" (13). This definition has the merit of being able to encompass a wide range of social practices that have traditionally not been considered within the canon of theater. It is precisely within this context that I situate the existence of a visible tradition of TJ processes. This topic holds significant political relevance today in Central America where repressive governments in Guatemala and Nicaragua have staged a series of judicial farces. They employ the outward form of judicial rituals but do not ensure the rights and guarantees of the accused. As I will argue, paying attention to the construction of these processes in relation to regimes of power allows us to discern the distinction between a judicial farce and a trial conducted with respect for the rule of law.

Taking these aspects into consideration, it is evident that the Ixil Trial is part of a series of processes of transition, democratization, and reparation. Farcical trials, as Christian Delage and Peter Goodrich have argued, show how the dictatorship handles the cases considered by the regime as political crimes. "Organized by dictatorships, show trials are political trials whose primary purpose is to advertise and publicize what the dictatorship views as political crimes" (3). They display what is considered as 'subversive' or 'traitorous'. In these trials, there is a lack of respect for the guarantees of both parties, like what occurred during the staging of the *Tribunales de fuero especial* (Special Jurisdiction Courts) during Ríos Montt's dictatorship, where the accused were executed without the right to a defense, under similar mechanisms of judicial farce.

The theatrical nature of a trial can be double-edged. While it can capture public attention and increase awareness of important legal issues, it can also be exploited by those seeking to delegitimize the

proceedings, as was the case in the Ixil Trial where the defense of the accused, along with supporters and detractors of the trial, utilized the media to portray the trial as a theatrical spectacle. By doing so, they undermined the legitimacy of the proceedings and cast doubt on the fairness of the outcome. It is crucial to identify and understand such dramatic strategies and to recognize the potential they have to impede the pursuit of justice.

This is why I explain the importance of understanding these trials from a theatrical perspective to account for the politics involved in the process of enforcing the law and to show how thinking about the law as theater enables us to understand how judicial institutions are performative at their core. They embed a politics through their practices and rituals. It is essential to acknowledge that avoiding the discussion of theatricality within the courtroom opens the possibility of discrediting legal processes that, although not farcical, unfold within the inherent theatricality of the justice system.

The anti-theatrical prejudice: Taking the theaters of the law seriously

In the past few decades, numerous theorists have explored the relationships between theater and law, creating rifts in the metaphysical philosophical tradition of the anti-theatrical prejudice. As Jonas Barish explains, the anti-theatrical prejudice is one of the central axes of Western metaphysics since Plato. It is based on the separation between being and appearance, nature and technique, reality, and mimesis, or between the world of forms and the sensible world. Richard Schechner (238) also agreed that this prejudice defines theatrical spaces as fictions, and 'fiction' as what is not real or not true. However, is a judicial process not also a form of fiction, a rehearsed technique that shapes behavior within legal spaces?

Even if we start from a critical perspective that emphasizes the produced character of reality, there is a reluctance to use theatrical language in the analysis of judicial trials. The reason for this can be attributed to several factors. One reason lies in the philosophical disregard for the world of appearances and spectacle. Another aspect resides in the significant tradition of farcical trials. This is exacerbated when the language of theater, normally associated

with fiction or falsehoods, is employed to discuss heinous crimes against humanity and genocide. In such instances, the utilization of theatrical and fictional language may appear as a relativistic and perilous approach to addressing the gravity of the subject matter.

However, it is important to note that trials are technically produced within the processes of the accusatory legal system: procedural codes that locally codify the behaviors of the bodies of the actors on the stage (e.g., rising when the court enters, the face-to-face posture between the witness and the court), the spatial separation into two distinct zones, the public and the legal stage, and the utterances that repetitively structure and legitimize the form of the ritual. These aspects are written and determine the structure of the ritual, although in these enactments, the outcome is linked to the ongoing process, without a pre-written resolution as in a traditional theatrical play. This difference gives a specificity to judicial theatricality compared to other theatrical forms within the arts tradition. However, the history of theater has also incorporated such open-ended, long-duration performances, as was the case in 2017 at a theater in Reinickendorf (Berlin). Vegard Vinge and Ida Müller presented an endlessly unfolding scene, which lasted around twelve hours. These aspects serve as examples of how the very practices themselves can transform the conceptual hierarchies of what is or is not considered theater.

My argument is situated within the growing body of research leading to the emergence of divergences within the metaphysical philosophical tradition concerning the anti-theatrical prejudice (Carneletti; Cole; Ertür; Felman; Roberts; Rogers) and the importance of media and technology in the performance of justice (Vismann, *Files*; "Tele-tribunals"; *Medien*). Amidst these perspectives, Marett Leiboff (1-2) argues that the notion of 'antitheatrical legality' in law and jurisprudence arises from the neglect of the body's significance in the process of legal enactment. Her approach builds upon Hans-Thies Lehmann's concept of the post-dramatic and his critique of the antitheatrical prejudice. The consideration of bodies within the legal realm significantly impacts the phonological and ethnocentric perspectives of the philosophical tradition (Derrida, *De la grammatologie* 50-51). Critical perspectives about the oppositional relationship of law and theater emphasize the central role of the bodies that both write and perform the law in local contexts

(Roberts 125). The attention to the bodies accentuates the importance of participation, that is clearly central in TJ processes. In this vein, it is also important to consider the extra-legal and extra-theatrical aspects of the institutional experiences of the individuals involved, particularly to comprehend the types of processes unfolding within a courtroom. This implies that the narratives of individuals or groups in positions of power can provide insights into whether we are dealing with judicial farces or processes that ensure the rights of the parties involved.

The attention given to bodies underscores the importance of participation, which is especially crucial in TJ processes. Perspectives such as the actor-oriented analytical framework argue for a more rigorous conceptualization of the notion of victim participation itself (Evrard 429). According to this, the Sepur Zarco trial (2015) for sexual violence, sexual slavery and domestic slavery in Guatemala, challenges the instrumental view on the participation of victims in these types of trials. It provides a broader view of what can enter and participate in the hearings. This is crucial to understanding the interference of other phases or forms of participation they call *ecosystems* and *trajectories*. This helps to understand the temporal and social boundaries taking place in the physical space of the trial, exploring the limitations of speech acts, as described within Derrida's critique of Austin's theory.

The question of spatial and temporal boundaries and acting in a trial is essential to the pursuit of more general philosophical quandaries, about such things as the notion of representation. Questions about space and time suggest that anything in the trial is just in real time and happening only in one place. Trials are a complex process of representation and reconstruction that involve a variety of types of evidence, including witness testimonies and written or audio-visual documents or materials; physical evidence such as bodies and bones, as well as non-verbal evidence, like gestures and other displayed behaviors. This leads us to the question about the limits of speech acts in relation to individuals, places and times; recognizing that everything that takes place there, is part of processes of memory and recollection. In addition, the intention and adequacy of the reference, of the act to the actor, for example, are central in any legal form or analysis in modern time, which necessarily involves putting these relationships into action, without questioning their practical reality.

However, this process must acknowledge that some elements are overlooked, such as a person's identity or the presupposition of cultural frameworks that would operate universally (García 314-316).

The complex multidimensionality of TJ processes challenges the ideological burden of the anti-theatrical prejudice, namely, that art belongs to the world of the technical and the mimetic, that it must be understood as artificial or false. This perspective is extended to the domain of law as a mere mechanical application of rules, without addressing the practices and sources that interpret them. The latter ideas raise questions that remain under focus: Is law not also the sphere of reproduction? Is this not precisely its problem, its connection with ethics and politics? Is the problem of the actor in the judicial scene not intricately linked to the matter of reproduction and the expectations surrounding the subject's transparency? What would be the significance for the law if it genuinely acknowledged the idea of character creation as a fundamental element of judicial theater?

In this view, the problem of law is its interpretation and application according to specific cases that are not contained in the universality of the rule – as established by Jacques Derrida in *Force of Law.* Making a judgment implies making a calculation between heterogeneous orders, that is, between the *universal* character of the law and the *specificity* of the case. What communicates these orders, is an *interpretive force* that is not reducible. This means that *enforcing* the law is a political gesture that is not contained in the rule nor in the case, but comes from an external calculation between the two. It supposes a *force of interpretation* which, although based on the rule, must also adapt to the case. In its inadequacy, the law opens a space for the responsibility of the interpreter and of the institutions that formulate its codes of interpretation.

Austin's Derridean reading of the hypothesis of idealization

In *How to Do Things with Words* (1975), Austin introduces the doctrine of Infelicities and etiolations (22), which excludes the utterances used by an actor on stage from being categorized as successful or *happy* utterances. He presents six 'necessary conditions' that determine the success or failure of a performative utterance (14-15).[4] If any of

these conditions are not met, the act falls into the realm of infelicities. For instance, if a promise is made without a genuine intention to fulfill it, it is considered an unhappy utterance. In this view, the promise made by an actor on stage is considered an infelicity because the actor is *merely acting* and will exit the performance to resume their *real* life without any obligation to fulfill the promise he made on stage. Austin sees this as a parasitic use of serious language in a non-serious context, where the actor's utterance lacks the genuine intention and commitment associated with a real promise.

Derrida quotes a passage from Austin's text ("Second Lecture"),[5] highlighting the idea that performative utterances delivered by actors or in certain contexts are hollow or void for Austin, existing in a separate ontological sphere that distinguishes them from everyday promises. Austin reduces the character of the play to the *real* actor's intentions, not the character's, and therefore argues that this act would be empty, apart from parasitizing *serious* language into a *non-serious* use. His peculiar emptiness or lack of meaning applies to any type of utterance in *special circumstances.* In such cases, language is used in ways that are not meant to be taken seriously but instead rely on its normal use, thereby parasitically borrowing from language. Considering Austin's perspective and the fact that every trial requires individuals to take on roles such as judges or witnesses, might this suggest that all speech acts within the trial are rendered void or *non-serious*?

Derrida critiques Austin's separation by asserting that the character's promise and origin lay within the context of the scene. The order of this construction would, likewise, be applicable to judicial theater. In Derrida's terms,

> Moreover, I want to stress that according to the logic of this hypothesis, it would not be the actor who should be held responsible but rather the speaker committed by the promise in the scene, that is, the character. And indeed, he is held responsible in the play and in the ideal – i.e., in a certain way fictional – analysis of a promise, the choice between the two being a matter of indifference here. (*Limited Inc* 89)

In this passage, Derrida identifies the use of a *fiction*. It is a 'theoretical fiction' (88), by means of which eventual aspects are excluded

under the argument of the purity of the analysis. This permits Austin to postulate ideal conditions (the *necessary conditions* of speech) to determine how things are done with words, although indicating that words could only do one thing. This leads to the question of the enforcement and interpretation of the law: e.g., Is there only one possibility? How can this be? What if the cases were different?

This attention to the world of forms presupposes, for Derrida, a mechanism defined by a "hypothesis of idealization" (*Limited Inc* 61), which consists of "an entire system of theoretical-methodological idealizations and exclusions" (69). These terms indicate that the method that Austin is formulating in his lectures would lead him in a first moment to look at the world of phenomena and then, in a second moment, to return to the form of utterances, excluding any parasitic relation. Parasitism would indicate a *non-normal* or a *literal* and *serious* use of language, as if there were a use of literal communication between speakers. In other words, instead of wanting to understand what words do, Austin returns to the form of utterances and what would be expected from them a priori.

Now, what is problematic is not to produce theoretical fictions, but to take as *real* what is being historically produced and to deny the complexity that language opens. According to this, the distinction between reality and fiction through the notions of ordinary/non-serious language are based on a process of theoretical fictionalization that does not recognize its own presuppositions of analytical production. Something similar happens when we refuse to talk about theater out of fear of trivializing the importance of trials, as if theater could not be a tool to produce serious scenarios of law – as Milo Rau has made clear in the *Congo Tribunal* (Congo and Berlin, 2015) and *The Moscow Trials* (Moscow Sakharov Center, 2013) hearings.

Examples from the Ixil Trial can help us grasp the problematic nature of Austin's exclusion. According to María Luz García, the investigation into one's personal identification details, such as name, date of birth, and occupation, reveals the cultural clash between the Justice system's framework and State Institutions' practices, juxtaposed with the customs and traditions of Maya communities (315-317). In this sense, it is not about universal forms, but rather cultural ones. Individuals must adapt and express themselves in accordance with the cultural norms and practices within the context where *justice*

is meant to be served. The same can be said about the structure of narrative testimony, which is linked to memory processes with diverse temporalities.

In 2018, I conducted an interview in Nebaj (Guatemala) with one of the mental health professionals[6] who accompanied the witnesses throughout the pre-trial, trial and post-trial process. She recounted that many people struggled to articulate what had happened. The pursuit of justice requires a chronological organization of events, which may not necessarily align with the ways in which memories are formed in situations of trauma. This means that those who testify must also be able to navigate a process that accommodates the needs of the judicial ritual. They come to testify in terms of their life, but they do so from the language of the judicial institution, not theirs. Learning to tell a story in these terms implies a process of reconstruction, which is not spontaneous. This undoubtedly multiplies the ways in which memories emerge and are organized within other spaces, times, and technologies. Memories parasitize the present without a clear explanation. Elena Raymundo Cobo recounts that many individuals are hesitant to discuss their recollections due to the immense pain they evoke, but as they hear the same narrative coming from others, they experience a profound sense of identification in the stories of fellow survivors. This collective healing, as observed during the trial, underscores the transformative power of connecting through shared experiences. Other studies have documented the healing power of shared narratives in cases in Rwanda (Norridge), Kosovo (Deperchin), South Africa (Cole), and the complexities surrounding the construction of witness images in Kurdistan-Iraq (Hardi).

The constructed nature of testimony and the process of healing is not related to the production of falsehoods, but rather to the shaping of memories in accordance with the demands of the law. However, as Felman states, during the cross-examination, this process is also subject to the specificity of the moment. They "dramatized or triggered an emblematic crisis in the law [...] a crisis of legitimacy and a crisis of truth" (4-5). This crisis is related to the paradigms in which truth or testimony are encapsulated.

What happens is that we are faced with different ways of operating that cannot be reduced to a single point of view. For this reason,

Derrida points out that the actor who promises something on stage, does so in terms of the character they play and not from the relations they have outside the theatrical scene. Thus, a theory of judicial performance would have to operate by contemplating the acts and not the ideal forms, since they never do, in fact, take place. When performing a trial, cultural, technical, and institutional practices come into play and impact interpretations. Norms and codes are conditions, but they are not mechanically performed. It is in this space and under these conditions that judicial politics and ethics emerge.

This idea is essential to understand the transfers in a judicial trial, because the specific issue of this form of theatricality lies in the relationship with the lifeworld, the real life of those who present themselves as witnesses or experts. The discussion around Austin's text locates a way to think about the theatricality of trials without seeking to collate a formal deontology about how things should be, to understand how they happen, and how we could interpret them. In other words, gestures, positions, words and ways of interpreting the penal codes produce the judicial institution. This locates the interest of analyzing the *social spaces* (Lefebvre) of the Courts of Justice through the lens of theatricality as a specific form of theater. This understanding emerges through an examination of the history of justice rituals, as evidenced by the works of Cornelia Vismann (*Medien*) or Shoshana Felman.

Marvin Carlson's concept of *ghosting* in the field of theater helps us comprehend the idea of a theatrical tradition within TJ settings. It refers to the revival of theatrical memory that reappears and haunts theatrical spaces, generating a montage of time(s) and space(s) that hinder the purity of the event(s) and reducing theater to its mere presence and identity. In this sense, in the field of law, Shoshana Felman (59) also speaks of *interjuridical nature*, identifying how certain characteristics of paradigmatic oral and public trials of the past continue to be inscribed in contemporary trials. Both concepts indicate that there are theatrical features that are repeated or quoted from one piece of theater to another and, in the same way, between trials from different context and periods of history.

Although both fields have developed independently, the way space is organized in the accusatorial system shows similarities to theatrical space. The same is true when considering the repetitive character

of the scenes and the distinction between theater and life that emerges in modernity. The theatrical tradition that has its origins in Greek antiquity, functioned as a useful model in the production of legal events. This leads to the existence of a *parasitic relationship* between law and theater. Namely, a relationship whereby the law produces theatrical events and the theater develops in these events.

Cornelia Vismann extensively reconstructs the problems that arose once the courts were moved indoors, as well as the role of publicity in the European tradition. Other contemporary considerations show that there is no sharp distinction between the reflections of theater, politics, and the production of the spectacles of law. According to Carlson, Felman and Vismann, and in terms of my interpretation, these are the forms of temporal and spatial parasitism that make it possible to understand or identify a canon of behaviors historically produced in judicial trials, which enable talk about a certain type of theater. This means that it is not only a matter of saying that the law is inspired by theater, but that the law constitutes a theatrical form that can/should be included within the theatrical canon. In this context, transitional justice trials also have a specificity in that they address situations that have a profound impact on national histories. I will now elaborate on this further.

Theatricality of the accusatorial system in TJ trials: The emergence of a new technology

Ruti Teitel ("Genealogía de La Justicia Transicional") defines TJ as a type of justice that responds to the crimes committed by repressive regimes in recent history (145). It is a technology in the Foucauldian sense, insofar as it involves the creation of knowledge and regimes of truth materialized in institutions which can be reproduced and inform law practices and conceptions. Teitel points out that this is a type of justice that became globalized in the second part of the 20th century.

While the national procedural codes localize the rituals in line with the norms of each country, the model of the accusatorial judicial ritual also functions according to forms and means of theatricalization that are not local. The Criminal Procedural Reform in Latin America began its implementation in 1992 in Guatemala (Fuchs et

al.), transforming the written practices of the inquisitorial system into the oral and public model of the adversarial or accusatorial system (de Mata Vela 10). This model is defined by five principles: orality, publicity, concentration, immediacy and contradiction. The first two principles facilitate the performance of the others: thanks to the gathering of the parties (civil parties – *querellantes* – and defense) involved in the case speaking in front of the tribunal and to the video and audio recordings, the decisions of the judges can be immediately notified and recorded. At the same time, it is thanks to the *continuity* of the confrontation between the parties that the *concentration* of all the evidence can be exposed. This happens within the structure of the ritual procedures that conditions the theatricality of a trial.

In this vein, Linda Mulcahy (1) asserts that trials are defined "as ritualized events performed according to a social and legal script". In the case of the Guatemalan Code of Criminal Procedure, Article 3 on Imperativity states that "The courts and the parties to the proceedings may not vary the forms of the process, nor those of its proceedings or incidences". The legal script of TJ processes is then pre-determined, but what happens there, cannot be completely co-opted beforehand. This can be understood by looking at the history of the emergence of international justice, starting with the staging of the Nuremberg Tribunals. These tribunals were presided over by the Allied powers, Great Britain, France, the United States and the Soviet Union, in response to the crimes outside German borders. The media was also crucial to this show of force performed by the allies and in the dissemination of this type of legal model for dealing with state crimes of recent history.

In this sense, the events of World War II placed new demands on the existing justice systems, e.g., the creation of an international tribunal and the consideration of the new media in the diffusion of these trials. The incorporation of visual documentation, such as film archives, was also central to the expansion of the spatial and technical boundaries of the means of trial production. This was also recognized as a central element in the Adolf Eichmann trial in Israel, which was recorded and broadcast by technical means, raising new problems for the question of the publicity of justice. In all these trials, the birth of a new technology began to take shape, consisting of an institutional transformation of the discursive, me-

dia and infrastructure networks that led to a different positioning of the characters in the judicial space. With this, the principles of publicity and orality became problematic issues linked to the question of theatricality and mediality. These aspects are referred to in the Memorial of the Nuremberg Trials, where the motives for certain theatrical decisions are explained. The Memorial clarifies the decision over the need to over-expose the defendants, raising questions related to clothing, e.g., exposing the defendants in civilian clothes would have a different impact than if they appeared in prison uniforms. The spaces of law in this type of TJ trials are intended to dictate a verdict where not only the crimes are legally condemned, but also constitute pedagogical spaces with an important component of moral denunciation. For this, it was not only important to expose to the public the bodies of the indicted in certain clothing, but also those of the survivors and witnesses and the amount of documentary evidence that was available. The *spectacle* reveals its utility of being a *visual* (Lat. *spectare*) *mechanism* (Lat. -*culum*) that creates knowledge through the judicial ritual procedures. This notion of spectacle also translates a relationship with memory since it implies a relationship with the *spectral.* Namely, with what reappears in the theatrical space without being able to indicate it as *that, now*, *there*. Individual memories and expert explanations in the cross-examinations evoke stories, people, spaces that are not *really* there and must be imagined, reconstructed.

