

# Truth, Trial, Tragedy: The Cultural Frame of Criminal Law

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## Prologue

CHORUS OF PROFESSORS

Dear audience! We will present to thee  
The critique of Law as a Tragedy.  
Illuminating for the very first time  
The significant Pashukanis crime.

His dialectical throne  
Dethroned sans due process  
His work got banished  
For a long time vanished  
Now open for access:  
Sensation!  
Innovation!  
Revelation!

Truth?

Dear scholars, so highly gifted  
The meaning of *truth*  
Has so often shifted  
Throughout the course of our story  
That it must be said  
– We are truly sorry –  
To be but carefully disguised  
Nothing but the other  
Of a Faustian power.

A power which would  
Obsessively understood  
Ever do good, but end in terror  
Like all ideas of great revolution  
In their forceful execution  
Reveal one substantial error:  
Forgetting the crucial conjunction  
Of subjective rights  
and their securing function.

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\* Martin-Luther-Universität Halle-Wittenberg. I wish to thank Markus Dubber and Simon Stern for their generous invitation to contribute to this special issue and for their meticulous editing, as well as Samraggi Hazra. I am also grateful to Igor Shoikhedbrod for valuable feedback on an earlier draft and to Greta Olson for supporting my work.

Bless you! Comrades or not  
 Hundreds of thousands have been shot  
 So why Pashukanis? You may ask  
 What is so special about his lot?

Well, let us finally quote Marx  
 The first time it is as tragedy  
 The second time a farce.  
 But Marx  
 Might also have been wrong.

Therefore, as we move along  
 With the course of presentation  
 Where the tormented spirits  
 Masters of dreams and adaptation  
 Hazardously leave  
 Their deep-buried graves  
 And start scratching the wound  
 Which still aches  
 We can only recommend:  
 Judge for yourselves.

Murdered! Denunciator!  
 People's traitor!  
 Nobody will be able to tell you later  
 Who is victim and who is perpetrator.  
 So come on ghosts, we give thee right  
 Come on, out into the stage light  
 Show yourselves, do not hide.<sup>1</sup>

## I. Introduction: Rational Punishment, Affects, Political Theater

Why should we think about political theater when we think about criminal proceedings? Should both disciplines not be strictly separated? Are theater and literature not harmless utopian fictions, while a criminal trial is considered to be of utmost reality, because it has the power to be *enforced*?<sup>2</sup> Traditional scholarship, for example, regards legal studies as a real, sturdy, rock-solid discipline because law has a fixed place in social life, whereas literature is considered utopian because, unconcerned with concrete social problems, it can serve as ethical education for lawyers.<sup>3</sup> This way of thinking appears logical. After all, are modern criminal proceedings not guided by rationality and objectivity, while theater is guided by

<sup>1</sup> Based on Daria Bayer, *Tragödie des Rechts* 30-31 (2021) (<https://www.jstor.org/stable/jj.423477>) (open access).

<sup>2</sup> See Robert Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1618-19 (1986).

<sup>3</sup> Alexander Baur, *Law and Literature: Zu den Grundlagen eines Dialogs der Disziplinen*, in *Ware Mensch: Die Ökonomisierung der Welt* 67, 70-71 (Heinz-Dieter Assmann ed., 2014); see also Simon Stern, *Law, Literature, and The Legal Imagination*, 35 *Yale J.L. & Human.* 211, 211-12 (2024); Austin Sarat, *From Charisma to Routinization and Beyond: Speculations on the Future of the Study of Law and Literature*, in *New Directions in Law and Literature* 59, 61 (Elizabeth S. Anker & Bernadette Meyler eds., 2017) (observing that “law schools . . . score . . . higher in the prestige and power hierarchy within universities than departments of English, classics, or comp lit”).

subjective affects<sup>4</sup> and interpretations? And is it therefore not dangerous to blur the lines between the disciplines,<sup>5</sup> threatening the accomplishments of both disciplines,<sup>6</sup> especially the protection of procedural rights achieved throughout history?

These concerns are legitimate and important. We should take them very seriously, and I will address them shortly (Part II). However, dualistically contrasting law as the real, powerful, on one hand, and literature as the ethical, utopian, on the other, is the expression of an uninformed view of literature. If we instead cease to use “literature,” “theater,” and “the arts” in general not only coarsely as an object of projection for everything that might be missing in the law, but interest ourselves in the specific means, techniques, and narrative values of a particular medium,<sup>7</sup> it becomes apparent that literature or theater is not always utopian or ethical. On the contrary, literature and theater might not be more, but less ethical than—or just as unethical as—the status quo of law. The arts can be—and historically have been—used as “a vehicle for class and gender ideologies.”<sup>8</sup> Accordingly, we should retain a critical distance to what we read and see, whether it is a legal text, a book, or a play.