Another important aspect for the emergence of this TJ technology involves the use of reproduction media and the emergence of mass culture. This facilitated a wider dissemination of the personal memories exposed during the hearings, creating in turn what Annette Wieviorka calls *the era of the witness*. This took place in the second part of the 20th century alongside the collection of testimonies that made up the televised *feuilletons* in the United States and France (128).[7]

In the case of the genocide trial in Guatemala, this tradition haunted the courtroom, and the specters of genocide and the TJ technology were informing the staging of this trial. All these elements contribute to the characteristics of the theatricality of TJ trials as a specific form of theatricality linked to the history of oral and public legal rituals. This benefits the theatricalization of social conflicts, as was the case in the important Truth Commission in South Africa, where

radio was essential and where different theatrical reenactments took place (Cole). The Truth Commissions in Guatemala have also revealed a new way of approaching the truth, from what Brigittine M. French calls *technologies of telling*. These technologies have undoubtedly foregrounded certain types of narrative construction and their forms of theatricalization that go hand in hand with the history of globalization processes of TJ, in which truth commissions are essential (Hayner 59). TJ must respond to the crimes of recent history and, in this sense, trials produce, as in the Ixil Trial, *memory battles* (Laplante 623), that expose and perform the uses of memory and history by law. This has been raised in the case of important trials in France (Rousso).

In Latin America, the crimes committed during the Cold War led to the production of an extended field of judicial processes, a *justice cascade* in the terms of Ellen Lutz and Kathryn Sikkink. The *Trial of the Juntas* that took place in Argentina in 1985 was an exemplary space to judge the atrocious crimes committed by the Argentine military dictatorship during 1976 and 1983. The presence of cameras and audio recordings in this trial gave it key exposure in Argentine society (Feld), as well as in other Latin American contexts where National Security Dictatorships were still in operation. None of these contextual aspects are alien to the theatricality of the trial, but are rather conditions of possibility that shape behaviors within the space and the TJ spectacle mechanisms. This determines the theatrical form of the trials according to Diana Taylor's definition. According to her definition, there are several essential elements: a scenario involving live participants, a structured plot and a flexible intended outcome. Taylor's definition is useful because it does not imply an assessment of the truth or falsehood of the theater, which makes it possible to understand that even farcical trials operate according to the mechanisms of judicial theater. The difference lies in the types of institutions that decide whether or not the rights of the indicted are guaranteed, and in more widespread mechanisms of state repression.

Theatrical mechanisms in the Ixil Trial

In one of the press articles published during the hearings of the Ixil Trial, Lucía Escobar affirmed: "I am so entertained with the Trial [...] that I started to watch the Nuremberg Trials on the Internet. Incredible parallels! Same excuses of the victimizers: 'we didn't know anything,' 'it is a political trial,' 'the court is impartial,' 'the sentence is written'". The author of the text does not seem to deride the trial, but rather, connects this trial to a broader history of TJ processes. On the other hand, the notion of entertainment in Escobar's text could be understood in the Latin sense, namely, *intertenere*, to have between or to establish a bond that produces a chiasm difficult to let go of. The entertainment leads her to look beyond this trial and relate it with other cases. Certainly, there are forms of entertainment that do not provoke this kind of interest and research, but are linked to a broad sphere of ephemeral consumption and banality. But this use should not eradicate the complexity of the Latin sense of the word. The theatrical characteristics also enable the audience, both present and through the media, to engage in identification (anagnorisis) and catharsis with the subject matter being discussed in the legal scene, particularly in TJ processes. It is through this connection that individuals can resonate with intimate and collective experiences.

The importance of attracting the attention of spectators inside and outside the courtroom through the media is crucial in these TJ trials, contributing important characteristics to the staging and development of the trial. Certainly, written texts and audiovisual records of testimonies exist, the oral and public exposure of these accounts in domestic court brings them into a different realm of truth: that of law and justice. The significance of publicly listening to these accounts from Guatemala's Palace of Justice, where they were sworn in, and their subsequent repetition in the media, transforms these forums into spaces that transcend mere judicial functions. Through the staging of TJ trials, the documentation of the crimes committed is brought to light. This exposure allows for a demonstration of the various social, military, and political sectors' involvement in the human rights violations that occurred in recent Guatemalan history. This led the court to be able to reason an official version of what happened there. In this sense, orality and publicity were crucial for these trials and for their role in the post-conflict society.

It is also important to structure this within the explanations of experts who, while framed by the spatial and temporal platform of the crimes in question, linked what happened to a *longue durée* period. This legitimates the legal typification of genocide to function as a category for thinking about a broader history from the perspective of legal procedures, which changes the content of historical research. The same happens when we listen to the testimonies of the survivors when they say, "it seemed that we were not human", "they treated us like animals". To be recognized or not as a human being make us go back to a wider history of colonialism. The situations described there make it also possible to link this case with testimonies in other cases of genocide in a transnational history or a *multidirectional memory* (Rothberg 3). This also contributes to the construction of a border history of TJ theaters.

Having been performed in a domestic court, the Ixil Trial also made it possible to produce a reenactment of the national and historical conflicts presided over by the same national institutions that enforced genocidal policies. This also facilitated the congregation in the same space of different sectors involved in the historical conflict, who came to occupy the chairs in the bleachers. For instance, other genocide trials staged in International Courts – such as The International Criminal Tribunal for Rwanda (Arusha, Tanzania) or The International Criminal Tribunal for the former Yugoslavia (The Hague) – could not have this type of spatial congregation of the society. This also points out that within the form of judicial theater, it is essential to consider the locations as a differential aspect that enables to distinguish the forms of the judicial and theatrical technology.

In Guatemala, not only those directly involved in the legal proceedings participated, but also other important sectors present in the public seating arena: e.g., representatives of other Mayan communities that lived through the genocide, political activists, members of NGOs and international organizations, academics, writers, filmmakers, photographers, in other words, any member of civil society. The other Mayan communities' representatives in the room that spoke neither Ixil nor Spanish (more than thirty Mayan languages are currently spoken in Guatemala) were also able to listen to the debate because organizations such as HIJOS or the Center for Independent Media facilitate simultaneous translation into other Mayan languages. This trial represented for many a space for political exercise and, for this

reason, the media's reproduction of the public's protagonism in this trial was so important.

This led to the implementation of a series of measures that were strategic for the evaluation of the active role of the public in the courtroom. From the press images, it was possible to appreciate the composition of the courtroom: it was crowded with different people, and the tribunal had this multilingual and multicultural portrait in front of them. The media also occupied a large part of the different areas of the Courtroom, to the point of locating in the legal scene as well. When Ríos Montt decided to testify after the closing arguments, the press was in the space between the tribunal and the dock. This is reasonable when considering the number of obstructions that the defense presented to stop this process, including death threats to Judge Yassmin Barrios, president of the tribunal. This is crucial when we consider the spatial and historical complexity of the performative character of language within the judicial ritual.

Besides, the press played a dual role in this trial. On the one hand, it allowed for the dissemination of the significant discussions taking place during the interrogations and cross-examinations to many platforms. The media also provided a platform to showcase the individuals who opposed the pursuit of justice, effectively serving as a witness to the multiple instances where the defense attempted to obstruct the trial by alleging procedural irregularities. However, the extensive coverage of this trial in various media outlets, along with the fear of a *domino effect* on other individuals associated with the war (military sectors, economic and political elites), also prompted the economic and military elite to take a stance against the conviction. These issues go beyond the trial itself and are deeply rooted in systemic challenges, including a history of impunity and a weak rule of law framework in Guatemalan tradition.

This is why the Ixil Trial had a strong impact on the mobilization of different sectors in the public space. For example, the demonstrations in the external space of the Palace of Justice divided between supporters of both sides, mobilized with slogans saying '*Yes* There Was Genocide' and '*No* There Was no Genocide'. All these actions tell us how these types of trials inscribed in an official court of law, represented by the State, manage to mobilize and expose different sectors of society. It is also the power over history, over the repre-

sentations of the past, over the exercise of authority that is at stake in this type of social rituals.

The media were also important in showing that this was not a farcical trial, as the defense lawyers and their supporters claimed, but a trial in which the parties enjoyed their legal guarantees. The newspaper articles revealed how certain figures positioned themselves thanks to the perception they bequeathed of the trial. From the first day of the hearings, CALDH attorney Héctor Reyes acknowledged that the type of defense litigation was a *show* (Ortiz). Other supporters of the defense indicated in their 2013 press articles that this trial was a *decadent circus* (Méndez Vides), a *political circus* (Ligorría Carballido) and a *judicial circus* (de La Torre). Within these utterances, the detractors of the trial sought to haunt the judicial space with the ghosts of the farcical trial. This brought an important historical and temporal complexity to the heart of a singular case.

What the videos evidence, is that those who used irreverent and destabilizing gestures and behavior were the defense lawyers themselves, as when the court removed Ríos Montt's lawyer on the first day of the hearings. In the documentary directed by Izabel Acevedo (*El buen Cristiano*), Ríos Montt's lawyer, García Gudiel, explains that this was a strategy of obstruction and that he knew this strategy would provoke the judge into a specific reaction.

From this perspective, the type of national and international recognition of this kind of domestic trials provides an opportunity for different sectors to mobilize and publicly show how the law apparatus works. This is palpable if we consider the annulment of the conviction on May 20, 2013, when three magistrates of the Constitutional Court follow the elites' mandate. Two magistrates reasoned against the vote of the three magistrates, however, the three magistrates in allegiance with the elites managed to impose their will. The authorship of the outcome of this process showed the alliance between the sector of the court and the economic elite. Everything happened thanks to the staging of the show of force between social sectors, which contributes to the complexity and the specificity of the theatricality of TJ scenarios. However, it is important to note that the annulment followed the conviction of Ríos Montt for both crimes, which many people in Guatemalan society and worldwide still consider valid. The subsequent annulment of the

verdict is viewed as an illegal action. It is crucial to recognize that the annulment does not diminish the seriousness of the Ixil Trial or the tribunal's effective handling of the proceedings.

Conclusion

Based on the insights presented, we have the elements to understand the specificity of judicial theatricality not as an analogy or metaphor, but as a distinct theatrical form with its own history and recurring practices. It is important to emphasize the authorship of trials, highlighting the institutional sources that give rise to them. Furthermore, there exists a theatrical tradition surrounding farcical trials and their interpretation of judicial rituals, which necessitates analysis based on their own practices, contexts and histories. I only mentioned it here to establish the limit and the distinction of the Ixil Trial. The last reference to farcical trials illustrates a key distinction in the political and social framework established by the authorship behind them, where practices of repression and pedagogies of terror come into play. It also emphasizes the importance of taking the idea of the actor, the rehearsal shaping the judicial process seriously, mapping the process as a production.

It is crucial to acknowledge that transitional justice trials entail substantial external participation, including media coverage and public engagement. This dynamic disrupts and complicates the spatial, medial and temporal definition and unity of the justice scene, as well as the actions and actors involved in the judicial proceedings. Regarding the ethical and political aspects, TJ trials play a crucial role in evidencing the fundamental principles and values of a just society. Through these trials and the documentation of their proceedings, scholars and societies can engage in deep reflection on the values that form the foundation of their legal systems. The audiovisual documentation of these trials further contributes to any future understanding and dissemination of their significance, ideally fostering broader awareness and promoting accountability for past atrocities. In other words, in every judicial process there is an exposition of the moral and political values of a society. Enforced rules (e.g., applied *by* a performative force that relates the general of the rule and the particular of the case) will not necessarily guarantee a priori the separation between farcical trials and processes

according to a notion of law associated with justice. The difference lies in the relations that this process establishes with other contexts that come to be performed within the spaces of the law. However, it is important to remember that the performativity of speech in these trials is articulated with other dimensions of the history and social life of local contexts and of the accusatorial tradition.

In conclusion, and key to my reflection, thinking of trials as part of the theatrical tradition, and of the actors in the judicial ritual as performers, makes it easier to abandon the paradigms that reproduce the anti-theatrical prejudice. As stated before in light of the Derridean interpretation of Austin's quote, all participants in a judicial trial occupy positions where they are representing their communities or political sectors. This happens because of the iterability of the form taken by the international and national practice of the law, as well as because of the trajectory of local histories. It enables the space of the court to open up to a complexity of determinations that is far from being explained by the intentions of either of the parties nor by the *form* of their codes.

In this regard, to understand how the canon of judicial processes works as a theatrical form, it is necessary to stop mechanizing the spaces of law and, rather, to analyze them according to the ways they *are* produced: e.g., taking stock of who the characters are, how they behave, what sector they represent, how the cross-examination structures their memories and explanations in ways that exceeds the courtroom. It is necessary to move away from conceptions that support a hypothesis and idealize legal procedures, memory and/or the general functioning of what we call justice. Justice is never guaranteed by the processes of law, but an analysis of the performances and the theatrical histories it impacts can help us differentiate between law and justice, and through a deconstruction of the law, we can begin to produce more just social processes.

Works cited

Austin, John L. *How to Do Things with Words (William James Lectures, Revised edition).* Harvard University Press, 1975.

Barish, Jonas. *The Antitheatrical Prejudice*. University of California Press, 1981.

Burns, Robert P. *A Theory of the Trial*. Princeton University Press, 1997.

Burt, Jo-Marie. "From Heaven to Hell in Ten Days: The Genocide Trial in Guatemala." *Journal of Genocide Research*, vol. 18, no. 2-3, 2016, pp. 143-169.

Carlson, Marvin. *The Haunted Stage: The Theater as Memory Machine*. University of Michigan, 2003.

Carneletti, Francesco. *Cómo Se Hace un Proceso*. Colofón, 2013.

Cole, Catherine M. *Performing South Africa's Truth Commission: Stages of Transition*. Indiana University Press, 2009.

Constable, Marianne. *Our World Is Our Bond: How Legal Speech Acts.* Stanford University Press, 2014.

de La Torre, Armando. "'Voluntad de Poder.'" *ElPeriódico,* 11 Apr. 2013, p. 20.

de Mata Vela, José Francisco. *"La Reforma Procesal Penal de Guatemala". Del Sistema Inquisitivo (Juicio Escrito) al Sistema Acusatorio (Juicio Oral).* 2007. Universidad Autónoma de Barcelona, PhD dissertation.

Delage, Christian, and Peter Goodrich. Introduction. *The Scene of the Mass Crime: History, Film, and International Tribunals* [Online Book], by Christian Delage and Peter Goodrich, Routledge, 2013, pp. 1-6.

Deperchin, Annie. « La Reconstruction de la Justice au Kosovo. » *Barbie, Touvier, Papon... Des Procès Pour La Mémoire*, edited by Jean-Paul Jean and Denis Salas, Éditions Autrement, 2002, pp. 144-153.

Derrida, Jacques. *De la Grammatologie*, 1967.

—. *Force de Loi*. Galilée, 1994.

—. *Limited Inc a b c*. Northwestern University Press, 1988.

Drouin, Marc. "Understanding the 1982 Guatemalan Genocide. The Cold War Years." *State Violence and Genocide in Latin America*, edited by Marcia Esparza et al., Routledge, 2010, pp. 81-103.

Ertür, Basak. *Spectacles and Spectres: Political Trials, Performativity and Scenes of Sovereignty.* 2015. Birkbeck, University of London, PhD dissertation.

Escobar, Lucía. "Testigos." *ElPeriódico*, 10 Apr. 2013, p. 31.

Evrard, Elke, et al. "The Meaning of Participation in Transitional Justice: A Conceptual Proposal for Empirical Analysis." *International Journal of Transitional Justice*, vol. 15, no. 2, 2021, pp. 428-447.

Fassin, Didier, and Richard Rechtman. *L'Empire du Traumatisme. Enquête sur la Condition de Victime.* Flammarion, 2011.

Feld, Claudia. *Del Estrado a La Pantalla: Las Imágenes Del Juicio a Los Ex Comandantes En Argentina*. Siglo XXI editores, 2002.

Felman, Shoshana, and Dori Laub. *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History.* Routledge, 1992.

Felman, Shoshana. *The Juridical Unconscious; Trials and Traumas in the Twentieth Century.* Harvard University Press, 2002.

FIDH. *Genocidio en Guatemala: Ríos Montt Culpable*. 2013.

French, Brigittine M. "Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony." *Journal of Human Rights*, vol. 8, no. 1, 2009, pp. 92–109.

Fuchs, Marie-Christine, et al. *La Justicia Penal Adversarial en América Latina: Hacia la Gestión del Conflicto y La Fortaleza de La Ley*. Centro de Estudios de Justicia de las Américas, CEJA, 2018.

García, María Luz. "Translated Justice? The Ixil Maya and the 2013 Trial of José Efraín Ríos Montt for Genocide in Guatemala." *American Anthropologist, vol.* 121, no. 2, 2019, pp. 311-324.

Hardi, Choman. *Gendered Experience of Genocide: Anfal Survivors in Kurdistan-Iraq.* Routledge, 2016.

Hayner, Priscilla. *Verdades Innombrables. El Reto de las Comisiones de Verdad.* FCE, 2008.

Laplante, Lisa J. "Memory Battles: Guatemala's Public Debates and the Genocide Trial of José Ríos Montt." *Boston Legal Studies Research Paper Series*, vol. 32, no. 3, 2014, pp. 621-673.

Lefebvre, Henri. *La Production de l'Espace*. Anthropos, 2000.

Leiboff, Marett. "Towards a Theatrical Jurisprudence." *Towards a Theatrical Jurisprudence*, Routledge, 2020.

Ligorría Carballido, Julio. "Ha Muerto La Paz." *Prensa Libre*, 20 Mar. 2013, p. 17.

Lutz, Ellen, and Kathryn Sikkink. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law*, vol. 2, no. 1, 2001, pp. 1-33.

Méndez Vides, Adolfo. "La Pasión de Ríos Montt." *ElPeriódico*, 21 Mar. 2013, p. 14.

Mulcahy, Linda. *Legal Architecture: Justice, Due Process and the Place of Law*. Routledge, 2011.

Norridge, Zoe. "Professional Witnessing in Rwanda. Human Rights and Creative Responses to Genocide." *The Future of Testimony. Interdisciplinary Perspectives on Witnessing*, edited by Jane Kilby and Antony Rowland. Routledge, 2014, pp. 129-43.

Oglesby, Elizabeth A. and, Nelson M. Diane, editors. *Guatemala, the Question of Genocide.* Routledge, 2018.

Ortiz, Gerson. "Incertidumbre en Juicio por Genocidio por Resolución de la CC." *ElPeriódico*, 18 Apr. 2013, p. 4.

Roberts, Ryan. "Theatre and the Law: A Dramaturgical Analysis of Comcare v PVYW." *Law Text Culture*, vol. 25, 2021, pp. 113–43.

Robin, Marie-Monique. *Escuadrones de la Muerte: La Escuela Francesa*. Sudamericana, 2005.

Rogers, Nicole. "The Play of Law: Comparing Performances in Law and Theatre." *QUT Law & Justice Journal*, vol. 8, no. 2, 2008, pp. 429–433.

Rothberg, Michael. "Introduction: Remembering the Holocaust in the Age of Decolonization." *Introduction: Theorizing Multidirectional Memory in a Transnational Age*. Stanford University Press, 2009, pp. 1–29.

Rousso, Henry. "L'Expertise des Historiens dans les Procès pour Crimes contre l'Humanité." *Barbie, Touvier, Papon... Des Procès Pour La Mémoire*, edited by Jean-Paul Jean and Denis Salas, Éditions Autrement, 2002, pp. 58–70.

Schechner, Richard. *Performance*: *Teoría y Prácticas Interculturales*. Libros del Rojas, 2000.

Searle, John R. "Reiterating the Differences: A Reply to Derrida." *Glyph*, vol. 2, no. 2, 1977, pp. 198–208.

Skaar, Elin, and Eric Wiebelhaus-Brahm. "The Drivers of Transitional Justice: An Analytical Framework for Assessing the Role of Actors." *Nordic Journal of Human Rights*, vol. 31, no. 2, 2013, pp. 127–148.

Taylor, Diana. *The Archive and the Repertoire*. 3rd ed., Duke University Press, 2003.

Teitel, Ruti. "Genealogía de La Justicia Transicional." *Justicia Transicional: Manual Para América Latina*, edited by Félix Reátegui, Comisión de Amnistía, Ministerio de Justicia y Centro Internacional para la Justicia Transicional, 2011, pp. 135–71.

—. "Transitional Justice Globalized." *The International Journal of Transitional Justice*, vol. 2, no. 1, 2008, pp. 1–4.

Vismann, Cornelia. "Tele-Tribunals: Anatomy of a Medium." *Grey Room*, vol. 10, 2003, pp. 5-21.

—. *Files. Law and Media Technology*. Stanford University Press, 2008.

—. *Medien der Rechtsprechung*. S. Fischer, 2011.

Wieviorka, Annette. *L'*Ère du Témoin. Fayard/Pluriel, 2013.

Notes

1 Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations.

2 Among the numerous sources about this trial, see the publication edited by Elizabeth A. Oglesby and Diane M. Nelson, *Guatemala, the Question of Genocide*.

3 The basis of these observations can be found in previous analyses of my doctoral research completed at the Institute for Latin American Studies of the Free University of Berlin (2021). In this work, I focused on three audiovisual records (the records of the Guatemalan Court of Justice, the extensive documentation of the film *El buen cristiano* and the series *El dictator en el banquillo*), press articles and interviews. I thank Fabiola Carranza for the English final proofreading of this text.

4 In 1976, Jacques Derrida received a manuscript from the American philosopher John Searle named *Reiterating the Differences: A Reply to Derrida*. Searle claimed Derrida's misunderstanding of his reading of Austin's text in *Signature événement contexte* [sic]. Derrida responds to this text some years later in the book *Limited Inc a b c*.

5 *Second Lecture*: "(ii) Secondly, as *utterances* our performances are *also* heir to certain other kinds of ill, which infect *all* utterances. And these likewise, though again they might be brought into a more general account, we are deliberately at present excluding. I mean, for example, the following: a performative utterance will, for example, be *in a peculiar way* hollow or void if said by an actor on the stage, or if introduced in a poem, or spoken in soliloquy. This applies in a similar manner to any and every utterance – a sea-change in special circumstances. Language in such circumstances is in special ways-intelligibly-used not *seriously* [my emphasis, J.D.] but in many ways *parasitic* upon its normal use-ways which fall under the doctrine of the *etiolations* of language." (Austin in *Limited Inc* 16).

6 Personal documentation: Interview with Elena Raymundo Coto from ECAP (*Equipo de Estudios Comunitarios y Acción Psicosocial, [Team of Community Studies and Psychosocial Action]*).

7 Other authors have spoken of the *era of testimony* (Felman & Laub), about the location of trauma and victimhood within a new institutionalized form of foregrounding the need for psychology professionals (Fassin & Rechtman).

Backstage Performances of Parliamentary Scrutiny, or Coming Together in Parliamentary Committee Rooms

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When new legislation comes before parliament, it is often referred to a scrutiny committee that undertakes detailed examination of the proposed law. The meetings of parliamentary scrutiny committees are often held behind closed doors and provide an opportunity for parliamentarians and their advisors to exchange views on the impacts of proposed laws, including their impacts on human rights. Responding to Lisa Samuels' provocation "to take encounter as a work" and to research on law as performance, this paper examines these moments of encounter as legal performances. We argue that these meetings, comings-together and encounters do the work of (per)forming human rights assessments of legislation. We also question how the spaces of committee meetings, the absence of an outside audience, and the differing levels of knowledge on the part of parliamentary actors affect the performance of human rights scrutiny.

Keywords: law and performance, legal performance, human rights, parliament, space, audience

When new legislation comes before a Commonwealth parliament, it is often referred to a scrutiny committee. The scrutiny committee undertakes detailed examination of the proposed law and makes recommendations in the form of a report to parliament about the proposed law. Some parliamentary committee meetings are publicly broadcast, such as the United Kingdom's House of Commons' Culture, Media, and Sport Select Committee (2012) inquiry into News International and phone hacking, and the hearings of the United States House of Representatives' Select Committee to Investigate the January 6th Attack on the United States Capitol (2022). Many parliamentary committees do their work behind closed doors, where parliamentarians and their advisors have opportunities to frankly exchange views. This is particularly so when it comes to scrutiny of proposed laws' impacts on human rights in Australian parliaments with a charter of human rights. In these meetings, parliamentarians will scrutinize proposed legislation to determine its impacts on human rights and will make recommendations for the parliament to consider when voting on the legislation, including recommendations for amendments and, occasionally, for legislation to not be passed. Legislation that limits human rights may still be justified if the limitations are deemed reasonable (*Human Rights Act 2004* (ACT) s 28(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13(1)). Whilst other work has examined the performance of human rights generally (see Rae; Madison; Slyomovics), in this paper we look at how this process of parliamentary human rights scrutiny is performed through legislative committee meetings. We argue that the performance of human rights scrutiny shapes parliaments' conception of human rights and the humans which are endowed with rights.

We approach these meetings or moments of encounter by parliamentary scrutiny committees as legal performances, informed by research on law as performance. In doing so, we draw from Richard Schechner's writings on rehearsal, Erving Goffman's conception of backstage performances, and Lisa Samuels' provocation "to take encounter *as a work*" (72). We argue that human rights scrutiny is made in and through these backstage meetings of parliamentary committees as moments of encounter – and these moments of encounter perform human rights scrutiny. Therefore, we argue that we need to take these backstage encounters seriously if we are to understand the ways in which human rights scrutiny is performed in

parliament and how conclusions are reached in contested claims for human rights. This poses a potential challenge, however, given that the work of scrutiny committees often takes place in private, with publics gaining only limited access to these encounters – a challenge that we attempt to overcome by speaking directly with performers in these human rights scrutiny processes, providing vital insights into how they conceptualize these backstage performances. However, the very challenge itself exposes how parliamentary performances of human rights scrutiny often exclude public audiences in ways that might be unconducive to reaching considered conclusions on the human rights impacts of legislation on the public and, at worse, that these processes might be considered as undemocratic insofar as they lack transparency. Through analyzing parliamentary scrutiny as performance, we aim to examine how public audiences access and understand these performances of parliamentary human rights scrutiny, and what obligations the actors in these performances might hold towards their public audiences.

Theoretical background

The term 'legal performance' refers to the way in which law is applied and interpreted in and through performance (Hibbitts). It is also used to signal the "merging and interplay of two disciplines (law and performance [studies])" (Lubin 4). Legal performance has two components: it executes something and thus can be said to be performative (in an Austinian and Butlerian sense), and it presents social conflict on the stage of the court – or, in this case, parliament – and thus can be said to be a performance (Peters "Legal Performance" 185). Legal performance and the related interdisciplinary field of law as performance "are still emerging fields" (Mulcahy and Leiboff 3), though growing with recent publications (Read; Leiboff; Peters "Law as Performance" Mulcahy "Performing Law"). Here we draw from this research to examine the ways in which the *encounters* of parliamentary scrutiny committees do the work of performing human rights assessments of legislation.

The idea of parliamentary human rights scrutiny as a performance might be challenging to scholars of parliaments and human rights, in part due to the pejorative connotations of performance as spectacle. Instead, we suggest that looking at parliamentary human rights

scrutiny through "a performance lens" (Mulcahy, "Methodologies of Law" 167) allows us to see the ways in which performance is inherent to its effects. In doing so, we are particularly influenced by Richard Schechner's writing on rehearsals and Erving Goffman's conception of backstage performances. These encounters of parliamentary scrutiny committees occur in the backstage of parliamentary buildings, behind closed doors, akin to a rehearsal room in which the work of scrutiny is done before the scrutiny report is presented in the public stage of the parliamentary chamber.

Performance theorist Richard Schechner writes that "theatre is but one of a complex of performance activities which also includes rituals, sport and trials (duels, ritual combats, courtroom trials)" ("Performance Theory" 179). He advances the notion of a "'broad spectrum' of performance" and questions "how is performance used in politics" ("The Future of Ritual" 21). He further notes that "political ceremonies" can be said to "share qualities of both social and aesthetic drama" ("Performance Theory" 192) – they are performative in that they enact changes of status, but also performances that readily adopt costumes, grand stages and received manners of speech to enact their changes. The actor in these ceremonies, the parliamentarian, can often take "techniques from the theatre: how to release news, how to manipulate the public's reactions, how to disarm his [*sic*] enemies; even how to make up his [*sic*] face, wear his [*sic*] costume, deliver his [*sic*] sentences" ("Performance Theory" 218). Schechner's work considers the different phases of performance activities, such as workshop, warm-up, cool-down, and aftermath. In his writings on rehearsal, Schechner argues for turning critical attention "from a comparison of works in their finished phase to works in the process of being made" ("Performance Theory" 204). He argues that "one must fold each work back in on itself, comparing its completed state to the process of inventing it, to its own internal procedures during that time when it was not yet ready for showing"' ("Performance Theory" 204). Here, we take up Schechner's call to examine not the completed product of parliamentary scrutiny – the scrutiny report – but instead the encounters in which it is made.

In relation to multi-authored works, Schechner argues that "the process of solidification, completion, and historical ratification is a process of rehearsal: how a work is reworked until it crosses a threshold of 'acceptability' after which it can be 'shown'" ("Performance

Theory" 205). We argue that much the same could be said for the scrutiny process, in the sense that the scrutiny report is drafted and redrafted by the committee until it reaches a level of acceptability to a majority of committee members (allowing for the occasional dissenting report) at which it can be presented to parliament. As Schechner writes, "works change over time as they are adjusted to immediate circumstances" ("Performance Theory" 205). Similarly, the scrutiny report changes as the actors responsible for drafting it adjust their stance towards the legislation before them. This is also a time-bound process, given the urgency of presenting the report to the parliament before the legislation is finally debated and voted upon.

Schechner argues that the preparation for a performance – the set-up or warm-up – is "comparable to rehearsal, but not exactly identical to it" ("Performance Theory" 207). Nevertheless, "both rehearsal and preparation employ the same means: repetition, simplification, exaggeration, rhythmic action, the transformation of 'natural sequences' of behaviour into 'composed sequences'", akin to a ritual process ("Performance Theory" 207), in what he also terms a "frantic patchwork" ("Between Theory and Anthropology" 250). Here again we see synergies with the scrutiny process, whereby certain claims are repeated and some are simplified or exaggerated according to the will of the committee. As we have argued in other work, repetition and simplification are key aspects of parliamentary human rights scrutiny, which allow complex ideas to be transmitted, socialized, and normalized (Seear and Mulcahy 6). As we discuss further below, the rhythmic action of sitting also shapes scrutiny performances. Furthermore, natural discussions are composed into certain sequences or formats of the committee report, including headings and sub-headings. (We discuss the formatting of reports in Mulcahy and Seear "Tick and Flick".)

Schechner's performance theory was influenced by the work of sociologist Erving Goffman. Goffman writes that performance is "all the activity of an individual which occurs during a period marked by his [*sic*] continuous presence before a particular set of observers and which has some influence on the observers" ("The Presentation of Self" 19). As Schechner explains, however, Goffman "did not propose that "all the world's a stage", a notion which implies a kind of falseness or put-on. What Goffman meant was that people were always involved in role-playing, in constructing and staging their

multiple identities" ("Performance Theory" x). Both were influential for examining everyday practices outside the theater through what we term "a performance lens" (Mulcahy, "Methodologies of Law" 167). Goffman describes two key spaces of performance. The first is the frontstage, "the place where the performance is given" ("The Presentation of Self" 93). As he explains:

> When one's activity occurs in the presence of other persons, some aspects of the activity are expressively accentuated and other aspects, which might discredit the fostered opinion, are suppressed. It is clear that accentuated facts make their appearance in what I have called a front region; it should be just as clear that there may be another region – a 'back region' or 'backstage' – where the suppressed facts make an appearance. ("The Presentation of Self" 97)[1]

This second space, the backstage, is "a place, relative to a given performance, where the impression fostered by the performance is knowingly contradicted as a matter of course" ("The Presentation of Self" 97) or "where action occurs that is related to the performance but inconsistent with the appearance fostered by the performance" ("The Presentation of Self" 117).

We see strong connections in the dimensions of the backstage that Goffman describes and aspects of the scrutiny process that occurs in parliamentary committee rooms. First, Goffman describes the backstage as the space in which the performance is "constructed" ("The Presentation of Self" 97). Similarly, we see the parliamentary committee room as the space in which the scrutiny of legislation and the accompanying report on it is constructed. Second, Goffman describes the backstage as the space where stage props are "hidden so that the audience will not be able to see the treatment accorded them in comparison with the treatment that could have been accorded them" ("The Presentation of Self" 97). Similarly, we see these scrutiny processes as hidden, such that the public cannot see the debates about human rights limitations and their justifications. Third, Goffman describes the backstage as a space in which "the team can run through its performance, checking for offending expressions when no audience is present to be affronted by them; here poor members of the team, who are expressively inept, can be schooled or dropped from the performance" ("The Presentation of

Self" 97-98). Somewhat similarly, we see the parliamentary committee room as a space in which parliamentarians are educated by an external human rights advisor and, based on that advice, some of their objections may be dropped from the report. Fourth, and relatedly, Goffman describes the backstage as a space in which "the performer can relax; he [*sic*] can drop his front, forgo speaking his [*sic*] lines, and step out of character" ("The Presentation of Self" 98). Similarly, we see the scrutiny process as a space in which parliamentarians can step out of their usual character, persona and rhetoric and adopt different ways of relating to one another. It is this backstage space that interests us, given our focus is on parliamentary committee rooms where the scrutiny process occurs, possibly in ways that are inconsistent with the appearance of unanimity fostered by the scrutiny report that is presented to parliament.

Finally, we turn to artist Lisa Samuels' conception of encounter. In her analysis of artworks, Samuels suggests the need "to take encounter *as a work* and to redistributed [*sic*] its elements as an art" (72). She argues that we should not just see encounter as a mechanism "to get somewhere else", but that we should stay with encounter as a mode of engagement (62), and she invites "lingering in the relational encounter" (63). Samuels further notes that encounter is a complex and recurring experience. The recurrent dimension of encounter "invokes the spelling 're-currents' as in the circulation of fluid, its always-reoccurring movement" (62). Working with Samuels, we examine parliamentary committee encounters as recurring performances that shape legislative scrutiny, but note they are fluid, fluctuating, and often fleeting. We argue that these performances matter to the way in which scrutiny of legislation is conducted in Australian parliaments, as well as how human rights are conceptualized, more broadly.

Method

In Australia, it is not possible to directly observe closed parliamentary committee meetings. To gain insights into how these processes work, therefore, we draw from thirty interviews we conducted with parliamentary actors – including parliamentarians, their advisors, and other parliamentary staff – about human rights scrutiny processes. These interviews were conducted as part of a research project,

approved by our university ethics committee, which examines how alcohol and other drug laws are subject to parliamentary human rights scrutiny in those Australian jurisdictions that mandate it. The interviews were guided by an interview schedule in which we asked participants to describe how the parliamentary human rights scrutiny processes work. Interview data were then transcribed verbatim by a professional transcriber, checked and de-identified. Both authors read the transcripts, developed a coding framework, and double coded the interviews. In this piece, we use pseudonyms to protect interviewees' anonymity and have removed key biographical details (such as the political party to which interviewees belong, or any portfolios that they might hold) to further reduce the risk of identification, given that they are public figures.

Drawing from these interviews, we explore three dimensions of the legal performance of parliamentary scrutiny: the *space* of committee meetings; the absence of an outside *audience*; and differing levels of knowledge on the part of parliamentary *actors*. If we take Peter Brook's famed adage that "a man [*sic*] walks across [an] empty space whilst someone else is watching him [*sic*], and that is all that is needed for an act of theatre to be engaged" (9), then we can deduce that the necessary components of performance are a space, an actor, and an audience. These, we argue, are equally applicable to legal performances as they are to theatrical performances.

Space

The work of parliamentary scrutiny often occurs in committee rooms. These are smaller, more intimate spaces than parliamentary chambers. In our analysis of the space of the committee room, we consider how it impacts the other two dimensions of the performance of human rights scrutiny: the actors and the audience. We argue that the configuration of the space can both constrain the actors and the presence of and engagement by public audiences.

If we look at a three-dimensional view of a committee room in the Victorian parliament, we can see tables placed in a horseshoe arrangement with a chair behind each, so that parliamentarians can face one another. A public gallery with chairs arranged in rows is not used during scrutiny committee meetings. The images of bewigged

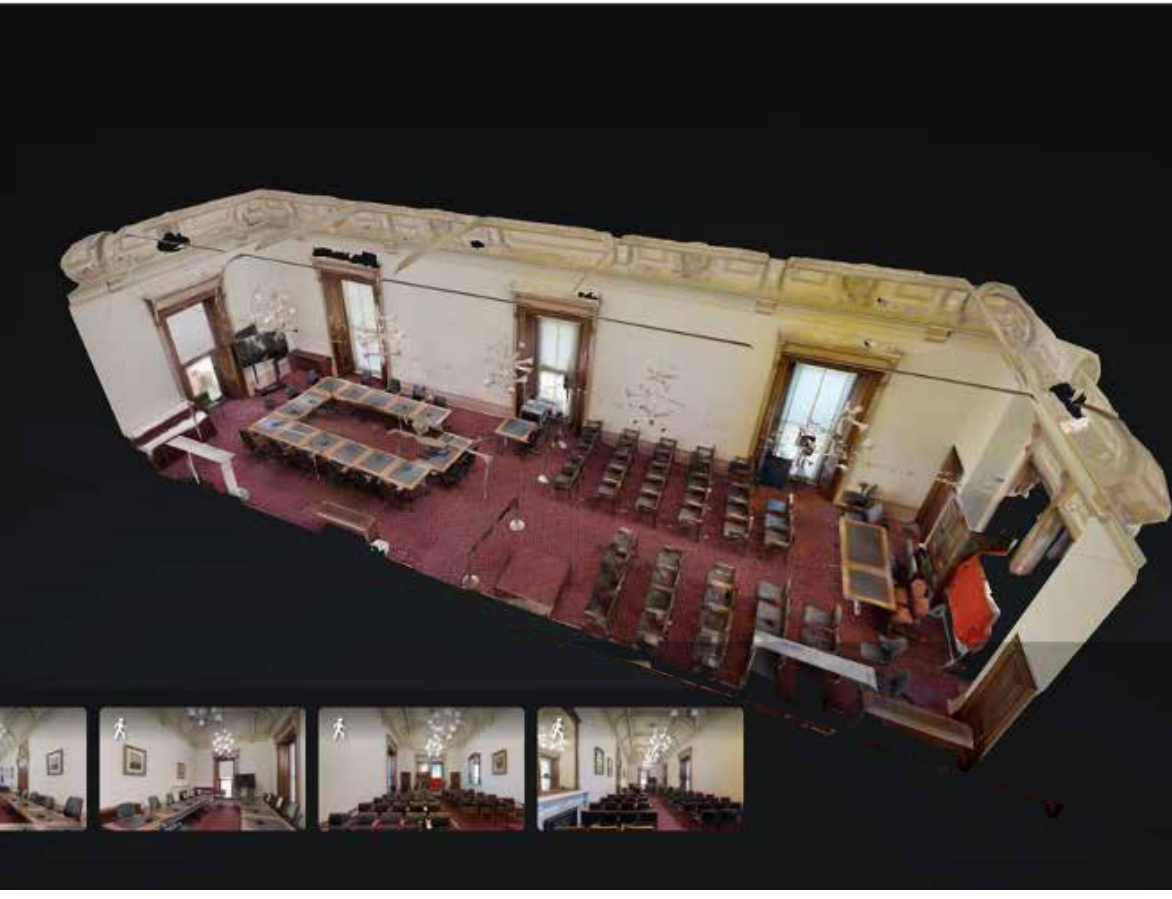

Figure 1. Still of Victorian parliamentary committee room

and bearded men and the architectural details, including dark wood paneling, vaulted ceilings, and fireplaces, speak to the history of the place and the ways of doing things inside it. These portraits of men remind us that this was – and is – a male-dominated space.

Though Goffman argues that "the front tends to be relatively well decorated, well prepared, and tidy; the rear tends to be relatively unprepossessing" ("The Presentation of Self" 107), here the backstage committee room is beautifully decorated, perhaps with an eye to the public that may sometimes enter, though not during scrutiny meetings. Goffman argues that "the backstage character of certain places

is built into them in a material way, and that relative to the adjacent areas these places are inescapably back regions" ("The Presentation of Self" 107). Here, this might be seen in the positioning of the table. It is arranged in a way that allows those at it to directly face one another, but it is hard to see each of the faces from the public gallery at the other end of the room. What this suggests is that the primary audience for the committee's performance is each other, and that the outside public is but a secondary audience to their performance.

One parliamentarian, Alexander, stated that the work of the scrutiny committee involved "the committee members sitting there, having the legal professionals talk us through the report they've written up, maybe ask a question or two." Similarly, Isabella averred that "the human rights law people would be at the table with these pieces of work." Here, the term 'at the table' operates in literally and metaphorically, signaling the group that makes decisions. As we noted elsewhere, "this account conjures a particular version of the process; one in which committee members are seated around a table with the legal advisor – talking, questioning, listening" (Mulcahy and Seear, "On Tables" 294).

In her work on legal performance spaces, Dorota Gazy has explained that "spaces have effect on how we act and how we behave" (qtd in Mulcahy "Interview"). The furniture acts as an obstacle to free movement, signaling "how they want us to behave: you come, you go, you sit" (qtd in Mulcahy "Interview"). Gazy has conducted interventions, bringing dancers into the courtroom space and restaging family law disputes in the home (Mulcahy, "Dances with Law" 118-121). These performance interventions demonstrate how space shapes legal performances, including the way it restricts certain movements. Here, the spatial arrangement invites a transactional approach; there is limited space to move around, step back, hide. A parliamentarian familiar with the space will move to their seat; pulled in, their legs are trapped under the table, constraining free movement.