Against this background, as I want to argue in this paper (Part III), political theater in the tradition of Greek tragedy and the dialectic theater of Bertolt Brecht gains special significance. It not only allows spectators to retain a critical distance to what they see on stage. It can also serve as a “lightning rod”<sup>9</sup> for criminal proceedings and their critique. More precisely, political theater, by engaging spectators’ and actors’ affectual and critical sides, can help to point out the ambivalences and gaps in past, present, and future criminal proceedings. It can thus help to critically reassess and re-actualize the cultural foundations of criminal proceedings, their legitimization, and their limits. Political theater can serve as a real—as opposed to a fictional—place where people can come to experience negative affects like fear, rage, and disgust, but also positive affects like joy, hope, and a sense of community. Channeling those affects and emotions in theater can help to rationalize the discourse about punishment and to focus on the core tasks of punishment. Also, in political

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<sup>4</sup> In cognitive psychology, “affect” is the superordinate category for describing the experiential state of feeling. “Emotions” and “moods” can be distinguished as subcategories mainly by their duration. Affective states can be distinguished “along the dual dimensions of pleasure and arousal.” Karen Niven, *Affect*, in *Encyclopedia of Behavioral Medicine* 49, 49 (Marc D. Gellman & J. Rick Turner eds., 2013).

<sup>5</sup> Julie Stone Peters, *Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction*, in *The Oxford Handbook of Law and Humanities* 198, 212-13 (Simon Stern et al. eds., 2020).

<sup>6</sup> On the risks of interdisciplinarity, see, e.g., Richard A. Posner, *Law and Literature* 6-7 (3d ed. 2009); Peters, *supra* note 5, at 210-13 (citing Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, in *New Directions in Law and Literature*, *supra* note 3, at 160, 161 (arguing that “disciplines still matter, both as engines and impediments”)).

<sup>7</sup> See Stern, *supra* note 3, at 212.

<sup>8</sup> Greta Olson, *De-Americanizing Law and Literature Narratives: Opening Up the Story*, 22 *Law & Literature* 338, 358 (2010).

<sup>9</sup> I thank my colleague Simon Kneip for creating this metaphor during one of our countless discussions on the topic; for a deeper account of the interactions of punishment, affects, and mythos, see his forthcoming Ph.D. thesis, *Ironie der Legalität: Anmerkungen zum Urteilsbegriff im Anschluss an die neuere deutsche Rechtskritik* [Irony of Legality: On the Concept of Judgment in Recent German Legal Criticism].

theater, structures of injustices which transcend the individual's case can be made visible and opened to discussion among a larger public. Thus, political theater can encourage spectators and actors to work towards real criminal-political change.<sup>10</sup>

To make this argument, I will—after having addressed concerns about the interdisciplinary interaction of theater and criminal proceedings (Part II)—present some theoretical reflections about the means of political theater and tragedy for addressing the ambivalences and gaps of criminal proceedings (Part III). I will then exemplify those theoretical reflections with some concrete examples of my practical theatrical work, inviting readers to make their own judgment about the use of political theater for criminal law (Part IV).

## II. Some Concerns First

We live in politically charged times, where extreme right-wing parties and racist ideologies are on the rise (again). Even in Germany, where the horrors of the Holocaust have, for a long time, served as reminders of “never again,” the right-populist and -extremist *Alternative for Germany (AfD)* has a real chance to come to power.<sup>11</sup> Academics, lawyers, and artists alike are therefore under high pressure and have a great responsibility of securing our modern social democracy and its legal safeguards.<sup>12</sup> Let me hence begin by clarifying three things:

### A. Truth and Interpretation

First, theater and criminal law today are two different disciplines—and for good reason. Criminal proceedings aim at authoritatively and bindingly establishing the “truth,” i.e., the “true facts”<sup>13</sup> of a case, to determine the applicable sentence for an individual's act.<sup>14</sup>

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<sup>10</sup> See also Schau-Prozesse: Gericht und Theater als Bühnen des Politischen (Katrin Wilhelms & Stefan Arnold eds., 2022).

<sup>11</sup> Greta Olson, *From Law and Literature to Legality and Affect 1* (2022).

<sup>12</sup> Cf. *id.*; see also Richard Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (1989).

<sup>13</sup> As Simon Stern points out, “facts” and “law” must be analytically separated and have a different narrative quality; liberal criminal lawyers often refer to analytical philosophy to state that only facts can be “true,” epistemologically speaking, not laws. Simon Stern, *Factuality, Evidence and Truth in Factual Narratives in the Law*, in *Narrative Factuality* 391, 391-92 (Monika Fludernik & Marie-Laure Ryan eds., 2020); see also Sebastian Seel, *Wahrheit im Strafprozess* (2021). However, laws may be considered as “true” or “false” from a sociological standpoint, as the young Karl Marx famously argued. Karl Marx, *Proceedings of the Sixth Rhine Province Assembly, Third Article: Debates on the Law Concerning the Theft of Wood*, in *The Dispossessed: Karl Marx's Debates on Wood Theft and the Right of the Poor* 59, 65 (Robert Nichols trans., 2021) (claiming a “customary right of poverty” as an “inalienable right” or “occupancy right”); see Daniel Bensaïd, *The Law on the Theft of Wood and the Right of the Poor*, in *id.* at 5, 13.