Goffman concludes that "the decorations and permanent fixtures in a place where a particular performance is usually given, as well as the performers and performance usually found there, tend to fix a kind of spell over it; even when the customary performance is not being given in it" ("The Presentation of Self" 108). Here, empty chairs suggest the absence of performers usually found there; the empty

room calls attention to the absent bodies. In our own experiences of appearing before parliamentary committees, we recall being called in to the committee room at a time when it is ready for the audience to enter. The stage must be prepared for outsiders to enter.

The experience of the public as outsider audiences attending parliament is shaped by the architecture of the space. In entering the parliamentary building, outsiders will usually enter through elaborate doorways; different from the side doorways through which insiders enter. The entry is not inviting and, as Renske Vos points out, "often layered with security precautions, which serve to keep unfamiliar people out" (153). Goffman writes that "the outside decorations of the building must in part be seen as the aspects of another show" ("The Presentation of Self" 117). This is a show of authority, that says that these are insider spaces to which the outsider should feel humbled by admittance. Even when inside the space, they sit at the edges, in a public gallery, away from the actors (Mulcahy and Seear, "Playing to the Gallery"). Further, even if meetings are open, packed galleries are unlikely, especially as audiences can watch online. So, despite the purported transparency that open committee hearings may provide, transparency is limited to those who have the capital and capacity to attend such meetings.

Importantly, the scrutiny process occurs predominantly "behind closed doors and is not visible to publics" (Mulcahy and Seear, "On Tables" 294). The doors are closed to intruding publics, and yet there are the rows of empty chairs that infer that the public is always watching this parliamentary work, akin to a gallery of ghosts. Goffman observes:

> Persons may become so sacred that the only fitting appearance they can make is in the centre of a retinue and ceremony; it may be thought improper for them to appear before others in any other context, as such informal appearances may be thought to discredit the magical attributes imputed to them. ("The Presentation of Self" 104)

We do not believe that a parliamentarian is such an 'exalted person' – they are, after all, representatives of and from the people – but it could be that magical attributes imputed to the scrutiny process make it improper for it to be conducted before a public audience.

Figure 2. Still of Dorota Gazy, *Court Dance*

Some argue that technical human rights scrutiny lends itself to 'behind the scenes' operations (Moulds 88; Rice). But why? Maybe debates about human rights are messy and thus unfit to be seen by the public? Or maybe the backstage enables "work control", concealing "the amount and kind of work that had to be done, the number of mistakes that were first made before getting it fixed" (Goffman, "The Presentation of Self" 99), recalling the oft-quoted phrase that laws, like sausages, should not be watched in the making (Goldsmith 515). Another possibility, as indicated by one of our interviewees, Charles, is that private committee meetings have the benefit of allowing committee members to "actually have difficult conversations with one another" in a way that may not be possible in more public arenas. Furthermore, Goffman argues that "it is often expected that those who work backstage will achieve technical standards while those who work in the front region will achieve expressive ones" ("The Presentation of Self" 108). In this case, backstage is technical scrutiny work, frontstage is expressive performance. None of our interviewees reported the kind of heightened emotions that sometimes play out in parliamentary chambers in committee rooms. Instead, as Angus averred, "if you're in a committee, you do get a bit together. There is a groupiness that happens, not a lot. You are trying to have that rapport." As Goffman describes, "in back regions [...] the very fact that an important effect is not striven for tends to set the tone for interaction, leading those who find themselves there to act as if they were on familiar terms with one another in all matters" ("The Presentation of Self" 109). Perhaps without a crowd watching on, parliamentary combatants are likely to peacefully focus on the technical task at hand.

There is also the matter of the public interest in these proceedings. Goffman writes of a mechanic that "customers often feel the right to watch him as he does his work" ("The Presentation of Self" 100). That is, we suggest, because the repairman's work affects a good a person owns, so there is a personal investment in seeing that good taken care of. Similarly, members of the public have an investment in decisions affecting their human rights and thus may have an interest in watching how these processes play out. In his review of the parliamentary human rights scrutiny system in Victoria, Michael Brett Young made several recommendations "to facilitate public participation in the scrutiny process" following submissions recommending the scrutiny committee actively engage with the

community and facilitate public input into its scrutiny work (185). This is suggestive of a growing public interest in better understanding what goes on in these proceedings and in securing access to them. However, the hostile architecture of the space – expressed in closed doors and actors' chairs not being oriented towards the public gallery – often precludes public access to these performances of legislative human rights scrutiny.

Actors

In this section, we consider the actors, the parliamentarians, who bring differing levels of knowledge and experience to these scrutiny performances. In our analysis of the parliamentarians as actors, we consider both actor training and how the actors relate to one another in performance. We should caution that we as researchers can only speculate on the backstage performances of others to which we are not in team (Goffman, "The Presentation of Self" 115). We have not been admitted to closed door committee meetings. We do, however, draw from accounts of these backstage performances from our interviews and ethnographic studies of backstage spaces to inform our analysis.

In relation to actor training, to take one example, the Commonwealth Parliamentary Joint Committee on Human Rights contains one member that has served on it for five years, one for two years, one for one year, and the remaining seven for just four months.[2] Committee members have previously served as political advisors, business directors, consultants, and campaigners. Three have legal qualifications. This raises the question of actor training. Many of the parliamentarians we interviewed remarked that they had no comprehensive training in human rights scrutiny but learnt the part as they went on. Alexander told us that, "when it comes to something as important as scrutiny [...] there's no guidance, there's no training." This often meant that they deferred to the human rights legal advisor. As Alexander explained, "there's no alternatives that committee members can go to, to try and get a different piece of advice. So, you really just have to deal with what they give you." This places a great deal of power in the legal advisor as trainer and creates what we have termed "a culture of reliance on only some perspectives" (Mulcahy and Seear, "A Culture of Rights" 14). Furthermore, legal

training is often conducted through text-based modes such as guides, guidance notes, and other resources, but it may be necessary for training to expand to consider legal performance beyond text and into ways of engaging sensitively with public audiences on legal matters (Bankowski, del Mar and Maharg).

Training aside, there is also the question of who the actors are performing for. The absence of a public audience during these proceedings does not mean there is no audience to these encounters; instead, parliamentary actors are important audiences to each other's performances. In reflecting on the preparatory phase of artwork, Schechner argues that "only performance requires it to be public, that is, acted out among the performers as rehearsal" ("Performance Theory" 204). In this context, committee members and parliamentary staff act as witness to the proceedings. As Goffman puts it, "team-mates in regard to one show will be to some degree performers and audience for another show, and performers and audience for one show will to some extent, however slight, be team-mates with respect to another show" ("The Presentation of Self" 112). We go further to say that these team-mates are, in the group setting of the committee, always audiences to one another and that this duality may affect the performance of scrutiny. As Alexander explained, "most of the debate in the committee that I've seen amongst committee members comes from government members going in to play for government bills [...and] running defence for the bill." Angus suggested that in "any parliament, there's always politics" and that this politicization was not just inter-party but intra-party, as "you may have discrepancies between various members from the same party on political issues." Another parliamentarian, Charles, stated that debate is "usually almost ideological and party positions," and that this can be challenging, particularly when another member is opposing a point on purely political grounds. Charles suggested that, in trying to engage other members of the committee, "you try and sort of free yourself from those partisan shackles [...] and just try and get down to what are the key facts of the matter so that, irrespective of one's ideology, they could be convinced. At least that's my approach."

Charles' reflections suggest a degree of collaboration amongst committee members. Samuels links the concept of witness to withness: "events have us witnessing each other, and parts of our tarrying can

be [...] carried out as withness" (64). For Samuels, "*withness* names sustained closeness with the event of one's interpretive reading" (60). In this context, as much as the parliamentarians are witnessing each other during these processes, they are also with each other during this process; this mutual audiencing creates what Goffman terms "backstage solidarity" ("The Presentation of Self" 114). This is perhaps evident in the very low number of dissenting reports in parliamentary human rights scrutiny. As Schechner describes, "these preparations literally 'compose' the performance *and the group* [...] allowing for a settling in to the task at hand" ("Performance Theory" 207; emphasis added). The group's withness is composed during these encounters, as they settle into ways of working together on the scrutiny task.

On this, Goffman observes that backstage, actors have a comfortable familiarity with one another: "since back regions are typically out of bounds to members of the audience, it is here that we may expect reciprocal familiarity to determine the tone of the social intercourse, Similarly, it is in the front region that we may expect a tone of formality to prevail" ("The Presentation of Self" 111). He goes on to describe the behavior amongst actors in these spaces in detail:

> Throughout Western society there tends to be one informal or backstage language of behaviour, and another language of behaviour for occasions when a performance is being presented [...] backstage conduct is one which allows minor acts which might easily be taken as symbolic of intimacy and disrespect for others present and for the region, while front region conduct is one which disallows such potentially offensive behaviour. ("The Presentation of Self" 111)

Goffman concludes that "we are likely to learn that labourers use a backstage manner and are unlikely to learn that lords use it too" ("The Presentation of Self" 115); nevertheless, these behavioral traits hold even amongst parliamentarians when backstage (some of whom, in the British parliament, are lords). Within the parliamentary chamber, there are strict conventions. For example, in the House of Representatives, a member cannot be referred to by name (and instead must be referred to by their office or electoral division), use offensive words to describe another member, use objectionable words, dress in an informal manner, sit on the arm of a seat, or eat;

this is allowed in backstage spaces, however. Furthermore, in the House, a member must address any remarks to the Speaker, cannot converse aloud or make any noise or disturbance whilst another member is speaking, and cannot personally reflect on another member; rules that do not apply in committees. The committee room thus allows for what Schechner terms "mood displays" ("Performance Theory" 246). As Goffman describes, "performers act in a relatively informal, familiar, relaxed way while backstage and are on their guard when giving a performance" ("The Presentation of Self" 114). There is, we suggest, a mutually constitutive relationship between rooms and behaviors.

Furthermore, differences of gender, age, ethnicity, etc., will impact backstage informality because of societal expectations of behavior (Goffman, "The Presentation of Self" 113). It cannot be forgotten that the parliamentary has historically been – and still is – dominated by older white men and their behavioral expectations code the place, for example, in terms of working hours, restrictions on breastfeeding in chambers, and practices of sexual harassment (which we discuss further later). Writing on parliaments as gendered workplaces, Josefina Erikson and Cecilia Josefsson observe:

> Parliaments have often been described as gendered organisations, gendered institutions and male-dominated institutional settings permeated by a culture of masculinity. This masculine culture originates from a time when politics was an all-male business, and it underpins both formal rules created by men to suit men and informal norms regarding how a politician should behave. Women entering politics are confronted by this pre-existing culture, regarded as 'space invaders', and constrained in various ways by rules, norms and practices that obstruct their political work. Numerous empirical studies have found that women MPs are negatively influenced by such obstacles in their parliamentary work. (20-21)

It is reasonable to assume that the same may apply to parliamentary committees and may in fact be heightened as closed committee rooms are what Goffman terms "shielding places" that enable "*involvement shields*, behind which individuals can safely do the kind of things that

ordinarily result in negative sanctions" or engage in "situationally improper" behavior ("Behaviour in Public Places" 39). Ostensibly 'proper' or 'improper' behaviors in these backstage parliamentary settings are often gendered. As Erikson and Josefsson conclude, "gendered 'logics of appropriateness' set the terms for appropriate behaviour within an organisation in general and prescribe appropriate masculine and feminine behaviour in particular" (33).

Importantly, these ways of acting backstage are not aberrations but part of the performance of parliamentary scrutiny. As Goffman says, "it may be necessary to handle one's relaxation [...] as a performance. One may feel obliged, when backstage, to act out of character in a familiar fashion and this can come to be more of a pose than the performance for which it was meant to provide a relaxation" ("The Presentation of Self" 116). One parliamentarian, Charles, stated that in the parliamentary committee room, there is "a fair degree of horse trading." As the allusion to horse trading suggests, co-operative decision-making is common in committee meetings. Charles claimed that most committee recommendations "will be consensus recommendations because they're just common sense, reasonable things to do." As Goffman describes, "when the audience is not present, each member of the team is likely to want to sustain the impression that [...] he [*sic*] is not likely to play his [*sic*] part badly when the audience is present [...] Each team-member will want the audience to think of him [*sic*] as a worthy character" ("The Presentation of Self" 112). Furthermore, each team-member is also "likely to want his [*sic*] team-makes to think of him [*sic*] as a loyal, well-disciplined performer" that "can be trusted with the secrets of the team" ("The Presentation of Self" 112-113). However, interviewees also pointed to the persistence of political divisions in these spaces. Alexander described "government members going in to play for government bills that are, in the view of the legal advisors, going to infringe upon human rights in some way." Adam noted that parliamentarians would "have voted in a party room for a policy" that they would then have to assess the justifiability of from a human rights perspective. The party room – as both a literal and figurative room[3] – seeps into the committee room, though the two are separated. Whilst we have argued for the benefits of public performance of parliamentary scrutiny, we also acknowledge that "it could be [...] more difficult for members to move away from party political positions in public hearings due to the attention that these hearings

Figure 3. Image of the front page of a scrutiny report

attract from media, and easier for them to develop positions that enhance human rights compatibility in private hearings" (Mulcahy and Seear, "On Tables" 295).

Ultimately, these performances generate a human rights scrutiny report that becomes public. This public document details how proposed legislation impacts the human rights of publics. It is often a balancing exercise, that weighs the rights of some publics against the interests of others. If we think of the parliamentarian as actor, we might ask: what kind of obligation do they carry to the publics that may be affected by their work? In the next section, we shall consider this question in light of public audiences to scrutiny work.

Audience

In the last section, we argued that the parliamentarians act as audience to each other, but it should also be noted that their backstage performances have a public audience always in mind. In writing on parliamentary debates on roadside drug testing in one Australian

parliament, we noted that "legislators had frequent recourse to 'the public' [...] but often they were invoking different publics, ranging from road accident victims and their families to drivers to non-government organisations concerning alcohol and other drugs, motorists, health, civil liberties, and residents' associations" (Mulcahy and Seear, "Playing to the Gallery" 260). As Schechner writes, "the rehearsal is a way of selecting from the possible actions those to be performed, making them as clear as possible in regard both to the matrix from which they have been taken *and the audience with which they are meant to communicate*" ("Performance Theory" 207; emphasis added). The work backstage is geared towards a public audience with whom the end product – the scrutiny report – will be in communion, so this working and reworking backstage is done in preparation for its eventual audience. Within these meetings, there is always an absent but imagined public audience to which the proposed legislation will ultimately apply (Mulcahy and Seear, "On Tables"). As Goffman puts it, "those who are outside will be persons for whom the performers actually or potentially put on a show" ("The Presentation of Self" 117). This is a diverse cohort, and as such it can be difficult for actors to ascertain what the public audience wants or to weigh up competing audiences' demands.

The parliamentary actors, as representatives of the public, often felt the need to be guided by this absent public in their parliamentary scrutiny deliberations. As Charles described, "I am so aware of how the decisions that I make in this job affect tens of thousands, hundreds of thousands of people." They also acknowledged, in a way that reflects our earlier discussion, that "I have a responsibility as a legislator to not allow my own lived experience to have undue influence over my politics and over my policy [...] because I represent more than me." The differing perspectives of these parliamentary actors and the audiences to which they appeal affect the legal performance of legislative scrutiny. As we have noted elsewhere, the "representative dimension [of politics] can infuse the way in which parliamentarians assess the human rights compatibility of legislation" (Mulcahy and Seear, "On Tables" 296), but it also raises difficult questions of how an actor represents different – and sometimes irreconcilable – positions and audiences.

The absence of a public audience also affects the behavior of those within the space in other ways. In the backstage, Goffman writes,

"performers behave out of character while there" ("The Presentation of Self" 98). There, the performer will "'go out of play', that is [...] drop from his [*sic*] face the expressive mask that he [*sic*] employs in face-to-face interaction" ("The Presentation of Self" 105). This unmasking allows the parliamentary actors to engage in less inhibited behavior. A recent review of Commonwealth parliamentary workplaces found that "the operation of the chambers can contribute to, and normalise a masculinised and competitive culture, both inside and outside the chamber" (Australian Human Rights Commission, 269). There are different rules of etiquette in backstage spaces, however (Goffman, "The Presentation of Self" 107). Whereas there are orders that regulate conduct in the parliamentary chamber, these are less present in the committee room space, particularly in private. Perhaps because of this, there is an emphasis on closing doors to public audiences. As we have written elsewhere, "the committee room's door offers a powerful barrier to community engagement, but also a potential pathway in" (Mulcahy and Seear, "On Tables" 305). The closed door forecloses any possibility of public participation, except through glimpses that may be caught through it.

Occasionally, public audiences are invited into public hearings. As Charles described, "the virtue of the public hearings allows those legislators who are wavering one way or another to be able to base their opinion at least [partly] on public support or opposition." The presence of a public audience can work to break down political and ideological barriers on the part of parliamentarians.

Nevertheless, there is a segregation of the public audience, which occurs through both architecture (as discussed above) and the actors' behavior. Goffman writes that the performer will "segregate his [*sic*] audiences so that the individuals who witness him [*sic*] in one of his [*sic*] roles will not be the individuals that witness him [*sic*] in another of his roles" ("The Presentation of Self" 119). This is because of the need for performers to maintain consistency to their audience. In some instances, actors will avoid public friendliness to certain audience members. In our own experiences before parliamentary committees, we have noted how some parliamentary actors with whom we are friendly will adopt consciously formal modes of address in the committee room to avoid any perception of partiality or impropriety, but then drop that formality in social settings. There is a sense in which the parliamentary actor is playing the part of a

Figure 4. Image of Victorian parliament door

politician in their performances before an audience in the committee room. Another reason for this segregation might be due to the committee deliberations being a rehearsal for the final tabling of the report. As Schechner describes, "the whole workshop-rehearsal phase of performance needs protection and isolation, a well-defined safety net" ("The Future of Ritual" 217), that allows for performers to "play with words, things, and actions" ("Between Theatre and Anthropology" 110) and in which "a technique is developed that will make the performative communication effective" ("Between Theatre and Anthropology" 291). It in in the rehearsal space of the closed committee room that the parliamentarian develop their report that is communicated to the wider parliament and public.

In conclusion, whilst there is some degree of skepticism towards public audiences being admitted to committee meetings, the actors in these encounters have a public audience in mind. This absent yet omnipresent public audience shapes the behavior of the parliamentary actors in their performance of scrutiny. In other work, we have pointed to frequent recourses to actual or imagined 'publics' in debates on human rights impacts of legislation and how these serve to remind legislators that publics hold an interest in these debates as they are affected by them (Mulcahy and Seear, "Playing to the Gallery"). However, given that the public is a diverse audience, it can be difficult for parliamentary actors to weigh up their competing demands when performing scrutiny.

We have argued elsewhere that "parliamentary human rights scrutiny committees need to open doors to people [...] and bring them to the table when it comes to scrutinising human rights compatibility" (Mulcahy and Seear, "On Tables" 307). One way of doing this may be through providing "the opportunity for more community engagement, including through calls for public submissions on legislation" ("On Tables" 306). As other scholars have noted, public engagement "can often lead the parliament [...] to hear from a more diverse range of stakeholders', including those that 'have a firsthand understanding of various legislative schemes" (Grenfell and Debeljak 812). In that way, the public audience can participate in the performance of human rights scrutiny and potentially steer the performance in different directions.

Conclusion

Thinking through parliamentary human rights scrutiny as performance and adopting a performance lens to analyse this process raises complex questions that might not have been asked were we simply to look at human rights scrutiny reports as instruments. Most importantly, it invites us to dwell on the publics that are audience to and affected by the performance of human rights scrutiny – how they can access and understand these performances, and what obligations the actors in these performances might hold towards their public audiences. We argue that these meetings, comings-together and encounters affect the way human rights assessments are performed. By that, we mean that the factors we have explored – the space in which this legal performance occurs, the experience of the actors, and the different audiences to the performance – affect the way human rights assessments are performed and can shape the resulting product: the scrutiny report that is then presented to the parliament. If this is so, then we contend that parliamentary spaces need to be reconfigured to accommodate and engage public audiences and that parliamentary actors need to be trained to consider the impact of their human rights scrutiny work on public audiences.

Whilst most legal scholars have tended to look at the scrutiny reports themselves, occasionally supplemented with information from interviews with relevant parliamentary actors, we have instead taken a different approach. Heeding the call from Samuels to figure encounter as a work worthy of study, and drawing from performance research from Goffman and Schechner, we have examined the performative factors of space, actors, and audience in parliamentary scrutiny. Examination of the elements of legal performance, we conclude, provides a richer understanding of the parliamentary scrutiny process itself. It exposes the ways in which parliamentary spaces and the actors therein exclude public audiences, and challenges us to think through ways in which public audiences can be better engaged in parliamentary human rights scrutiny.

This approach also raises questions that are worthy of further investigation. For example, Schechner argues that the rehearsal process "plays with performers' personal life experiences [and that] materials brought into and uncovered by workshops and rehearsals" also have bearing on the process ("The Future of Ritual" 40). With this in mind, we might

question to what degree to parliamentarians' personal life experiences and other materials brought into the parliamentary committee have a bearing on the human rights scrutiny process? This and other questions are beyond the scope of this particular example, but point to the ways in which an examination of the performative dimensions of parliamentary human rights scrutiny can call into question established practices.