<sup>14</sup> See German Code of Criminal Procedure § 244(2) (“To establish the truth, the court ex officio extends the taking of evidence to all facts and means of proof which are relevant to the decision.”); see also Rome Statute arts. 54(1)(a) (“The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally . . .”) & 69(3) (“The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”).

Theater, in contrast, is not concerned with sentencing an individual. Furthermore, it aims not to establish an *officially binding narrative* about what happened; it is rather an invitation for actors and spectators to subjectively interpret the facts performed by or presented to them—it can be a catalyst for “the subjective side of social relations.”<sup>15</sup> The dialectical truth of theater necessarily contains the possibility of other interpretations. Theater therefore cannot and should not replace modern criminal proceedings, with their balanced ways of establishing the true facts of a case while at the same time taking into consideration the procedural rights of the accused (e.g., the presumption of innocence, the right to a defense, and the right to cross-examine witnesses).<sup>16</sup>

### **B. Framework Conditions**

Second, legal truth found in a criminal trial is not absolute or set in stone for all time. Rather, it depends on the framework conditions of the political system that installs the proceedings<sup>17</sup> and decides on admissible evidence and the role expectations in court.<sup>18</sup> This becomes especially visible in international criminal proceedings, where the legitimacy of a trial<sup>19</sup> is often rejected by the accused as “mere victors’ justice.”<sup>20</sup> Theater is not (or at least not in the same way)<sup>21</sup> dependent on those framework conditions, and it is especially not bound by the restrictions of the formal rules and roles in the criminal process. Theater therefore has the freedom to break (role) expectations, to show the malleability of legal rules and roles, and to open the possibility of their redefinition. Theater shows that other

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<sup>15</sup> See Richard Johnson, *What Is Cultural Studies Anyway?*, 16 *Social Text* 38, 43 (1986); see also Sarat, *supra* note 3, at 63 (linking this approach of cultural studies to law and literature).

<sup>16</sup> These rights have become an important element in Civil Law Systems (traditionally associated with an inquisitorial method of truth-finding) as well as in Common Law Systems (traditionally associated with an adversarial model of establishing the truth). See Thomas Weigend, *Should We Search for the Truth, and Who Should Do It*, 36 *N.C. J. Int’l L. & Com. Regul.* 389, 400 (2011). Due to the influence of international human rights instruments, both systems seem to progressively merge. This becomes explicit in international criminal law in the narrow sense (“Völkerstrafrecht”). The Rome Statute, as a compromise between different legal systems, offers a hybrid form of adversarial and inquisitorial elements (e.g., art. 69). See *id.* at 401-08; Rome Statute of the International Criminal Court, *Article-by-Article Commentary art. 69* (Kai Ambos ed., 4th ed. 2021).

<sup>17</sup> See Michel Foucault, *La vérité et les formes juridiques*, 10 *Chimères: Revue des schizoanalyses* 8 (1990) (English translation in Michel Foucault, *Power: Essential Works of Foucault, 1954-1984* (James D. Faubion ed., 2001)).

<sup>18</sup> Martha Merrill Umphrey et al., *Introduction: Law and/as Performance*, in *Law and Performance* 1, 5 (Martha Merrill Umphrey et al. eds., 2018).

<sup>19</sup> On the issue of *ius puniendi* in International Criminal Law, see Kai Ambos, *Punishment Without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law*, 33 *Oxford J. Legal Stud.* 293 (2013).

<sup>20</sup> Martti Koskenniemi, *Between Impunity and Show Trials*, 6 *Max Planck Y.B. U.N. L.* 1, 5, 9, 16, 32 (2002).

<sup>21</sup> In capitalistic society, institutionalized theater is also bound to external economic and political framework conditions, as well as the internal demands of the field. See Peters, *supra* note 5, at 211; Daria Bayer, *Reconstructing the House of Law*, in *Critique and Law* (Jochen Bung et al. eds., forthcoming) (draft online: <https://perma.cc/V52E-LVEL>).

ways of addressing injustices and dealing with violations are possible—for better or worse. Theater can thus reveal the gaps in, as well as the safeguards of, criminal proceedings. And it can do so while simultaneously entailing and embracing the possibility of other interpretations, of missing something, of not exhaustively covering the subject. In other words: it can try out and fail.<sup>22</sup>

### C. Responsibility of Political Theater

This leads me, third, to emphasize that, even if political theater—unlike a criminal proceeding—has the freedom to fail, creating it remains a task that carries a high degree of responsibility.<sup>23</sup> While it may not be the same responsibility as befitting a judge or a prosecutor, whose duties of establishing true facts come from a triple responsibility towards the accused, the victims, and the public, political theater makers still have a responsibility of truth towards the public (and arguably also towards the victims or survivors of a crime). The artistic means of theater as well as other forms of visual media such as photographs or memes can have a highly suggestive effect on the public, and thus are always open to the risk of being misused by authoritarian, anti-democratic tendencies.<sup>24</sup> Furthermore, the appropriation or misrepresentation of victims' suffering without their consent, along with insufficient criminal proceedings, can add to the “secondary victimization” of crime victims.<sup>25</sup> We should be worried about this risk, and be clear that political theater makers, though not under an obligation by law, are under a moral obligation to the truth of social facts—if not historical truth—while producing dialectical truth.<sup>26</sup>

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<sup>22</sup> Certainly, texts can also do that. A marvelous example is Peters, *supra* note 5. Peters enjoyably lets her readers be part of her multiple attempts of mapping the field of law and performance, thus performing in her text what she is writing about (the impossibility or rather the unwillingness of mapping the field).

<sup>23</sup> Thanks to Maximilian Amos, who reminded me of this important point in an interview (<https://perma.cc/8HRL-F4ZR>).

<sup>24</sup> Olson, *supra* note 11, at 5.

<sup>25</sup> See, e.g., Uli Orth, Secondary Victimization of Crime Victims by Criminal Proceedings, 15 Soc. Justice Res. 313, 314 (2002); Leo Montada, Injustice in Harm and Loss, 7 Soc. Justice Res. 5 (1994); with focus on rape victims, see, e.g., Rebecca Campbell & Sheela Raja, Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence, 14 Violence & Victims 261 (1999); Antony Pemberton & Eva Mulder, Bringing Injustice Back in: Secondary Victimization as Epistemic Injustice, *Criminology & Criminal Justice* (2023) (<https://doi.org/10.1177/17488958231181345>).

<sup>26</sup> See “A Note on the Historical Accuracy of this Play” by Arthur Miller at the beginning of his play *The Crucible*:

This play is not history in the sense in which the word is used by the academic historian. Dramatic purposes have sometimes required many characters to be fused into one; the number of girls involved in the “crying-out” has been reduced; Abigail’s age has been raised; while there were several judges of almost equal authority, I have symbolized them all in Hathorne and Danforth. However, I believe that the reader will discover here the essential nature of one of the strangest and most awful chapters in human history. The fate of each character is exactly that of his historical model, and there is no one in the drama who did not play a similar—and in some cases exactly the same—role in history.

I thus understand political theater as a critical practice which reflects, complements, and imagines past, current, and future criminal laws and systems. The practice of theater follows different rules than criminal proceedings, but it still follows rules of morality as well as rules of stagecraft. A theatrical play may not be right or wrong, but it may be touching or unmoving, well-made or flawed, complex and accurate, or deterrent and misrepresentative.

### III. Tragedy and Other Forms of (Political) Theater

Why am I speaking only of political theater and criminal proceedings, and not, as may be more common, “law and literature” in general? What is specific about the interaction of (political) theater—or more precisely, of tragedy—and criminal proceedings?

#### A. *The Means of Political Theater*

What is political theater? This question is not easy to answer. Theater as an umbrella term can point to different forms of written theatrical plays (tragedy, comedy, documentary) as well as to different modes of production (institutionalized or free scene) and different ways of (non-)spectatorship (theater stage, site-specific performance, invisible theater, didactic play). From a Brechtian perspective, theater becomes political if it addresses general questions or current issues of social or political relevance, and does so with the intent to confront the spectator with the issues so vividly as to sow the spark in her to engage in political action.<sup>27</sup> Of course, the line between when theater is “political” and when it is not is not clear.<sup>28</sup> Still, as a working definition, I want to echo Susan Sontag’s insight that theater—as art in general—loses its political quality when it is

motivated by a flight from interpretation. To avoid interpretation, art may become parody. Or it may become abstract. Or it may become (“merely”) decorative. Or it may become non-art.<sup>29</sup>

I think that this definition is very fitting for both theater plays and academic texts alike. Often, I am under the impression that when a critical scholar is too afraid to make a specific point, she flees into abstractedness or sharp irony, using so many complicated words that readers will be sidetracked from grasping any specific meaning.<sup>30</sup> Or, as I often see in theater, many distractions such as strobe effects, live camera, and nudity are used to shock the

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As for the characters of the persons, little is known about most of them excepting what may be surmised from a few letters, the trial record, certain broadsides written at the time, and references to their conduct in sources of varying reliability. They may therefore be taken as creations of my own, drawn to the best of my ability in conformity with their known behavior, except as indicated in the commentary I have written for this text.