Works cited

Australian Human Rights Commission. *Set the Standard: Review into Commonwealth Parliamentary Workplaces*, 2021.

Bankowski, Zenon, Maks del Mar, and Paul Maharg (eds.). *The Arts and the Legal Academy: Beyond Text in Legal Education*. Routledge, 2012.

Brook, Peter. *The Empty Space*. Touchstone, 1996.

Erikson, Josefina, and Cecilia Josefsson. "The Parliament as a Gendered Workplace: How to Research Legislators' (Un)equal Opportunities to Represent." *Parliamentary Affairs,* vol. 75, 2022, pp.20-38.

Goffman, Erving. *Behaviour in Public Places: Notes on the Social Organisation of Gatherings*. The Free Press, 1963.

—. *The Presentation of Self in Everyday Life*. Penguin Press, 1969.

Goldsmith, Peter. "Parliament for Lawyers: An Overview of the Legislative Process." *European Journal of Law Reform,* vol. 4, no. 4, 2002, pp. 511-523.

Grenfell, Laura and Julie Debeljak. "Future Directions for Engaging with Human Rights in Law-making: Is a Culture of Justification Emerging Across Australian Jurisdictions?." *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions*, edited by Julie Debeljak and Laura Grenfell. Lawbook Co, 2020.

Hibbitts, Bernard. "De-scribing Law: Performance in the Constitution of Legality." *Performance Studies Formations: Connections/Contestations/ Coalitions Conference*, Northwestern University, Illinois, 1996.

House of Commons Culture, Media and Sport Committee, United Kingdom Parliament. *News International and Phone-hacking*, 2012.

House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, United States Congress. *Final Report*, 2022.

Legislative Council Privileges Committee, Parliament of Victoria. *Inquiry into Breach of Committee Deliberations and Report Contents*, 2022.

Leiboff, Marett. *Towards a Theatrical Jurisprudence*. Routledge, 2019.

Lubin, Cheryl. *Courting the Stage: Law, Drama, and the Performance of Law*. PhD thesis, University of California Los Angeles, 2008.

Madison, D. Soyini. *Arts of Activism: Human Rights as Radical Performance*. Cambridge University Press, 2010.

Moulds, Sarah. *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia*. Springer, 2020.

Mulcahy, Sean. Performing Law. Podcast on Soundcloud, 2021.

—. "Interview with Dorota Gazy and Peter Rombouts." *Performing Law.* Podcast on Soudcloud, 2021.

—. "Dances with Law: From Metaphor to Methodology." *Law and Humanities,* vol. 15, no. 1, 2021, pp. 106-133.

—. "Methodologies of Law as Performance." *Law and Humanities,* vol. 16, no. 2, 2022, pp. 162-182.

—. and Kate Seear. "On Tables, Doors and Listening Spaces: Parliamentary Human Rights Scrutiny and Engagement of Others." *Australian Journal of Human Rights,* vol. 28, no. 2, 2022, pp. 286-307.

—. and Kate Seear. "Playing to the Gallery: The Invocation of Human Rights, Legal Actors, and Outside Audiences in Debates on Roadside Drug Testing in the Australian Capital Territory." *Griffith Law Review,* vol. 31, no. 2, 2022, pp. 240-265.

—. and Kate Seear. "A Culture of Rights Finding its Feet: Parliamentary Human Rights Scrutiny in the Australian Capital Territory." *The Journal of Legislative Studies*, 2023, pp. 1-24. .

—. and Kate Seear. "A 'Tick andFlick' exercise: Movement andForm in Australian ParliamentaryHuman Rights Scruting." *Dance Research Journal*, vol. 55,no. 3, 2023.

—. and Marett Leiboff. "Performing Theatrical Jurisprudence: An Introduction." *Law Text Culture,* vol. 25, 2021, pp. 1-21.

Peters, Julie. "Legal Performance Good and Bad." *Law, Culture and the Humanities,* vol. 4, no. 2, 2008, pp. 179-200.

—. *Law as Performance*. Oxford University Press, 2022.

Rae, Paul. *Theatre and Human Rights*. Bloomsbury, 2017.

Read, Alan. *Theatre and Law*. Bloomsbury, 2015.

Rice, Simon. "Allowing for Dissent: Opening up Human Rights Dialogue in the Australian Parliament." *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions*, edited by Julie Debeljak and Laura Grenfell. Lawbook Co, 2020.

Samuels, Lisa. "Withness in Kind." *Performance Paradigm,* vol.16, 2021, pp. 60-73.

Schechner, Richard. *Between Theatre and Anthropology*. University of Pennsylvania Press, 1985.

—. *The Future of Ritual: Writings on Culture and Performance*. Routledge, 1993.

—. *Performance Theory*. Routledge, 2003.

Seear, Kate and Sean Mulcahy. "Forging New Habits: Critical Drugs Scholarship as an Otherwise to Rights." *The International Journal of Human Rights,* 2023, pp. 1-23.

Slyomovics, Susan. *The Performance of Human Rights in Morocco*. University of Pennsylvania Press, 2005.

Vos, Renske. "A Walk Along the Rue de la Loi: EU Facades as Front- and Backstage of Transnational Legal Practice." *Backstage Practices of Transnational Law*, edited by Lianne Boer and Sofia Stolk. Routledge, 2019.

Wheeler, Brian. "Secret Doorway in Parliament Leads to Historical Treasure Trove." *BBC News*, 26 February 2020.

Young, Michael. *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act*, 2015.

Notes

1 We note that it appears Goffman uses the term 'facts' to refer to aspects of activity.

2 The Committee membership can be found at Parliament of Australia, "Parliamentary Joint Committee on Human Rights – Committee membership".

3 In Australia, the term 'party room' is uniquely used to refer both to the room in which members of the parliamentary group (a political party or coalition of political parties) meet and the parliamentary group itself.

Legislative Theater and Modern Slavery: Exploring a Hyperlocal Approach to Combatting Human Trafficking

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Since 2018, Act for Change (AfC), a Ghanaian applied theater company, has been using Boalian theater techniques to address issues of modern slavery and human trafficking in their community. Here, using the framework of Boal's Legislative Theater, we discuss the ways in which AfC has developed Boal's work, innovating it within a specific context to find new and powerful ways of using performance to engage with intractable issues of modern slavery and human trafficking. Focussing on the specific dynamics of a single community, this article explores how employing a 'hyperlocal' approach in James Town, Accra, enables a focus on the local stories that highlight how modern slavery and human trafficking operate. More specifically, while using a Marxist-Freiran framework and by engaging with Augusto Boal's concepts of Legislative and Forum Theater, this article focuses on how performance methodologies can engage with complex international issues by developing intra-local dialogue and partnerships at the local level. The goal here is not to

argue that community action can act as a replacement for statutory instruments or state-led initiatives, but that they are a potentially significant and under-developed complementary tool in the fight against modern slavery, as they place the community and the survivor at the center of change. By taking this approach, we aim to reflect on how theories of legislative theater can aid the development of a hyperlocal methodology and how the project in James Town exemplifies modern legislative theater practice.

Keywords: applied theater, Ghana, community theater, modern slavery, Augusto Boal, Paulo Freire

Act for Change is a community theater company in James Town, Accra, Ghana. Over the course of a four-year research project in collaboration with researchers at the University of the West of Scotland, they worked with survivors of modern slavery in the James Town community using Boalian performance techniques to center survivors' narratives and lived expertise, and to develop dialogue around modern slavery and human trafficking between survivors, schools and the wider community.

Modern slavery is a growing global issue. According to the latest Global Slavery Index report, there has been a significant rise in people living in conditions of modern slavery since 2015 (Walk Free 2023). Strategies for tackling modern slavery, forced labour, and human trafficking exist at the international level through conventions administered through the International Labour Organization (ILO), but there remain significant issues of implementation at the national and local level. In Ghana, which is the focus of this article, there are a number of relevant statutes, which are considered below, as well as a National Plan of Action for the Elimination of Human Trafficking in Ghana (NPA). However, there is little evidence that the approaches outlined in the NPA are having an impact at the community level. For example, the NPA, which represents the state's most explicit attempt to develop and implement a coherent strategy for addressing human

trafficking and modern slavery, calls for, amongst other things: "regular community engagements in the form of testimonies from rescued victims and their families" (Ministry of Gender 14), and a directive to "form and strengthen school and community-based child rights clubs" (15). However, there is little detail in the NPA about how community engagement should be achieved or what support is available to do so.

Between 2018 and 2022, a research team made up of Dr. Collins from the University of the West of Scotland and Nii Kwartelai Quartey and Collins Smith from Act for Change, worked with survivors of modern slavery, NGOs and local community stakeholders in a research project that examined the specific local factors that enable modern slavery and human trafficking. Both Quartey and Smith are from James Town and have worked on numerous community engagement projects in the area as performance practitioners. Their company was the partner throughout the research project and is amongst the foremost applied performance companies currently working in West Africa. Dr. Collins has worked with Act for Change on various projects since it was established in 2011. Working in James Town, an area of Accra that sits on the coast, and drawing from traditional Ghanaian performance practices (Donkor 43-44), the team used forms of performance methodology derived from Augusto Boal's Theater of the Oppressed, to engage survivors and then bring those stories to the community. This approach was designed specifically to address two issues: firstly, a lack of opportunity for survivors of modern slavery returning to James Town to talk about their experiences, and secondly, an absence of community-level dialogue about the risk and nature of modern slavery in James Town.

This approach highlighted several issues that we engage with throughout this article. Firstly, how can performance be used to effectively center the narratives of the people that legal systems talk about? How can participatory theater support existing legal structures in order to lead to inculcate collective awareness and action in relation to intransigent issues? And, finally, how can performance methodologies be used as dialogic tools of co-creation, not just between participants, but between participants and the broader community? In order to address these questions, it is first useful to set out some of the defining issues of modern slavery in James Town and then examine the existing legal framework.

Ghana and Modern Slavery

Ghana has well documented issues with modern slavery, which, as Scarpa notes, covers areas of "forced labour, the bonded labour/debt bonded practice, forced prostitution and sex slavery, the worst forms of child labour, trafficking in persons, and early and forced marriages" (4). Drawing on Kevin Bales, Scarpa further notes that modern slavery is characterised by "very low purchase cost of slaves, very high profits for the exploiter, [...] surplus of potential slaves and irrelevance of ethnic differences" (4). In terms of people trafficking and forced labour, Ghana is noted as a "source, transit and destination country for men, women and children" (Atugabu 35). Global Slavery International estimates that in Ghana 133,000 people are living in modern slavery, and gives a Government Response Rating of CC, the third lowest category (Walk Free 2023). In 2017, the Western Regional Minister, Gifty Kusi, stated that as many as 1.86 million Ghanaian children were 'victims of forced labour' (Wamakor 2017).

The annual Trafficking in Persons report (TIP), 2017, produced by the U.S. Government, downgraded Ghana to the lowest Tier 3 level for consistently failing to address contemporary slavery in the country. The failure to tackle issues of modern slavery and people trafficking has real economic impact. Potential restrictions to US Aid and funding from the Millennium Challenge Corporation can amount to millions of dollars of development money being withheld from the country (TIP, 2018). Though the 2018 TIP Report notes multiple areas where government is not demonstrating sufficient intent to address the issues of modern slavery, it upgraded Ghana to a Tier 2 country after Ghana committed USD 83,866,652 over five years to addressing the issue (NPA 30).

Since 2018, the Ghanaian government has begun to increase the number of investigations into people trafficking and forced labour, inaugurated a specialist board and began the dissemination of awareness-raising materials. In 2017, 6 traffickers were prosecuted under the Anti-trafficking Act, as compared to none the year before. In a 2019 interview with CNN, the Minister of Information claimed there had been 13 convictions in 2018 (Coorlim). Hence, though the top-down approach is leading to some progress, it is not commensurate with the scale of the problem.

James Town and Modern Slavery

As with the broader picture in Ghana, James Town is a source, transit and destination point for modern slavery. The types of slavery noted by the ILO's 2018 TIP Report correspond closely to those that we identified in the first stage of the research project in 2018 (Collins and Quartey), namely: forced child labour in the fishing industry, sex work and young women leaving to work in the Gulf states. They also correspond to the definition of modern slavery provided by Scarpa above. Specifically, the types of modern slavery found in James Town are young boys being recruited to work in the fishing industry on the Volta Lake, young girls being brought to James Town to sell goods on the roadside and for sex work, and educated young women being recruited for domestic service in the Gulf states (Collins and Quartey). The nature of modern slavery in James Town is strictly gendered with domestic and sex work falling to girls and women, and fishing falling to boys. Though James Town remains a thriving fishing port, boys are not recruited into the local industry but removed from their community and relocated to the Volta region, where they have no network and do not speak the language.

Though gender is a key factor, there are several issues that are common across the different types of modern slavery. Firstly, recruitment is often done through intermediaries with family members or family friends acting as informal agents. These agents approach families or individuals with promises of schooling for their children or the opportunity to travel abroad and earn money in the case of domestic workers in the Gulf. Underpinning these interactions is a sophisticated network of intermediaries and agents who control and coerce individuals at every step of their journey. One of the key findings that came out of our work was the complicit silence that surrounds modern slavery (Collins and Quartey).

The interaction between traditional practices of apprenticeship and modern slavery is contentious and complex, particularly in cases of practices on Lake Volta. A CNN report on child slavery on Lake Volta stated that there are as many as 20,000 children involved as modern slaves in the fishing industries (Coorlim). The reaction of the Ghanaian government was mixed, with the Minister of Information, Kojo Oppong Nkrumah, calling for immediate action, and some Ghanaian academics questioning the veracity of the figure and

putting the experience of young people involved down to traditional systems of patronage and apprenticeship, along with western bias (Mensah and Okyere). Though Mensah and Okyere raise critical questions, particularly around consent and misrepresenting vulnerable young people, multiple sources, including the ILO, specifically highlight practices on Lake Volta as falling under the Worst Forms of Child Labour. Moreover, evidence of the selling of boys from James Town into this industry was found during our research. Though it is not the focus of this article to disentangle this issue, we would emphasise that the Boalian approach taken in this research has centered on the lived experiences of survivors of modern slavery. Hence, if in discussing their experience, they have identified that it is consistent with modern slavery, then that is sufficient. Moreover, as explored below, these experiences are consistent with Ghana's domestic legislation that protects against modern slavery, human trafficking and forced labour.

Ghana's legal framework

Within the top-down framework of Ghana's current approach to modern slavery, ministries, government and civil institutions are involved in tackling human trafficking and the worst forms of child labour in Ghana. Several international bodies are also involved in monitoring Ghana's policies and actions. All largely agree that the Ghanaian government has made progress since 2017 but that progress is slow and the funds allocated are insufficient (ILA 2018). However, the key question to emerge from this is whether the effects of these changes are being felt at the community level or by survivors of modern slavery, which, to date has not been explored. With this in mind, it is useful to examine what Ghana's obligations are under international conventions, and what policy and legislative tools Ghana's government has in place to support survivors of modern slavery. To provide some context, the following is a brief analysis of Ghana's domestic legislation and policy approaches to the tackling of modern slavery. As these have been developed with reference to Ghana's obligations under various international conventions, it is useful to discuss these first.

International instruments

At the international level, the main framework for tackling modern slavery is two parts of the International Bill of Human Rights: the Universal Declaration on Human Rights 1948, (UDHR) and the International Covenant on Civil and Political Rights, (ICCPR), which are administered by the United Nations (UN). The UDHR states that "no one should be held in slavery or servitude, slavery in all of its forms should be eliminated" (Art. 4), and Article 9 of the ICCPR recognises the right to liberty and security and prohibits arbitrary arrest and detention (Art. 9.3). Though the Declaration and the Convention set down the guiding principles of international Human Rights law, the topic of modern slavery has been given a sharper focus in the UN's Sustainable Development Goals, which require states to meet specific targets. The eradication of modern slavery falls under UN Sustainable Development Goal 8.7, which calls on member states to:

> Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms. (UN, 2020)

One of the key indicators of whether a state is in compliance with international norms is the ratification of the International Labor Organisation's conventions. These are divided into three categories: fundamental, governance and technical. Ghana has ratified eight of the ten 'fundamental conventions' between 1957, the year of Ghana's independence, and 2000 (International Labour Organisation, 2023). Additionally, there are a number of technical conventions that Ghana has not ratified; these include the Work in Fishing Convention, 2007, and the Domestic Workers Convention, 2011, both of which are pertinent to the forms of modern slavery found in Ghana.

The principles covered in the ILO's fundamental conventions are also included by the ILO's Declaration on Fundamental Principles and Rights at Work, 1998 (DFPRW). In order to monitor compliance with the DFPRW, the ILO undertakes annual reports, which noted in 2015, 2016 and 2017, the same period during which Ghana was categorised as a Tier 3 country in the US Department of State annual

Trafficking in Persons (TIP) Reports, a "failure [by the Ghanaian government] to respect the reporting obligations on the application of standards" (ILO, 2017). In 2018, the ILO issued a General Direct Request to the government of Ghana, noting that "none of the eight reports requested [that year] have been received" (2019). Hence, though Ghana has ratified the Conventions, its compliance is unclear.

In 2000, Ghana ratified the Worst Forms of Child Labour Convention, 1999. Art. 7(2) calls for effective and time-bound measures for preventing the engagement of children in the worst forms of child labour and for providing the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour, and their rehabilitation and social integration. The lack of rehabilitation and social integration was a clear issue for the survivors we interviewed and engaged with during the project, and it was precisely these issues that Act for Change was able to engage with through community performance (Collins and Quartey).

The ILO noted "with deep concern" (2016) the prevalence of children who have been trafficked or sold into fishing activities or are otherwise engaged in hazardous fishing activities in the Lake Volta region. It notes "with regret" (2016) the absence of information regarding the Analytical Study on Child Labour in Lake Volta Fishing in Ghana, which highlighted that

> Many trafficked children are used in the fishing industry. According to the Ghana Child Labour Survey Report (2003), over 49,000 children are involved in fishing in Ghana: 87 percent boys, 13 percent girls: 25 percent are children 5-9 years of age, 41 percent are 10-14 years of age, and 34 percent are 15-17 years of age. (Government of Ghana and ILO 2).

Though the sample sizes were relatively small, 350 children across 10 districts (7), the findings are consistent with our research in James Town with survivors of slavery who had been taken to work on Lake Volta.

What comes through this analysis is a lack of urgency and engagement on the part of the Ghanaian government. Though there is an

acknowledgment of the problem of modern slavery within Ghana, there is a clear sense of frustration at the international level that Ghana's government agencies are not making progress more quickly. Furthermore, it is clear from our engagement with survivors that the forms of child labour and modern slavery that concern the ILO do exist at the community level. The lack of reporting and reliable data means that issues of children being used in fishing on Lake Volta remains contentious as, in some instances, it exposes a tension between traditional practices of apprenticeship and human rights law (Coorlim; Mensah and Okyere). However, by centering on the stories and experiences of survivors in our project, one of whom had been trafficked to Lake Volta and returned to James Town several years later, we were able to communicate this story directly to a community audience and so highlight the fact that one person's lived experience has a significance and potency that goes beyond statistical data.

National legislation and the NPA

Ghana has a number of relevant statutes that, taken together, provide a useful framework for defining what constitutes modern slavery, human trafficking and forced labour. The types of modern slavery we identified clearly fall under the legal definitions outlined below. To begin with, Ghana's 1992 Constitution protects citizens from slavery and forced labour under Section 16 (1 and 2). Section 28(d) protects children (defined as a person below the age of eighteen years [28(5)]) from exposure to physical and moral hazards. Section 28 sets down that:

Every child has the right to be protected from engaging in work that constitutes a threat to his health, education or development.

1. A child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
2. The Constitution is the highest law in Ghana and taken together, Sections 16 and 28 clearly protect against the practices of child labour highlighted in our research in James Town.

The Children's Act, 1998 defines the minimum age at which a child can work as 15 (section 89); though they can engage in 'light work' from the age of 13 (section 90). 'Light work' is clearly defined as "work which is not likely to be harmful to the health or development of the child and does not affect the child's attendance at school or the capacity of the child to benefit from school work" (90[2]). This definition rules out the working practices of children on Lake Volta noted in the 2013 Analytical Report and through our research. Where 'light work' may encompass traditional practices such as a family taking in the child of a relative and requiring that child to undertake housework. However, that does not, then, extend to hazardous practices, or work that interferes with the child's ability to attend school.

Under the Labour Act, Art. 58(1), "[a] young person shall not be engaged in any type of employment work likely to expose the person to physical or moral hazard". Again, a young person is defined as a person under 18. Both the Constitution and the Children's Act, 1998 define a child as a person below the age of 18. Together with the Labour Act, 2003, both statutes clearly preclude the types of work described by survivors in our research.