<sup>27</sup> Marc Silbermann, *Die Tradition des politischen Theaters in Deutschland*, 23–24 *APuZ: Aus Politik und Zeitgeschichte* 13 (2006).

<sup>28</sup> See Michael Kirby, *On Political Theater*, 19 *Drama Rev.* 129 (1975).

<sup>29</sup> Susan Sontag, *Against Interpretation*, in *Against Interpretation and Other Essays* 3, 10 (2009).

<sup>30</sup> Perhaps this is a feature of German academia in particular.

public, but it remains unclear what specific message should arise from this (and of course, those effects have become so common on theater stages, that they may not even be shocking anymore). Political theater might also use those effects, but with the aim to support a message. By being specific and explicit about the story, it does not allow spectators to not have an interpretation.

In this regard, it is important to note that “political theater” infers the *practice of theater*, as opposed to theater as a (mere) written form of literature. That means that political theater is a *place where people actually meet*. Where actors enter into a *special form of communication* with each other and the audience. They engage in a thought experiment together: They know that what is shown is not reality, not the absolute truth. But actors and spectators alike are willing to pretend for *the duration of the performance* that what is being shown is true. In this way, the representation is dialectical, because it always entails the possibility of another interpretation of the facts. Theater can achieve this dialectical effect through its specific artistic means—such as music, video projections, or intentionally breaking out of roles and directly engaging with the public.<sup>31</sup> I can do this, for example, by staging a dialogue between two people and simultaneously projecting a video with opposing content. Or, I can do this by separating body and voice: one person speaks a text, while another reacts to that text with her body. This makes it clear that what is happening on stage is always only part of the truth and that spectators are invited to critically question what they see on stage.

### **B. Tragedy and Criminal Proceedings**

One of the forms of theater that is closely connected with criminal law is tragedy. Tragedy and criminal law, especially international criminal law investigating “the most serious crimes of concern to the international community as a whole” (Preamble para. 4, Rome Statute), both center on unresolvable conflicts. Furthermore, their structures have some similarities. Michel Foucault identified the origin of the modern criminal process in the tragedy of *Oedipus Tyrannus*<sup>32</sup> by Sophocles. There, in Foucault’s structural interpretation, the democratic form of knowledge defeats the tyrannical concentration of power-knowledge in one person.<sup>33</sup> Foucault concludes that the method of “enquête” (investigation)—of hearing out different witnesses and taking each testimony equally seriously<sup>34</sup> (regardless of whether a god, a king, or a normal citizen gives it)—is established within the

<sup>31</sup> Called “breaking of the fourth wall” in theater. On Brecht’s various artistic methods, see generally Bertolt Brecht & Elisabeth Hauptmann, *Gesammelte Werke* (1967); Fredric Jameson, *Brecht and Method* (1998); Laura J. R. Bradley, *Brecht and Political Theater: “The Mother” on Stage* (2006); John J. White, *Bertolt Brecht’s Dramatic Theory* (2004); Bayer, *supra* note 1, at 191-92.

<sup>32</sup> The meaning of the Greek *τύραννος*—while often translated as “rex” or “king”—is vividly debated. See Edmund Stewart, *Tyranny in Tragedy*, 40 *Polis: The Journal for Ancient Greek and Roman Political Thought* 234 (2023).

<sup>33</sup> Foucault, *supra* note 17, at 30.

<sup>34</sup> However, the concept of “testimonial injustice” coined by Miranda Fricker shows that not all testimonies are given equal consideration in modern criminal proceedings. Miranda Fricker, *Testimonial Injustice, in Epistemic Injustice: Power and the Ethics of Knowing* 9 (2007).

tragedy. The tragic “enquête” as a democratic form of truth-establishment thus replaces the ancient form of “examen” (ordeal).

Moreover, *The Oresteia* by Aeschylus is often referred to as the “founding myth”<sup>35</sup> of democratic criminal proceedings, since at the end of the third volume, *The Eumenides*, the goddess Athena establishes an earthly tribunal to end the cycle of blood revenge.<sup>36</sup>

Regardless of whether one believes those speculative accounts about the origins of criminal proceedings in a specific Greek tragedy—Foucault’s interpretation of *Oedipus Tyrannus* is much debated<sup>37</sup>—, one can affirm that, historically speaking, the tragedy as a social practice is specifically linked to criminal proceedings. The classic tragedy follows strict procedural rules as to how it should be written to gain the desired effects on the public—to lead to *eleos* and *phobos*. Through the representation on stage, the public could feel those affects, externalize them, and thus purify itself from them in everyday life (the so-called *katharsis*).<sup>38</sup>

Tragedy was a crucial element of political life and had an institutionalized place in the lives of citizens. It could address questions of general social or political relevance that had no specific place in everyday life. In my opinion, therefore, theater today, like tragedy in ancient Athens, has an independent and important place for democracy between law, criticism, and politics. Here, the fundamental social issues of coexistence, which have no place in everyday political life, can be collectively relived and critically examined. In the theater, citizens can also feel democracy, which they encounter in everyday life only as an abstract political concept that they take for granted. They can experience themselves as a collective and strengthen their sense of community (or, as some scholars call it, *communitas*).<sup>39</sup>

Tragedy might, finally, allow us to represent gaps in the criminal process because, often, those (felt) gaps result from weighing conflicting rights against each other. To give an example: the fact that in some cases one cannot convict an accused because of evidence that is gained illegally or because the evidence became known only after the accused has been formerly acquitted in a trial may seem unjust to victims and their relatives. In this

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<sup>35</sup> Cf. Stephe Harrop, Greek Tragedy, Agonistic Space, and Contemporary Performance, 34 *New Theatre Q.* 99, 100 (2018) (critiquing “the ‘myth of simultaneous origin,’ according to which tragic theatre and democratic politics sprang into being at the same cultural moment”).

<sup>36</sup> However, this “tribunal” is heavily biased. See Bayer, *supra* note 1, at 181-85.

<sup>37</sup> Within literature as well as within philosophy departments; thanks to Sebastian Simmert for reminding me.

<sup>38</sup> See the references to Aristotle and Brecht in Bayer, *supra* note 1, at 175-77, and Daria Bayer, *Tragödie als Medium für die Rechtskritik: Neue Formen für “Recht und Literatur,”* in *Schau-Prozesse: Gericht und Theater als Bühnen des Politischen*, *supra* note 10, at 145, 151-52.

<sup>39</sup> Victor Turner, *The Ritual Process. Structure and Anti-Structure* 96 (1969). Drawing on this concept and the legal possibility to move the trial of international crimes away from The Hague (cf. the Rome Statute art. 62: “Unless otherwise decided, the place of the trial shall be the seat of the Court”), Philipp Eschenhagen argues in his Ph.D. thesis, *In Situ: The Transformative Power of Presence at the International Criminal Trial* (forthcoming), that holding international criminal proceedings *in situ* can add to a moment of feeling of *communitas* and thus to enhance collective healing and transformative justice.

sense, the rights of the accused conflict with the rights and necessities of victims as well as the public to know the truth and get retribution for the violations. This conflict seems unresolvable. The unresolvable conflict is also at the root of tragedy, and is its material.

### *C. Performance, Visuals, Social Media. Yes! And Still: Theater*

Naturally, tragedy is not the only dialectical way of pointing out gaps in and ambivalences of criminal proceedings. Rather, with the rising complexities of modern legal systems, more complex or more interactive forms of representation may become necessary. Not only have criminal processes changed fundamentally over time, but so too have theatrical theory and practice. Bertolt Brecht and modern political theater makers like Milo Rau still use elements of ancient tragedy but vary it accordingly to the problem in case. Brecht emphasized that the dialectical form of theater may not only be a technique to create effects on spectators but could also engage actors in a different way of thinking. Augusto Boal perfected this technique with his “Theater of the Oppressed,” e.g., by going to prisons and staging plays in which prisoners and guards were acting side by side. And, more recently, performance as a technique of “showing-doing” has successfully entered the theater field as well as departments of theater and English.<sup>40</sup>

Current scholars of “law and literature” have therefore expanded the reach of the field, offering other names such as “law as performance”<sup>41</sup> or “legality and affect.”<sup>42</sup> They also include performances of law or the analyzation of trials as performances<sup>43</sup> as well as visuals and social media.

I am very sympathetic towards these new “mappings” of the field of law and literature, because they express the move away from mere texts and the ethical charging of the law by so-called “great literature”<sup>44</sup> and indicate the shift towards understanding law as part of a cultural production process and the transgression of disciplinary borders. However, as a possible contribution to and refinement of the new field of “legality and affect,” I still want to make an argument for the specific use of political *theater* as a way of legal criticism

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<sup>40</sup> Peters, *supra* note 5, at 203.

<sup>41</sup> Umphrey et al., *supra* note 18; Julie Stone Peters, *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe* (2022). However, it is debated between disciplines what “performance” means. Peters seems to refer to a theatrical interpretation of performance, and sharply criticizes legal scholars for using the word “performance” only as a provocation, without engaging in analyzing what artistic performance actually means. By contrast, Eschenhagen, *supra* note 39, proposes a concept of “legal performance” (as opposed to mere performativity) building on Erika Fischer-Lichte’s work. The dispute recalls the old (unsolvable) question: Which came first—law or performance, the chicken or the egg?