The Human Trafficking Act, 2005 takes a different approach, setting out a number of statements that highlight the responsibilities of the community, rather than the rights of the individual. For example, Art. 6(2) states that "A person who fails to inform the police commits an offence and is liable on summary conviction to a fine of not less than two hundred and fifty penalty units or a term of imprisonment not less than twelve months or to both". Where human trafficking is so bound up in recruitment via informal networks of extended family and family acquaintances (Collins and Quartey), emphasising the role of the community to report trafficking represents an interesting change in approach, placing an obligation on the community without providing effective reporting mechanisms or clarity on what constitutes human trafficking as opposed to traditional practice.

Despite the law being 'on the books' the TIP report, 2018 notes that the government has not reported any cases. Interestingly, the report does highlight that two traffickers were ordered to pay restitution to the victims of human trafficking, but states that there is no information on whether they "complied with the order" (200).

From the above discussion, a number of things are clear: firstly, Ghana does have domestic laws in place to tackle human trafficking and child labour. Secondly, Ghana has ratified several international conventions that are designed to deal with child labour, modern slavery and human trafficking. Though both the Human Trafficking Act and the Children's Act have provision for reporting and prosecution, no legal instrument discusses mechanisms for protection of survivors.

The NPA was developed in association with the Canadian Government and UNESCO and is the most significant acknowledgement of the breadth and scope of the problem facing Ghana in terms of human trafficking and modern slavery. It outlines four aims:

1. Prevention of TIP;
2. Protection of TIP victims;
3. Prosecution of TIP offenders; and
4. Partnerships with stakeholders to combat TIP.

Though it is important to highlight that the NPA recognises the need to safeguard victims of TIP, as previously noted, Ghana's history of enforcement in this area is poor and the budget allocated over five years is relatively low. Specifically, in terms of protection, the Ghanaian government has budgeted USD 15,767,753 over 5 years. In terms of protection, the NPA notes that

the plan recognises that providing enhanced care and protection to victims is the combined responsibility of a number of agencies and stakeholders. Victim care is a central theme of the plan and includes the rescue of victims and runs through to providing adequate privacy, security, health and psychosocial support during the investigation, trial and rehabilitation stages (5).

The agencies and stakeholders identified in the NPA include various government ministries, the Human Trafficking Management Board, the Human Trafficking Secretariat, the National House of Chiefs. However, absent from this list are schools, NGOs and local community organisations. Interestingly, given the nature of our project, discussed below, strategies include developing public campaign programmes on human trafficking, especially in high-risk communities (11). One of the suggested activities is to "develop and implement media tools, using

print, broadcast, new media, billboards, dramas [...] to raise greater awareness". (11). There is, therefore, an awareness at government level that arts and media have a role to play in enacting policy in this area.

In line with our findings, the NPA highlights the 'increasing trend' of young men and women leaving for the Gulf States. Notably, the NPA states that "after their return, many report being deceived, overworked, starved, abused, molested, and/or forced into prostitution" (2). In terms of reintegration, the NPA notes an intent to "establish [a] management system to follow-up on the return, protection, rehabilitation and reintegration of victims" (29) and to ensure that origin and destination countries contribute to the costs of doing so. An output in this regard is the establishment of a database, which the ILO noted in 2018 was 'being developed'. In order to support reintegration of survivors of modern slavery into their communities, the NPA suggests it will "[p]rovide community sensitization and knowledge enhancement to prevent stigmatization towards rescued and re-integrated victims through the development of community engagement programmes" (17). The responsibility for this lies with the Ministry of Gender, Children and Social Protection, the National Commision for Civic Education, the Department of Social Welfare, unnamed NGOs, and the Information Service Department. Again, there is no mention of community involvement in leading this 'knowledge enhancement'.

The NPA represents an acknowledgment by the Ghanaian Government that there is a serious problem with modern slavery and human trafficking in Ghana. Moreover, it highlights a small but significant shift away from a solely national level policy-driven solution to a slightly more nuanced multi-stakeholder strategy. Though there remains an emphasis on the state, there is an understanding that community actors have a role to play, particularly when it comes to reintegration of survivors.

It is here that we argue a legislative theater approach could be most beneficial to achieving the aims of the NPA, and so the Ghanaian government. The project we undertook, discussed below, highlighted many of the issues detailed in the NPA and effectively operationalised the NPA's desire to sensitize communities and reintegrate survivors. Here, then, we examine the potential of Forum Theater to bridge the gap and act as an interlocuter between survivors and the community.

Modern Slavery and Legislative Theater

The research project took place from 2018 to 2022, in three phases. In the first project, Hidden Histories: Untold stories of James Town and Slavery, the research team explored the links between historic and modern slavery in James Town, through a series of ten interviews undertaken with survivors of modern slavery and individuals with a particular knowledge of the history of James Town, the dynamics of colonialism in the area and traditional government. In terms of survivors, we talked with people who had been trafficked as children from James Town to work in the fishing industry further north on Lake Volta, and others who had been trafficked to the Gulf states for domestic work as school leavers. We engaged with local NGOs who work with people experiencing slavery in James Town, particularly young girls who are brought for sex work under the pretext of a better education. Through these interviews, we explored the perceptions, experiences and mechanics of modern slavery and how it operates in the area. In addition, borrowing from Wellington's (2018) methodology of community and architectural analysis, we considered the history and built environment of James Town and how merchants' tunnels were used to move enslaved people from '*m))mli' (moumes),* a Ga word that describes a merchant's house as both a fort and a prison, unseen to the coast (Collins and Quartey 9). As well as capturing the hidden nature of the slave trade in James Town, the tunnels reflected a sense of unseeing, a purposeful obfuscation that enables the community to ignore what was there. This provided a clear parallel with the lived experience of survivors of modern slavery, all of whom noted the difficulty of making their experience seen by the broader community.

Throughout all the stages of the project, theater practitioners at Act for Change ran drama workshops in a local high school with young women who were at particular risk of trafficking, and developed performances based on the testimonies of survivors, which were then shown back to community audiences. Increasingly, these performances acted as an opportunity for dialogue between the performance and the audience.

The company was founded in 2011 and is led by Collins Seymah Smith and Nii Kwartelai Quartey. Since its inception, Act for Change has used theater as a means of engaging their local community in

issues that are particularly acute in James Town, from sanitation to domestic violence and sexual and reproductive health. As the resident company of the James Town Community Theatre Centre, the members of Act for Change are now well established as community activists and are very well networked within James Town and Accra more broadly. Consequently, they are able to undertake work in schools and attract an audience to the Theater Centre at short notice.

The play that resulted from the first stage of research in 2018, *Ode to the James Town Child,* directed by Quartey, was shown in local schools and at the company's performance venue in James Town in July 2018. The performance played to nearly eight hundred people across three performances, with audience members clearly engaged in the themes explored and the lives of the characters. After each performance, the audience was invited to offer strategies to the protagonists, essentially presenting suggestions to stop them being lured into modern slavery. Though the suggestions were powerfully emotive, they did not offer the kinds of practical strategies capable of addressing the core issue: that modern slavery in the community or affecting members of the community was easy to ignore. For example, common suggestions were to pray or talk to the police. However, this obfuscated a community level responsibility to acknowledge and learn from survivors who return to the community. Reflecting on our approach, we considered how we might better facilitate an empowering process which could create space for the survivors to tell their own stories whilst engaging with the community as less of a passive audience and more of a collaborator.

The second phase of the project was a series of drama workshops in schools, where AfC practitioners worked with a group of female students who were nearing graduation. As a group who were particularly at risk of recruitment into modern slavery, the participants were attuned to pressures of being young women leaving the school environment and the associated expectations coming from families and community to be economically active, contribute to the household and, if possible, travel overseas. Here, they were identifying, through performance and without the pressure of an external audience, the complex network of push and pull factors that leave young women vulnerable to modern slavery. One of the key issues to emerge from these workshops, which took place weekly over two months, was that the participants began to identify practices in the community,

or that they had heard of, as falling within the definition of modern slavery and human trafficking.

The latest stage of the project to date was a three-day workshop event at the James Town Community Theater Centre. Hosted by Act for Change, the event brought together survivors, NGOs, school students and teachers with whom the project had previously engaged. The three-day workshop was grounded in Freire's Popular Education theory in terms of its designing, planning and implementation. In this context, we created space for the 'Facilitator' role, which Quartey and Smith assumed, guiding the learning journey of the participants identified as 'organic intellectuals'. This stands in contrast to the traditional role of an 'Expert or Teacher' in the classroom, who possesses all the knowledge to be imparted onto the students (Freire 72). By challenging and destabilizing power dynamics in the process of knowledge creation, the space effectively democratized the participants' learning experience.

Employing the spiral model of learning, the workshop harnessed the insights and perspectives of participants in exploring the issue of modern slavery. Drawing upon Ghana's rich cultural heritage, the workshop embraced activity-based and participant-centered methodologies such as sculpture, drama, storytelling, songs, and other popular art forms. This innovative approach allowed participants to utilize familiar learning aids from their own culture, fostering meaningful reflections on the pressing matter of modern-day slavery. Following the sharing of knowledge and experiences among participants, patterns emerged, prompting a collective analysis of these shared insights. Commonalities and differences were examined, facilitating a deeper understanding of the subject matter. Additionally, the facilitator introduced new information on legal instruments and frameworks pertaining to modern slavery. This encouraged the collaborative expansion and creation of fresh knowledge and theories, transcending the limitations of the individuals present in the room. Consequently, a supportive environment was cultivated, empowering participants to apply their newly acquired knowledge and skills within smaller groups, subsequently presenting their findings to the larger collective. This interactive process enabled participants to practice newfound abilities, develop strategies, and formulate action plans, fostering a sense of agency and preparation for real-world implementation. Together, the participants explored

their experiences of modern slavery, which they then turned into a community performance piece following a Boalian model. One of the key outcomes of this stage of the project was that the survivors were trained in community performance techniques: one of the survivors acted as the joker/facilitator in the community performance, thus acting as both a metaphorical and literal interlocutor between experiences of modern slavery and the James Town community.

Developing Boal in James Town

Inspired by Paolo Freire, Boal's practice aims to re-establish the role of the spectator and their relationship to the action taking place on stage. More specifically, during Theater of the Oppressed projects, the aim is to eliminate passive spectatorship and develop a constructive, theatrical, problem-solving dialogue between actors and 'spectactors' (Boal's reconstructed term for an active audience) (*Theatre of the Oppressed* xxi). Drawing parallels between Freire's teacher-student relationship and Boal's actor-spectactor, both practices discuss the importance of knowledge not being inherently owned by one side of the fence. Quite the opposite, both sides of the conversation are knowledgeable and the process of teaching/performing becomes a creative dialogue that enriches all.

After interacting with local communities during a production of *Zumbi* in the early 1960s Boal's practice began to center the people they were performing to, rather than the messages the production team found important. As Boal reflected: "Before that encounter we were preaching revolution for abstract audiences. Now, we met 'the people' [...] How should we speak to these real people? *How could we teach them what they knew better than us?*" (*Hamlet* 194). The idea of 'preaching revolution for abstract audiences' is a particularly relevant one when discussing political theater that deals with real people and their stories and naturally goes back to the Freirian concept of learning. More specifically, Freire indicates how transformation might be effected at the local level (Freire 95); where the learning environment might potentially be transformed from one of 'cultural invasion', where one party assumes the power to 'transform' the other (e.g. preaching revolutions to abstract audiences), to 'cultural synthesis', where a climate of dialogue and reciprocity enables people to realise their capacity to discover their own transformative

possibilities. Freire identifies that in cultural invasion, the actors draw the thematic content of their action from their own values and ideology; their starting point is their own world, from which they enter the world of those they invade. In cultural synthesis however, the actors who come from 'another world' to the world of the people do so not as invaders. They do not come to teach, transmit or give anything, but rather to learn, with the people, about the people's world. In cultural invasion the actors superimpose themselves on the people, who are assigned the role of spectators on a narrative that is chosen for them. In cultural synthesis, the actors become integrated with the people, who are co-authors of the action that both perform upon the world.

Though the principle of cultural synthesis is clearly applicable in the work undertaken by Act for Change in James Town, what is equally interesting is how it resonates with specific traditions of Ghanaian performance. One of the most recognisable forms of Ghanaian theater, *anansegoro,* was developed in the 1960s by Efua Sutherland and her company at the Ghana Drama Studio. Influenced by the cultural policies of Kwame Nkrumah, Ghana's first president, Sutherland investigated ways to develop a theatrical tradition in Ghana rooted in traditional village storytelling, or *anansesem.* The *anansesem*, or Ananse stories, focussed on the spider god Ananse and his various exploits (Collins 186) To develop *anansegoro,* Sutherland borrowed from both the narratives – for example in her play *The Marriage of Anansewa* – and the styles of storytelling found in Ghanaian villages. This included the *mboguo,* which Donkor describes as "an embodied interactivity" that is designed to unsettle "authorial knowledge and authoritative knowledge" of the storyteller (40). Within a village context, the storyteller leads the narrative, but as the audience listen, they can interrupt, so disrupting the narrative and repositioning the power balance of the event. This structural element removes the storyteller's omniscience and makes space for the audience to shift the direction of the narrative. Thus, the audience in Ghana's precolonial performance traditions possess a significant agency in the storytelling event. This tradition, later formalised by Sutherland, has been established as a central tenet of Ghanaian theater since independence. Being invited to engage in and be part of the performance event, rather than a passive spectator, is part of the backdrop of the audience's relationship with performance. Hence, its application within Forum Theater is by no means an alien prospect.

When exploring the practice of Theater of the Oppressed, it is often seen as a tree with multiple branches, practices and aesthetics, but Forum Theater is probably the most commonly used one. Forum Theater is comprised of a group of people, performers and spectactors, who are looking to solve an issue faced by the community for which nobody has the answer. During this problem-solving process, the performers present a scene in which the issue is clear, followed by spectactors being invited, by the Joker (the facilitator of the Forum), to join the action on stage and enter the scene. Replacing the protagonist at any moment of the scene they find crucial, these spectactors reveal, by means of theater, thoughts and desires relatable to the group to which they belong. As Boal discussed: "Even if it fails ten times, the process does not fail. The process was good, because by trying and trying and trying you develop the capacity of analysing and looking for solutions" (Boal et al.). Forum Theater is not about finding the right answers, but about working with your community in order to workshop possible solutions to very real problems.

Moving on from Forum Theater within the Theater of the Oppressed tree is the Direct Action. According to Boal, "during Forum Theatre we have ideas but the main aim is the Direct Action where we change the reality, it is important to not only understand the reality but to also modify it and transform it" (Boal et al.). This transformation can be on a personal or a community level. According to a different interpretation, also by Boal in his book *The Aesthetics of the Oppressed*, Direct Actions "involve the theatricalisation of protest demonstrations, peasants' marches, secular processions, parades, meetings of workers or other organised groups, street commissions etc., using all available theatrical elements, such as masks, songs, dances, choreography etc." (6). Either approach to Direct Action, within Boal's framework, aims towards turning art and theory into reality which can then lead to change, which takes us to Legislative Theater. Legislative Theater aims to harness that change and in combination with Forum Theater to produce a truer form of democracy by influencing the legislative system. As Boal defines it, Legislative Theater is: "A set of processes which mixes Forum Theatre and conventional rituals of a parliamentary chamber or assembly, with the objective of arriving at the formulation of coherent and viable bills of law. From this starting point, we then have to follow the normal route for their presentation in legislative chambers and put pressure on the legislators to approve them" (6). Even without the final

step that Boal offers here, Act for Change aimed to use Legislative Theater in a hyperlocal manner, in order to address vital issues that affect the participants, in order to connect local communities in James Town with modern slavery survivors through narrative and creative problem-solving dialogue.

At several points throughout the project, Act for Change practitioners engaged community audiences, stakeholders and survivors as spectactors. The results of these interventions were at points powerful and galvanising. For example, when, during one performance, a female school student declared to 500 of her peers that she would 'rather eat stones' than have her future children taken from her, the room cheered and applauded. Equally affecting, was when participants in school workshops were able to critique common practices and everyday interactions with a fresh understanding of how they might be, or could lead to, modern slavery. In another instance, students questioned existing policies on modern slavery and suggested ways of improving policies by referencing the domestic strategies that ended the Guinea worm infestation in Ghana. Here, the public were given incentives for reporting cases of Guinea worm and the students drew an effective analogy both between the insidious character of modern slavery as a societal disease, and an effective community-based solution driven by the government. Throughout these performances, the research team observed and noted the reactions and asked the audience to write down a strategy they would use if they were the protagonist. These approaches developed a large data set that clearly demonstrated an appetite at the community level to acknowledge and address the problem of modern slavery, which to this point had not been clear.

During the final phase, a survivor, acting as Joker, formed the performance narrative, selected the spectactors and engaged directly with the community audience on what success looked like for the protagonist. This achieved two important things: firstly, it opened hitherto closed lines of communication between survivors of modern slavery and the community and, secondly, it reframed the community as a body capable of suggesting and enacting solutions that complement existing policy. As the performance was played through for the second time, the joker invited the spectators to shout 'freeze'. This stopped the action with the performers holding their position as though time had stopped. The audience member would then

touch the actor they wanted to replace in the scene and enact a new strategy. As each intervention unfolded and the action played and replayed, the joker and the audience began to discuss the viability of the approaches. Here, the research team in Ghana saw for the first time the audience talking with a survivor of modern slavery about their experience and what could be done to safeguard others in the community.

As noted, the NPA directly calls for engagement with the community but without a clear sense of how such engagement should be achieved or to what end. Here, the community as a self-selecting audience, not only bore witness to the stories of survivors of modern slavery but interacted, engaging in meaningful dialogue with a survivor through the frame of performance. The documentary *Practising Freedom* (Sarkodee), that accompanied this phase highlights the direct action of audience members to suggest and enact solutions. Though, in practice, the solutions may be ultimately unsuccessful, it is the engagement itself that is significant here, as a forum had been created in which a community-level dialogue could take place. As Collins Seymah Smith, Director of Act for Change said, this was 'James Town talking to James Town about James Town' (Murray). Interestingly, due to covid restrictions, Dr Collins was unable to travel to Ghana for the final phase of the project and his absence resulted in clearer lines of communication between the participants, and then between the performance and the community audience. One of the striking elements that the documentary shows, is that the conversations that take place during the performance do so in Ga, the local language, rather than English. Without the UK-based academic in the audience, there was no pressure for the dialogue to be filtered or take a perspective from outside the community into account. Ultimately, the Boalian practice of deconstructing the role of audience/actor sits well with the Ghanaian community storytelling drama, which runs akin to the theory of 'cultural synthesis' embedded in Ghanaian performance traditions. This way, it became a useful and appropriate tool for combatting modern slavery in James Town in a manner that complements and gives substance to the slightly nebulous ambitions set out in the NPA.

Conclusions

Boal's work has been applied in multiple contexts around the world. The application of his approach in James Town has enabled both an important forum for community discussion to take place and to see the potential of Legislative Theater as a way of supporting and complementing state-led policy initiatives that raise awareness around modern slavery. This type of performance-based approach becomes useful, because if individuals who become caught up in modern slavery and human trafficking survive their experience and return to their community, their reception is complex. Though James Town is a tight-knit community, survivors can find themselves ostracised. These issues were consistent across all the survivors we interviewed in the community, and this raised the issue that not only were survivors not getting the support they require, but that there was no mechanism or forum through which to tell their story and so warn other potentially vulnerable individuals.

Though the NPA suggests that community awareness projects should take place, it does not provide any examples of projects that have taken place or are currently running. There is little mention of the role of schools, community groups, local government, religious groups or traditional groups. In addition to that, we need to acknowledge the difference between awareness (which is what the NPA suggests) and meaningful participation (which is what grassroot organisations have to offer). What this project demonstrates, is that the community is capable, on multiple levels, of building bridges and developing vital workable solutions to the issue of modern slavery and human trafficking. From awareness raising to problem solving and enforcement, the various community stakeholders involved in our project positioned themselves as articulate, creative and solution-centered. The NPA places responsibility for addressing Modern Slavery on state agencies, and while keeping this pressure on, we argue that resource would be better directed towards organisations working at the community level who, like Act for Change, understand their own community. This 'hyperlocal' approach, which foregrounds community knowledge and networks, allows for sustainable links to be built up over time and so for change to be affected incrementally with community stakeholders, rather than imposed upon them.

There are, of course, limitations to this project. One is that understanding the lived experience of participants, whether survivor, community member, school pupil or theater practitioner over time is complex. Therefore, being able to know what the long-term impact will be, is the subject of future research. Clearly, the opportunity to develop workable policy is desirable. It is not possible to prevent human trafficking and modern slavery, however, it is possible to develop meaningful dialogue at the community level. Moreover, the potential replicability of the project, using performance as a framework for complex and uncomfortable community dialogue, is something to pursue further.

The legal framework for addressing modern slavery and human trafficking in Ghana clearly exists, with a balance struck between the rights of the trafficked individual and the requirement of witnesses to report instances of trafficking. What our project demonstrates, is that when the stories and the agency of survivors are central to the project, and community groups are invited to engage, discussion and action is forthcoming. Fundamentally, this is how this approach and the adoption of Boalian techniques are valuable. The promotion of dialogue through structured drama-based interactions, can provide a safe space for participants to share their – sometimes challenging – narratives, while Legislative Theater provides a framework which can push the context further. As a result, this project argues that while remaining rooted in local communities, this kind of work can inform the policy work that is already taking place in and beyond Ghana, preventing vulnerable groups from recruitment into modern slavery and supporting those who return.

Works cited

Atugabu, Raymond. *Human Trafficking in Ghana: A Review of Legislation.* ILO, 2005. Accessed 3 Oct. 2023.

Boal, Augusto. *Theatre of the Oppressed*. Pluto, 2008.

—. *Hamlet and the Baker's Son: My Life in Theatre and Politics*. Routledge, 2001.

—. *The Aesthetics of the Oppressed*. Routledge, 2006.

Boal, Julian, et al. *Theatre of the Oppressed in Actions. An Audio-Visual Introduction to Boal's Forum Theatre*. Routledge, 2015.

Collins, Stephen. "Who Owns Ananse? The Tangled Web of Folklore and Copyright in Ghana." *Journal of African Cultural Studies*, vol. 30, no. 2, 2018, pp. 178-191.

Collins, Stephen, and Nii Quartey. "The Ghost at the Junction: Exploring the Links between Historic and Modern Slavery in Accra, Ghana." *Journal of Modern Slavery*, vol. 7, no. 1, 2022, pp. 1-17.

Coorlim, Leif. "Child Slaves Risk their Lives on Ghana's Lake Volta." *CNN*, 2019, Accessed 28 Feb. 2023.

Donkor, David. "*Kodzidan Mboguw*: Supplanted Acts, Displaced Narratives and the Social Logic of a Trickster in the 'House of Stories'." *The Legacy of Efua Sutherland: Pan-African Cultural Activism*, edited by Anne Adams and Esi Sutherland-Addy, Ayebia Clarke Publishing, 2007.

Freire, Paulo. *Pedagogy of the Oppressed*. Translated by Myra Bergman Ramos, Penguin Classics, 2017.

"Global Findings." *Walk Free. Global Slavery Index.* 2022. Accessed 7 Jan. 2023.

Government of Ghana, and International Labour Organisation. *Analytical Study of Child Labour in Lake Volta Fishing in Ghana.* 2014. Accessed 15 Oct. 2023.

International Labour Organization. *Analytical Study on Child Labour in Lake Volta Fishing in Ghana.* 2013. Accessed 15 Dec. 2019.

—. *Observation (CEACR).* 2016. 10 Oct 2023.

—. *Observation (CEARC).* 2018. Accessed 6 Jan. 2021.

—. *General Direct Request (CEACR).* 2019. Accessed 10 Oct. 2023.

—. *Ratifications for Ghana.* 2023. Accessed 9 June 2023.

—. *Up-to-date Conventions not Ratified by Ghana.* 2023. Accessed 9 June 2023.

Mensah, Betty, and Samuel Okyere. "How CNN Reported in 'Child Slaves' Who Were Not Really Enslaved." *Al Jazeera*, 2019. Accessed 28 Feb. 2023.

Mindero Foundation. *Measurement, Action, Freedom: An Independent Assessment of Government Progress towards Achieving UN Sustainable Development Goal 8.7.* 2019. Accessed 7 Jan. 2023.

Ministry of Gender, Children and Social Protection. *National Plan of Action for the Elimination of Human Trafficking in Ghana 2017-2021*. 2017.

—. *Livelihood Empowerment against Poverty.* 2019. Accessed 28 Feb. 2023.

Murray, Andrew. *UWS Research Matters Podcast.* Forthcoming 2023.

Patt, Martin. *Human Trafficking and Modern-day Slavery.* Accessed 20 Jan. 2022.

Republic of Ghana. *1992 Constitution of the Republic of Ghana*, Act 527. 1996.

—. *The Children's Act*, Act 560. 1998. Accessed 28 Jan. 2023.

—. *The Labour Act*, Act 651. 2003. Accessed 28 Feb. 2023.

—. *Human Trafficking Act*, Act 694. 2005. Accessed 28 Feb. 2023.

Sarkodee, Palmer. *Practising Freedom.* Accessed 3 Oct. 2023.

Scarpa, Silvia. *Trafficking in Human Beings: Modern Slavery.* Oxford University Press, 2008.

United Nations, Department of Economic and Social Affairs. *Sustainable Developments, 8.* Accessed 3 Oct. 2023.

US Department of Labor. *Findings on the Worst Forms of Child Labor – Ghana.* 2019. Accessed 16 Jan. 2022.

Walk Free. *Global Estimates of Modern Slavery.* 2022. 20 Jan. 2023.

From the Truth Commission Report to the Stage and the Museum: The Artistic Dislocation of Violence from the Ecuadorian Chapter of 1983 to 2008

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Are commemorative plaques enough to collectively and symbolically amend the horror of human rights violations? And if not, why is this strategy still the most common way for governments to pay their due respects to the families of the victims? This paper analyzes the suitability of the arts to address the reparation of the victims of human rights-related crimes perpetrated in Ecuador between 1983 and 2008, as investigated by the ad-hoc Truth Commission installed there afterwards. National and constitutional law, as well as international jurisprudence, will help to illuminate this study objective. Furthermore, in order to unpack the collective and individual dimensions of the right to memory of the victims, their families and their broader social fabric in which they are embedded, the notion of 'memory sites' is incorporated into the analysis. To contribute to the establishment of interconnections between the law and the arts, several initiatives for the recovery of

memory in Ecuador are reviewed, from a critical stance. In this vein, the text foregrounds a centralizing proposal to consolidate an Ecuadorian aesthetics of memory, through institutionalization and museography, to address the governmental duty for reparations; but more importantly, to finally permeate the consciousness of an entire country whose past is still waiting to be incorporated into its present. By intertwining the legal, the artistic and the political layers present in this discussion, we advance in the direction of an aesthetics of memory that challenges the dominant narratives of genocidal violence.

Keywords: memory, integral restitution, violation of human rights, memory centers, immaterial reparations

Reparations form a global phenomenon, one that does not present itself in a unified way; it is rather necessary to note, at different scales, the extreme variety of ways available to express reparation (Michel 17). Because of this, contemporary doctrine and jurisprudence formulated a revisionist view of the concept of reparation as an obligation of the States, not only to disburse sums of money to those who have had their rights violated, but as a remediation that has to be understood in a multidimensional way. In this discussion, the right to memory appeared as the concept and as the instrumental paradigm for such expansion, illuminating the immaterial aspects of the reparations that have been neglected so far. Following that, then we can pose the question: can the arts become suitable tools for the immaterial reparation of victims of human rights violations? This is the guiding light for the present investigation, which is based on the hypothesis that an exclusively monetary stance does not fully repair the impairment suffered by the victims of human rights violations. The rights to the good name, dignity and honor of the victims, the recovery of the truth and the right to memory require an extensive and interdisciplinary understanding to achieve a restitution that can be said to be truly holistic. In this sense, we foreground the

interaction between the law and the performing arts to achieve a remediation that is both individual and collective as well as material and symbolic. It is important to bear in mind that due to the nature of the violations, there are no reparation mechanisms that are proportionate to the serious harm caused to the victims and their families (Van Boven 20). However, in what follows we will propose several ideas on how memory centers and coherent curatorial criteria can institutionalize, operationalize and optimize the current reparative initiatives in Ecuador that lack aesthetic considerations and, therefore, are insufficient to transmute the narratives configured by systematic violence. Since our discussion is based on legal considerations, we will intend to outline a juridical basis to build an aesthetics of the right to memory.

Remembrance and a perfected mimesis

Art can be understood as a generator of images, whether static (as in the case of sculpture, painting, photography, mural) or dynamic (theater, performance, video-art); confections of aesthetic value that permeate our perception and sensitivity. Its content and the event of its presentation, stem from the representational space in the direction of reality and can be used for the construction of new horizons of meaning, necessary for the victims of human rights violations, for their families and the communities they belong to. The character of otherness and de-territoriality of *poiesis* (quality of poetic creations) allows us to consider artistic representation as a world parallel to the *world*; with its own rules (immanence): by establishing its difference (of a separate ontological order, materiality in a different state); any poetic entity founds a new level of being, what we call "an ontological leap" (Dubatti 27). This ontological leap beyond the regular disposition of things, would in accordance with the philosophy of Walter Benjamin be a proposal for improvement aimed at the order previously established (the narrative created by violent regimes). That is, art takes reality and imitates it, not faithfully, but under a hidden intention to "show how else things can be", to repurpose history according to the social interests that are mostly needed; in other words: a "perfected mimesis" (Benjamin 117). Symbolic reparation measures, and the commemorative, vindicating or honorable actions that they entail would lose their meaning if they are applied only within the intimate circle of the victim and his

relatives. On the contrary, the intention of the reparation of honor, good name and, ultimately, of the recovery of truth, establishes a memory that has to be validated on a collective level. Art is then proposed as the socio-aesthetical event able to inaugurate a new order of things, not only communicating it, but by enacting it through the artistic work and its meaning-making power:

> This kind of meaning is not the simple communication of an idea or concept, but something that surpasses it (the simple transfer of messages is carried out through systems of communication codes that respond to rules agreed upon and accepted by the parties involved). But here the idea is twisted, it overcomes the communicative one-dimensionality. (Andruchow 1)

The measures of immaterial reparation appeal to rescue a particular truth to incorporate it into the great collective memory through the action of remembering, not only with words (communicative one-dimensionality), but beyond them. "Remembering in the sense of Benjamin has to do with a space that appears when linear temporality breaks and time opens up in all directions, bringing together past, present and future in a whirlpool in which the before and after intertwine" (Pinilla 290). This "memory of what remains in the gutters of history" (Pinilla 299) is recovered through remembrance, but differs from it, because it surpasses it:

> therefore, the opposition between memory and remembrance can be translated into a tension between, on the one hand, a commemorative repetition close to a certain historicist will, and on the other, the construction of a past on the border between the individual and the collective. (Grimoldi 2)

The drive to recover the painful memories of some and transform them into the memory for all, resembles a postmodern invigoration of the stories of "the vanquished" now rendered central and as a challenge to what until then has been the only way to see the world: the triumphant narrative established by State-sponsored systematic violence.

All of this aligns with the notion of remembrance, positioned at the threshold of the individual and the collective, but still experienced by an individual subject, which is why it cannot admit critical reformulation or the incorporation of new elements. But a theatrical play, an arts-based memory center or a memorial museum can underpin the *experience*, which arises "as an interruption, a displacement that links the past with the present, offering a new image" (Grimoldi 203) in its construction. Without overly focusing on the experiential, the true immaterial restitution of rights, to honor, to good name, to truth, to memory, occurs at the specific moment in which the art event favors the friction between the past and the present, and gestates, installs and transmits a new image that disrupts the order of the meaning implanted by the fascist, oppressive and dictatorial administrations and their crimes, as the ones perpetrated by the Ecuadorian government between the years 1983 and 2008 (now established and documented by the ad-hoc "Truth Commission" report).

Furthermore, the blunt and necessary counterweight for amnesty laws is art, the antagonist of institutionalized oblivion. The commemorations, marches, plays, meetings, and public apologies, update the impossibility for oblivion, they *present* and not only *represent* human rights violations, to be able to give that past an opportunity to be heard from a present that makes space for it. At this precise juncture the gaze towards the past becomes political. Indeed, memory is no longer merely an object of contemplation or interpretation for its substance and manifestation as a social or individual faculty. "This memory, on the contrary, demands, from a political dimension, an ethics of responsibility for the lives frustrated by barbarism and a kind of justice vindicating the victims" (Reyes 67). Politics, law, and aesthetics will then allow the transmutation deserved by the victims and ordered by international or transitional justice courts, according to the case. "It means exchanging death for life. Music, poetry, theater, cinema, puppetry (...) connect the past with the present creating a new form of remembrance and a new future projection" (Grimoldi 204). However, no matter how much binding force and good will there is, the disconnection between politics, law, and aesthetics, as mentioned above, results in a fogginess that leads to the ineffectiveness of the reparative actions undertaken.

The public and complete disclosure of the truth, as long as such disclosure does not cause further harm or threatens the safety and

interests of the victims and their relatives, witnesses or persons who have intervened to assist the victim (United Nations High Commissioner for Human Rights 2005) should be made through artistic interventions in order to show reality "not as the facts that have been, but what in their absence appears as a frustrated possibility questioning the legitimacy of the factual, while allowing past injustice to be present as a demand for justice" (Guerrero 32). This is the main thesis of this research, which seeks to postulate the effectiveness of the performing arts and museography to exercise immaterial reparation for the victims of atrocious crimes and massive violations of human rights, or those who have been affected by the "absolute evil", to use the words of Carlos Nino (2006). An ensuing question arises: why not honor, commemorate or remember the victims through speeches, plaques, lectures, conversations or any other type of verbal exchange without an aesthetic will like the one palpable on a theatrical play? The answer might lie in the legal premise that things in law should be undone in the same way as they were done. It could be added that the damage that has been caused by actions cannot be repaired through words. Art as an exceptional operation-action, affects reality in a deeper way than speeches, words, or testimonies. Art, in contrast, highlights the impossibility of language to make present the unmentionable or incommunicable of experience, even when there are favorable conditions from transitional governments seeking for truth.

The reparation of rights then, has to be made and not referred to, executed and not alluded to, concretized and not described, put simply: it has to be performed. This faculty of art to transgress the order of things implies a reformulation of the magnanimous sense imposed by violence and State-led abuse. "And if art, the aesthetic sphere, has a fundamental role between the police order and the political interruption of that order, it is because they have the power to renew a new distribution of the sensitive" (Rancière 9); if the police order is understood in Rancière's terms as the functioning of the polis with its parts recognized under an order (9). From this enmeshment comes a multidisciplinary link, above any euphemism, where aesthetics, as the "regime of the sensitive" (Arcos 1), serves as pontiff between the sensitive forms of art and life, which "finds its greatest expression in the spheres of the political and the social" (Arcos 18) circumscribed by the regulations of law. From there it follows that art would become political, not a priori, nor by the

technique committed to its deployment (tekné), but in the event of interruption of the linearity of everyday time to populate a space with the postulation of an aestheticized discourse within the framework of the convivial and public event that implies the reception of art. This "issue of visibilities" (Arcos 18) is strengthened when at the jurisdictional level the recovery of truth has been ruled, beyond moral debts and fragmentary initiatives. In other words, the law with its imperative force socializes the memory of the victims of human rights violations, carried through an artistic discourse, so that it enters the political field and becomes part of the collective acquis. "Politics consist in reconfiguring the distribution of the sensitive that defines the common of a community and that introduces new subjects and objects, in making visible what was not and in making those who were only perceived as noisy animals heard as speakers" (Arcos 33).

Memory sites and the construction of social identity

The first theorization of places of memory was done by Pierre Nora, who understood them as important enablers of symbolic value for a particular community. He described them as providers of cohesion and identity among a group, in the absence of common elements among heterogeneous members of the same population, because of the disappearance of traditional nation states. Nora put the importance of understanding this topography of collective identity on the epistemic map, because "there is no social identity without memory. But, at the same time, there is no spontaneous memory, so it is necessary to identify the places of such memory" (OAS 30). According to the Institute of Public Policies on Human Rights (IPPDH) of MERCOSUR, sites of memory are

> all those places where serious violations of human rights were committed, or where these violations were resisted or faced, or that for some reason the victims, their families or the communities associate them with these events, and that are used to recover, rethink, and transmit traumatic processes, and/or to honor and repair the victims. (1)

These places ratify the double-edged function of memory, since they entail both a symbolic reparation for the victims and a guarantee of non-repetition for society as a whole, if we consider its educational and preventive functions.

> Memory sites: spaces recovered for memory such as former clandestine detention centers, monuments, memorial plaques, street names, squares, etc. The factor that makes these sites places of memory is the history they concentrate for various social actors. Its construction as a "site of memory" may be due to a State initiative, but sometimes it is the will of social movements that make them significant. At the same time, these "sites" do not make the same sense to everyone. The same space can convene opposing forces. (OAS 30)

The issue is that, when talking about past events, there will always be conflicting versions. This clash represents the struggle of a memory that is trying to stand out above other memories and be validated within the collective imaginaries. As Derrida emphasized, it is not possible to preserve everything, and therefore we must take a critical look at the memories that have been achieved so far and recognize that behind them there was a political criterion of selection.

The connotations of the crimes classified as "absolute evil" (Nino) were perpetrated against specific individuals. But, in the reiteration of this operation, an entire community is affected, because its stability, security and well-being are compromised. In recent years, the litigation of collective cases has grown substantially: that is, cases in which the affectation of a group or a "class" of victims by the action or omission from a State is foregrounded. Examples include cases of indigenous peoples, as well as the recent precautionary measures ordered by the Inter-American Court on prison affairs and black communities (Abramovich). Atrocious crimes or crimes against humanity are usually directed against a target population, fueled by discriminatory criteria taken to the extreme. It can be a community with a particular ethnicity, or a specific nationality, membership of a certain social group or any other shared trait. While such crimes can be carried out against entire communities, there are violations of rights against individuals, the impact of which also merits restitution to the society to which they belong. Is the payment of a sum of money sufficient to

make reparation for a case of enforced disappearance? From the onset we can all agree on a negative response. Even if the victim did feel compensated for such monetary reparation, this serious type of human rights violation transcends the victim and has repercussions on the social complex in which they are immersed (Rousset). In the same vein, various jurisdictional bodies have recognized reparation measures for the victim and their closest nucleus, accompanied by strategies of a greater scope, after acknowledging the serious tremor caused in their broader social context. For example, the Inter-American Court of Human Rights (2012) came to the understanding that the state of prolonged impunity could cause victims to alter social relations and the dynamics of their families and communities. Additionally, when there are cases of massive violations of human rights, it is not possible, at least not with total certainty, to make an individualized and exhaustive identification of the victims; therefore the reparation of these crimes require the application of collective strategies, which, in the case of Museums or sites of memory, would involve spaces for the social validation of the pain of the affected people and its consequent remediation. Hence "the need for public knowledge of the truth as a way to overcome the traps of radical evil" (Nino 144) is at the same time, the reverse of the "impulse towards private revenge, and thus affirms the rule of law" (Nino 213).

Memory spaces do not have a merely utilitarian characteristic. To believe so would be to claim that profit is taken from the victims and their suffering. On the contrary, recovering and safeguarding memory "contributes to restoring their self-respect, (...) that true history receives official recognition, that the nature of atrocities be discussed openly and publicly, and that those who perpetrated these acts are officially condemned" (Nino 213). Furthermore, the facts are deployed within the daily life of the communities affected, for analysis and public scrutiny, so as to promote solidarity and collective appreciation of the rule of law, through theatrical or visual works of art. It is precisely art that can fill the gaps in the notions related to non-impunity and truth which the law cannot tackle by itself because it is a structure of minimums, not interventionist; in opposition to art, which unfolds above "what is allowed", "the acceptable" and the "agreed upon". In this way, art supplements law; as core aspects of collective rights do not materialize only by the mere rule of a judge, but are enacted within convivial, real and present events, as those configured by the performing arts.

The symbolic reparation: Articulating the legal, aesthetical, and political

The symbolic reparation as a legal category is a recent concept, its normative and jurisprudential development openly raises a flexible body of measures that must respond in favor of the satisfaction of three subjects that are in three different dimensions: the victim as an individual, the victim as a collective subject and finally, the social conglomerate (Sierra 23). With this, it is intended to take into consideration the particularity of the damages caused, the participation of individual and collective actors, and the specific socio-cultural contexts in which the violations took place. In Ecuador, the components of symbolic reparation were introduced for the first time in its legal sphere since the entry into force of the Constitution from 2008. According to the Magna Carta, victims will enjoy mechanisms for comprehensive reparation, which will include, without delay, knowledge of the truth of the facts, and measures of restitution, compensation, rehabilitation, guarantee of non-repetition and satisfaction. Here it is worth clarifying that symbolic reparation encompasses three rights: truth, memory and human dignity, and two guarantees: of non-repetition and satisfaction (Ordoñez) that contribute to the achievement of a broader reparation that aims to exercise actions on the irreparable dimensions of violence. The jurisprudence of the Inter-American Court of Human Rights has pointed out that the adoption of these measures is transcendental when rights violations respond to structural patterns and must have a broad scope for the entire collectivity. They are measures that are part of the individual and collective dimensions of reparation, allow the formation of a historical and collective memory, but also celebrate the commitment of society and the State not to repeat acts that generate human rights violations in the future. As mentioned above, given the impossibility of reestablishing by material means the conditions in which the victims were before the events occurred, it is important to remember the role of symbols in society and culture and their impact on the construction of social meanings and imaginaries, since symbols are linked to broader schemes of thought. For some authors (Mendoza), symbolic reparation is a developing legal concept that requires art and culture for its effective implementation.