<sup>42</sup> Olson, *supra* note 11.

<sup>43</sup> E.g., Eschenhagen, *supra* note 39, at 67-96; Peters, *supra* note 5, at 205.

<sup>44</sup> Which, speaking for the German discourse, still seems to be the status quo of a slowly emerging field of “law and literature,” which has begun to enter German law school curricula. It therefore seems useful to keep the connection to the classical term “law and literature” for now—see Olson, *supra* note 11—so as not to overwhelm German legal scholars with more radical terms like “law as performance” just yet. Hopefully, this will become possible soon.

that is different from the use of social media or performances in a broader sense. While of course a modern theater play may heavily draw on performative elements (as the examples under Part IV will show), staging a play is different from the creation and reception of a performance, or a social media post. The main differences lie in the bodily presence of actors and spectators in one room and the depth of topical engagement and narrative structure. Performance artists often work alone, and they can create great performances shedding light on the gaps of law.<sup>45</sup> However, their performances remain bound to a specific place and time, and while they may be reenacted, they rarely retain their provocative spark if written down. Performances are more in the moment.

Political theater, by contrast, often engages multiple people during the production process—the director, actors, writers, technicians, costume makers, stage builders, video artists, researchers—as well as through the performances of the play—spectators—and through the written version of the play—readers. It also allows for deeper research into concrete historical occurrences or structural questions, and to narrate them in their complexity. Political theater takes its audience seriously. It aims at *structural change* through affects and critical reflection, not only at momentary attention or entertainment (although of course political theater should also be entertaining, but not as an end in itself).<sup>46</sup> Another question of course is whether political theater *succeeds* in fulfilling those very ambitious aims. This is something only the spectators and you, the readers, can judge. So please, go ahead and make your own judgment.

#### IV. Staging the Critical Foundations of Criminal Proceedings: Three Examples

As promised, I will now proceed from theoretical reflections to three concrete works, where I tried—together with my theater collective<sup>47</sup>—to use political theater as a way of performing the gaps and ambivalences of criminal proceedings: A. “Tragedy of Law” about the dilemma of modern legal criticism; B. “Publicum Ex: A Public Trial” about the structural injustices of tax law; and C. “nest/polluters” about discrimination and sexual violence within law and academia.

##### *A. A Self-Reflection of the Persistent Dilemma of Legal Criticism*

*Enter Andrey, The Guard and Yevgeny.*

ANDREY           Well then, traitor! Do you confess?  
 YEVGENY         I am no traitor!  
 ANDREY           I am sorry? Did I hear correctly? You are no traitor? Please, think about that.  
                       *Silence.*

<sup>45</sup> E.g., Jakob Wirth, *Beobachtung 2. Ordnung* (2019) (<https://perma.cc/DXQ4-829V>).

<sup>46</sup> Bertolt Brecht, *Kleines Organon für das Theater*, in *16 Gesammelte Werke: Schriften zum Theater 2*, at 659, 701 (Suhrkamp Verlag ed. 1967), emphasized that political theater must “also remain theater—and is not, for example, a scientific demonstration” (my translation); see also Bayer, *supra* note 1, at 189.

<sup>47</sup> *kollektiv im Fenster* (<https://perma.cc/CF3Q-SV37>).

You must admit it yourself. We cannot look inside your head.  
 GUARD Exactly!  
 YEVGENY Exactly.  
*Silence.*  
 ANDREY Confess!  
 YEVGENY I did not kill anyone!  
 ANDREY You hid in your papers and let people starve to death. Is that not murder?  
 You took away the only thing people had—their faith. Is that not theft?  
 You tried to overthrow the system that we built together through twenty years of hard  
 work. Is that not betrayal of the people?  
 YEVGENY I... I... I am not sure...<sup>48</sup>

The first and most elaborated attempt to use political theater as a medium of staging the gaps of criminal proceedings was my Ph.D. thesis “Tragedy of Law,” published in German in 2021.<sup>49</sup> It centers on the life and death of Yevgeny B. Pashukanis. Once the Soviet Union’s most famous legal theorist, Pashukanis was purged in 1937 as an “enemy of the people” for engagement “in counter-revolutionary activity in the sphere of the theory of Soviet criminal law.”<sup>50</sup>

His plight is seen among Western scholars as “one tragic expression of that supposed misguided Marxist utopianism.”<sup>51</sup> In 1924, Pashukanis published his work *The General Theory of Law and Marxism*.<sup>52</sup> In it, he put forward the thesis that law must “die”<sup>53</sup> (i.e., “wither away”<sup>54</sup>) in a fully developed communist society.<sup>55</sup> Pashukanis identified the legal processes

<sup>48</sup> Based on Bayer, *supra* note 1, at 57-58: (Last act?), scene 15: “Trial” (my translation). Yevgeny Pashukanis and Andrey Vyshinskiy are historical figures. The guard is a symbolic representation of “the people.” While this specific guard may not have existed, surely countless people of the proletariat worked in secret and official prisons during the Soviet Union under Stalin.