Certainly, artists establish a link with society, by describing facts, events, customs within a historical, political, and social context,

through their works of art; their works can also reveal essential truths of societies, in which power relations and the hegemony of some discourses over others generated violence and violation of rights (Sierra 31). In this sense, it is important to consider artistic expressions that denounce the violence present in a given era, as they can become a support mechanism to communicate alternative truths about the construction of the past and preserve the collective memory. On the other hand, the importance of artistic expressions lies in rescuing social solidarity as a result of the common aesthetic engagement we go through while appreciating them. The novelty of this interdisciplinary perspective is that studies are beginning to be developed in three fields: aesthetic litigation, understood as a mechanism for the defense of human rights through art by victims; cultural practices or cultural heritage; artistic litigation, framed in the broad disciplinary field of art, is conceived as the contribution of works of art to the structuring of guarantees of non-repetition of human rights violations and symbolic reparation, developed in the field of comprehensive reparation to victims of serious and massive human rights violations (Falconí; Mendoza; Sierra 2020).

Effectiveness of the application of the right to memory in Ecuador

In Ecuador, the conjunction between art and the right to memory is still an incipient arena, despite the fact that there is specialized legislation to channel such an effort. Here, some of the national experiences that have sought to correct the oblivion and ratify the truth of the cases of serious human rights violations will be reviewed. In addition to the binding aspects emanating from the Victims Act with some considerations emanating from international *soft law*, a set of recommendations will be formulated in this section to direct the configuration of the Memory Centers in Ecuador and the reparation of gross human rights violations through the arts.

Mandate of the Victims Act and the prosecution of serious human rights violations and crimes against humanity

This law limits its scope of application to victims of human rights violations and crimes against humanity committed between 1983 and 2008, coinciding with the cases that were investigated by the

Truth Commission. As previously mentioned, in 2008 the rights of victims to be repaired in a comprehensive manner were recognized on a constitutional level, a right whose application, according to the Magna Carta, is not limited only to the victims to whom the report of the Truth Commission or the Law refers. A crucial aspect of the Victims Act is the fact that it recognizes the responsibility of the State against the victims as well as "towards Ecuadorian society" (art. 2) and aims to exercise a comprehensive reparation that "restores the victim objectively and symbolically" (ibid., Art. 3). It is important to note that this same law orders the creation of the "Administrative Reparation Program" by the Ombudsman's Office in Ecuador, which will be responsible for implementing reparation strategies for the "beneficiaries of individual measures", who for these purposes will be considered "the direct victims of human rights violations and also their spouses or partners by de facto union and relatives until the second degree of consanguinity" (ibid., art. 5). It is clear that reparation is understood in its two dimensions, individual (only victims and their families up to the second degree of consanguinity) and collective, a provision that is ratified in article 9 of the same normative body, which specifies lines of action that surpass the direct victims as exclusive recipients of this public policy. The Directorate of Reparation is ordered to be responsible for "human rights education and dissemination of the final report of the Truth Commission", as well as the "implementation of symbolic measures and measures of satisfaction", hand in hand with the "line of archive and custody of the documentary memory of human rights violations" (ibid., art. 5). The worrying aspect is that, despite the general provisions ordering the creation of a "Museum of Memory" within ninety days of the entry into force of this law, this has not been fulfilled, having passed 10 years since its publication. During this time, three consultancies were contracted in 2015, 2018 and 2020 to start with the museography design. However, the implementation of the "Museum of Memory" has not materialized. The few actions that have been carried out do not take into account the opinion of the victims, who claim that they have not participated in their design, which would have added yet another layer of invisibility. The Museum is expected to be installed in the Manuela Sáenz District, where the Pichincha Criminal Investigation Service -SIC 10- operated and which, according to the report of the Truth Commission, was one of the main places for the execution of torture, isolation, extrajudicial detentions and other practices that violated rights during the period from 1983-2008.

The Office of the Ombudsman of Ecuador carries out, with the support of the mandate of the Victims Act, a program for the reparation of victims of human rights violations, which is executed with various governmental institutions, civil society organizations, as well as with direct victims and their families. Some of the reparation strategies include the socialization of the report of the Truth Commission, the promotion of human rights and the implementation of symbolic and immaterial reparation measures, which have been dearly lacking in the Latin American country. While this institution is not the only source of initiatives to recover the memory of human rights violations, it has become the leading institution at the national level for their fulfillment. However, some of the reparative strategies, as will be seen in the following table, remain rudimentary, in the sense that they do not go beyond the merely enunciative scope (commemorative plaques), and therefore do not manage to configure events with an aesthetic or artistic value sufficient to move the community or re-signify the memory. That is where the articulation carried out by a Museum or other institutional bodies is needed, to establish political and aesthetic guidelines to avoid incongruity (see Table 1).

Table 1.- *Points of memory in Ecuador.*

Place	Type	Cases commemorated	Creation
Memory point at the Heritage Cemetery of Cuenca	Sculpture of the symbol of Human Rights and a small square.	The cases of Damián Peña, Edwin Barros, Carlos Salamea, Johnny Montesdeoca, Benito Bonilla, Leonardo Segovia, Luis Ortega and Ricardo Merino, killed by police members.	On the initiative of the Committee of Relatives and Victims Killed by the Police in collaboration with various NGOs and the Municipal Cemetery Company. **Date created:** December 11, 2015.
"The cry of memory" outside the Attorney General's Office. Quito	Latin American muralism of expressionist style created by the artist Pavel Egüez.	The victims of the governmental repression of the decades of the 70s and 80s lived in the Southern Cone by dictatorial or oppressive regimes. The heads of the dictatorial regimes of the twentieth century in Argentina, Chile and Ecuador are depicted. Another portion of the work pays tribute to human rights defenders such as the mothers of the Plaza de Mayo or Jaime Roldós.	Galo Chiriboga Zambrano, Attorney General of the State inaugurates this exhibition in celebration of Human Rights Day. **Date Created**: December 10, 2014.

Place	Type	Cases commemorated	Creation
Memory point of the Illingworth Passage. Guayaquil	Commemorative plaque	Fybeca case, Wellington Peñafiel case, Víctor Alvarado and victims of 21 other cases of serious human rights violations documented by the Truth Commission of Ecuador for having been tortured, disappeared, extrajudicially executed or arbitrarily detained.	The Ombudsman's Office of Ecuador, the Secretary of Culture and Heritage, the Government of Guayas and the University of the Arts in a coordinated manner. **Date Created:** December 01, 2017.
Memory point "La Estancilla" Atacames	Commemorative plaque	The cases of Pedro Dimas Loor Vera, former *Taura* commando and his comrades in the ranks whose rights were vexed by elements of the State as detailed in the report of the Truth Commission.	Project of the Ombudsman's Office, together with the GAD of the Tosagua canton, the Ángel Pedro Giler Parish Council and the Ministry of Culture and Heritage. **Date Created:** November 29, 2017.
Memorial of the "El Arbolito" park Quito	Abstract sculpture by the artist Dolores Andrade.	The cases of Consuelo Benavides, Jaime Otavalo, Gustavo Garzón, and the disappearance of the brothers Santiago and Andrés Restrepo in the hands of State agents during the government of León Febrés Cordero.	National Art Contest for Memory. **Date Created:** July, 1997. **Withdrawal date:** August 26, 2016.
Memory point "Luis Casierra" Atacames	Commemorative plaque	The case of Luis Eduardo Casierra who was extrajudicially executed by navy officials. This case is documented by the Truth Commission of Ecuador.	Project of The Ombudsman's Office of Ecuador. **Date Created:** November 19, 2017.
Memery point "Jiménez brothers" Lago Agrio	Commemorative plaque	The Jimenez brothers were detained by the Ecuadorian military, who accused them of being terrorists. For three days they were subjected to various forms of torture. This case is documented by the Truth Commission of Ecuador.	Project of the Ombudsman's Office, together with the GAD of Sucumbios and the Ministry of Culture and Heritage. **Date Created:** January 30, 2016.

Place	Type	Cases commemorated	Creation
Audiovisual installation called "Pathosformel"	Pathosformel by the artist Miguel Angel Murgueytio	The cases Quinta Leonor, Sabanilla, Freddy Aponte, Stalyn Armijos and Omar Burneo, cases of serious human rights violations documented by the Truth Commission of Ecuador for having been tortured, disappeared or arbitrarily detained.	Project of the Ombudsman's Office in coordination with the artist Miguel Angel Murgueytio, in which photographs, texts, and testimonies shared by the victims in workshops of minimal memories were used, highlighting the importance of their life projects. https://www.youtube.com/watch?v=JqpfGBWrrok **Date created:** November 7, 2018. **Withdrawal date:** November 12, 2018.
Musical Compilation	"El infiernillo: 1984-1988"	Tribute to Yuri Moncada, former member of *Alfaro Vive Carajo* and *Batallón América*, who was extrajudicially executed in Colombia. Case documented by the Truth Commission of Ecuador	Project of the Ministry of Culture and Heritage to bring together leftist performers and singer-songwriters of the 1980s that combines classic and unreleased songs related to the violation of human rights that occurred in the country and the violation of human rights that occurred in the 1980s, and unreleased songs related to the violation of human rights that occurred in the country between 1984-2008. **Date Created:** December, 2012.

Criteria for the creation of Memory Centers in Ecuador

The sites of memory imply, according to the Institute of Public Policies on Human Rights of MERCOSUR, an "obligation of means and not of results, which is independent and complements the obligations to investigate and judge" (11) in that they socialize a truth that is necessary to be appropriated by society as a whole. The truth that society has the right to know is not only one that is formal and bureaucratic, like the one that arises from a judicial process, but also the one that allows us to evoke and build memory from a bottom-up perspective. Truth thus acquires a more complex meaning than the mere discovery of factual evidence and means confronting or taking charge of the past (8). This vision conceives the expertise in the prosecution of crime intertwined with the strategies of immaterial reparation in terms of the achievement of justice, since the latter constitutes a fundamental weapon for the fight against impunity; understood not only as a lack of prosecution of the accused, but as the social and widespread oblivion of those who injured rights. Because "a people's knowledge of the history of its oppression belongs to its heritage and, as such, must be preserved by appropriate measures in the name of the State's duty to memory" (13). Such intangible heritage prevents, in turn, the subsequent generation of revisionist or denialist discourses, as long as it is structured through educational or pedagogical tools of memory, an achievement that would be obtained if the information is shared through the operations of a Museum or Center for the Commemoration of Victims.

The importance of memory as a behavioral guidance is illustrated since the enterprise of the Jesuit Mateo Ricci during the XVI century, who in his "Palaces of Memory" combined the Western tradition of mnemonics and the imagery of Christianity to think of the importance of establishing the past to chart the future. This tension was symmetrical to the contradiction between the establishment and sustainment of native and European memories that arose in the Americas, a conflict that was saliently territorialized, as Indigenous places of worship later became the niches of the new Catholic religion, and where images were the weaponized instruments (Guerrero 16). But images, as pedagogical instruments with the potential to establish memory, are not fully constituted as such as long as they are expressed through words, reports, communiqués, memoranda or

any other text materialized on a written medium or archive, which might even reify the distance between the past as a collection of passive facts and our contemporaneity (Donoso). This information only has the opportunity to be enacted through art's agency; a concept or an idea elevated through metaphor to an aesthetic language, a composition, a gesture or a movement that, whether figurative or abstract, appeals to the viewer not only through reason, but also perceptually, through the senses, imagination and their emotional entailments. In Benjamin's philosophy, the image does not represent a mere rhetorical device to illustrate or emphasize an idea; rather, it has an expressive force of its own, a potential derived from the fact that its form and content are intrinsically linked (Pinilla 290). Such images will have to be designed, with the greatest possible participation of the victims and their families, so that they can be exposed to a wider audience, with a view to structuring a content that serves as an educational tool to operate in three distinctive ways: prevention of new situations of violation of rights; empowerment on the rights that protect the community; and as a tool to strengthen processes of reform and democratization of institutions. When the points of memory are located in places where the abuses were committed, States must adopt judicial, legal, administrative, or any other decisions that are necessary to guarantee their physical security; at the same time, it is not advisable to alter the probative value that some properties, surroundings or facilities could contain. Finally, and in consideration of the fact that many memory centers also serve as centers for archiving evidence or documents with an evidentiary value, Pablo Greiff, special rapporteur of the United Nations, has recommended that their access become public and that, far from being protected, they should be offered to academics, thesis writers and various researchers, so that knowledge about atrocities can mobilize a general audience, as well as generate specialized reflections and scholarly analysis.

Before this study, victims' collectives and their allies (including the two authors of this paper) filed an appeal for non-compliance before the Constitutional Court of Ecuador in 2021. On February 15, 2023, this court declared that the Ministry of Culture and Heritage failed to comply with the Second General Provision of the Victim's Act, an express obligation that gives it the responsibility for the construction of the "Museum of Memory". The Ministry has a period of one year, from the date of notification of the sentence, for its

construction, and must submit quarterly reports on the progress of the project. Likewise, the Ministry of Finance was urged to provide all the necessary facilities.

Conclusions

Based on the need for comprehensive reparation, the monetary dimension is an important aspect within the processes of restitution of victims; however, by itself it does not manage to correct all the consequences caused by a serious violation of human rights, since the impact suffered does not fall solely on the patrimony of the people. This nuance is even more relevant for those victims whose relatives are still missing. If the debate is to be moved forward, it is important to grasp the heterogeneity of meanings that victims and their relatives assign to this type of measures, beyond a naïve or generalizing conviction that remembrance is inherently good. The symbolic reparations measures seek the acknowledgement and recognition of victims through the redemption of honor, the recovery of truth and good name, not for the victim in isolation, but as a subject of rights that is part of a social fabric, because in its integration within it, these rights take on their true significance. The value of such measures lies in the fact that allowing the victim and their family to rectify their truth alerts their entire community about the crime and prevents similar acts of violation in the future. Regarding art as an effective tool for the transfiguration of memory, and based on the aesthetic theory revised, it follows that reparative measures that do not configure images, but only make linguist references to honor or memory, do not suffice to invoke the deeper and sensitive commonality of artistic appreciation. Despite their social and political value, these textualist measures are not effective in getting society to incorporate a new narrative into its collective history, due to the depersonalization of the victims, the suppression of their image with symbolic value and their inability to move beyond exhaustive verbalizations. Examples of this phenomenon are the various commemorative plaques that have been erected in Ecuador and that are one of the most frequent methods when it comes to recovering the victims in their moral dimension. About the need for a Museum and specialized museography in Ecuador, we have identified a flagrant breach of the mandate of the Victims Act, which dictates the immediate creation of a Memory

Center in Ecuador. It can be said, from a pragmatic stance, that such an absence generates a blurring of the few experiences of memory recovery that occur in honor of the victims of serious human rights violations in the country, which end up being isolated efforts; a diaspora of acts that do not find connection with each other and that claim, from their isolation, certain cohesive parameters, at technical, political, aesthetic and legal levels, that could be emanated by the long-awaited Memory Center in Ecuador. As of today, theater and the performing arts in Ecuador constitute an underexplored source of memory-building by the government. Its incorporation has been described in this paper as a suitable tool to allow for the individual remembrances of the victims of human rights violations to finally permeate the consciousness of an entire country whose past still waits to consolidate its own aesthetics of memory.

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Works cited

Abramovich, Victor. "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System". *Journal of the Faculty of Law of the Pontifical Catholic University of Peru*, no. 63, 2009, pp. 61–138.

United Nations High Commissioner for Human Rights. "Basic Principles and Guidelines on the Right to a Remedy and Reparation." OHCHR, 2005.

Andruchow, Mary. *Conceptual axis: Art as a materialization of myth and ritual action*. Faculty of Fine Arts of the University of La Plata, 2017.

Arcos, Ricardo. "Aesthetics and their political dimension according to Jacques Rancière". Nómadas, 2009.

Benjamin, Walter. *The work of art in the Age of Mechanical Reproduction*. Itaca, [1935] 2003.

Inter-American Court of Human Rights. Case of Massacres of El Mozote v. El Salvador, 2012.

Inter-American Court of Human Rights. Case Reverón Trujillo v. Venezuela, 2009.

Derrida, Jacques and Bernard Stiegler. *Echographies of Television: Filmed Interviews*. Polity Press, 2002.

Donoso, Esteban. "Ecos y susurros: re-narrar la memoria de la danza en Quito, Ecuador." *post(s)*, vol. 5, 2019, pp. 56-69.

Dubatti, Jorge. *Philosophy of Theatre III: The Theatre of the Dead*. Atuel, 2014.

Greeley, Robin Adèle, Michael R. Orwicz, José Luis Falconí, Ana María Reyes, Fernando J. Rosenberg, and Lisa J. Laplante. *The Symbolic reparation: Culture and art for nine cases of human rights violations*. Universidad Externado de Colombia, 2020.

Greiff, Paul. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition*. United Nations Press, 2014.

Grimoldi, Maria Inés. *Memory and remembrance in Walter Benjamin's work: Resignifying the past, looking at the present, conquering the future.* Harold Conti Cultural Center of Memory, 2010.

Guerrero, Freddy. *Memory and exceptionality in Alto Sinú: The limits and scope of re-presentation.* Pontificia Universidad Javeriana, 2009.

Institute of Public Policies on Human Rights. "Fundamental principles for public policies on memory sites", MERCOSUR, 2012.

Mendoza, Liliana. *Culture and art for nine cases of human rights violations, studies on symbolic reparation*. Universidad Externado de Colombia, 2020.

Michel, Johann. *The Reparable and the irreparable. Being Human in the Age of Vulnerability.* Lexington Books, 2021.

Nino, Carlos. *The Judgment of Absolute Evil*. Ariel, 2006.

Nora, Pierre. *The places of memory*. Trilce, 2008.

Ordoñez, Valentina. "The Mampujan knitting's: a reading from a symbolic reparation perspective". *Andamios*, vol. 14, 2018, pp. 291-343.

Organization of American States. *Education, memory and human rights: Pedagogical guidelines and recommendations for their teaching.* Ministry of Education of Argentina, 2010.

Pinilla, Ricardo. *The spaces of memory in the work of Walter Benjamin.* Universidad Pontificia de Comillas, 2010.

Rancière, Jacques. *The future of the image*. Prometheus, 2011.

Reyes, Mate. *Midnight in History: Comments on Walter Benjamin's Theses on the Concept of History*. Trotta, 2006.

Rousset, Andrew. "The concept of integral reparation in the jurisprudence of the Inter-American

Court of Human Rights." *International Journal of Human Rights*, vol. 1, no. 1, 201, pp. 59–79.

Sierra, Yolanda. "Relations between art and human rights." *Rule of Law* 32. Universidad Externado de Colombia, 2014.

Sierra, Yolanda. *Symbolic reparation: Jurisprudence, songs and fabrics*. Universidad Externado de Colombia, 2018.

Sierra, Yolanda. *General theory of symbolic reparations*. Universidad Externado de Colombia, 2020.

Van Boven, Theo. *Victims Rights to a Remedy and Reparations: The New United Nations Principles and Guidelines*. Concluding remarks: conclusions and recommendations. Report 1, 1992.

Authors' biographies

Sixtine Bérard's research examines the visual representation of law enforcement in European performing arts, from the emergence of the 'modern' state-bound police in the 19th century to the present day. A central focus of this inquiry is to determine whether cultural portrayals of the police merely replicate dominant self-representations or if they offer a space for deeper and critical exploration of the essence of policing. This study investigates the performative, discursive, and technological motifs – 'topoi' – used to stage the police. By adopting a cross-temporal and intermedial approach, this research aspires to make a substantial contribution to a more comprehensive and critically informed understanding of policing, performativity, and visual culture in Europe.

Lily Climenhaga wrote the dissertation *(Re)Creation Processes: Milo Rau and the International Institute of Political Murder* in a joint degree between the University of Alberta and Ludwig-Maximilians-Universität and was the co-editor of *Theater*'s special 2021 edition on Milo Rau. Lily is currently undertaking the FWO-funded postdoctoral project "Institutionalized Resistance: Milo Rau's NTGent Period" (1290323N) at Universiteit Gent. Lily is a dramaturg, editor, blogger (*https://lostdramaturgininternational.wordpress.com*), critic, translator, and occasional stage manager.

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Rocío Zamora-Sauma is an associate professor in the Philosophy Department at the University of Costa Rica and a researcher at the Institute for Philosophical Research (INIF). In 2016, she received the DAAD (Deutscher Akademischer Austauschdienst) scholarship to pursue doctoral studies at the Latin American Studies Institute of the Free University of Berlin, focusing on performativity and theatricality in the Ixil Genocide Trial in Guatemala. She also completed the Erasmus Mundus Europhilosophie Master's program in Luxembourg, Toulouse, and Louvain-la-Neuve.

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