<sup>49</sup> Bayer, *supra* note 1; see also Jewgenij Tragödie des Rechts, Kollektiv im Fenster, YouTube (Oct. 15, 2019) (<https://perma.cc/8KXS-BQD6>) (premiere of the play included in the dissertation); Daria Bayer, Jewgenij: Tragödie des Rechts, Andrea von Braun Stiftung (Mar. 15, 2021) (<https://perma.cc/HK4Q-9PWN>) (report on the production process); Igor Shoikhedbrod, Review of Daria Bayer, *Tragödie des Rechts*, Marx & Philosophy (2023) (<https://perma.cc/V23C-DEQW>). An English translation of the book is in preparation.

<sup>50</sup> S. Arkady Vagsberg, *Stalin’s Prosecutor: The life of Andrei Vyshinsky 129* (Jan Butler trans., 1990); Pashukanis had openly argued for the abolition of the death sentence in December 1936 on the occasion of the drafting of a new Soviet constitution. Naturally, this only served as a welcome pretense for getting rid of the disgraced Pashukanis, whose “withering away of law” thesis posed an obstacle to Stalin’s idea of a “strong Socialist state.”

<sup>51</sup> Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (2008).

<sup>52</sup> Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Chris Arthur ed., Barbara Einhorn trans., 1989).

<sup>53</sup> *Id.* at 104.

<sup>54</sup> Cf. Christine Sypnowich, The “Withering Away” of Law, in *The Concept of Socialist Law 1* (1990); in Russian: *otmiranie prava*.

<sup>55</sup> Whether this would be a utopia—as Pashukanis assumes—is debatable.

and their language<sup>56</sup> as mechanisms of alienation. The law, and criminal trials in particular,<sup>57</sup> create a separate reality in which we no longer meet as individuals, but only as abstract legal subjects without individual characteristics, without skin color, origin, gender, or class. Pashukanis therefore assumed that in penetrating “the secrets of social forms and . . . reduc[ing] ‘all social relations to man himself,’”<sup>58</sup> law as a mechanism of alienation would disappear from interpersonal relations.

These de-alienated individuals would understand the other not as abstract property owners, but as concrete individuals, as an extension of themselves. Henceforth they would, without external sanction mechanisms, orient themselves towards an internalized, collective expediency. Pashukanis also refers to this intuitive form of regulating social relations as “technical regulation[s]” guided by a “unity of social purpose.”<sup>59</sup> The insight into the purposefulness of these regulations in turn requires a corresponding education or self-reflection. Pashukanis’s idea of an “ideal (non-)law” can thus be understood as a kind of absolute rational law.<sup>60</sup>

Pashukanis’s theory, rebutted by his tragic fate, raises the inevitable question: How should the *process of development* from existing law to utopian non-law take place? The attempt to bring this about through a fundamental upheaval of the political system by means of a violent revolution (re-)produces the (tragic) violence of law, to which Pashukanis himself fell victim: He was arrested on January 20, 1937, and sentenced to death after only a “few minutes of ‘legal proceedings’”<sup>61</sup> by the Military Board of the Supreme Court on September 4 the same year.<sup>62</sup> The sentence was executed on the spot half an hour after the judgment was rendered.<sup>63</sup> Pashukanis experienced first-hand what a society without the institutional safeguard of subjective (procedural) rights can mean. Critical legal scholarship has not found until today any other consistent way of regulating social interactions that does not risk totalitarianism.

The play, which I wrote based on theoretical and historical research on Pashukanis and his work, imagines the “trial” that Pashukanis never had, and which therefore only takes

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<sup>56</sup> Pashukanis uses the term “legal form”—following Marx’s and Engels’s analysis of the commodity form—as an umbrella term for all actors, concepts, procedures, and institutions of law. Cf. Bayer, *supra* note 1, at 100-06.

<sup>57</sup> See Pashukanis, *supra* note 52, ch. 7 (“Law and the Violation of Law”); see also Daria Bayer, *Securing Power Through Law: On the Example of Pashukanis*, *Ancilla Iuris* (2022) (<https://perma.cc/DQH8-Y8LW>).

<sup>58</sup> Pashukanis, *supra* note 52, at 84.

<sup>59</sup> *Id.* at 81.

<sup>60</sup> A key question is what happens when individuals do not adhere to technical regulations and the procedures in which those technical regulations are defined, despite the supposedly intuitive expediency of abiding by them. Similar conceptual problems arise in the law-making process and enforcement of legal norms. See Bayer, *supra* note 1, at 114-20, 133-38.

<sup>61</sup> Vagsberg, *supra* note 50, at 133.

<sup>62</sup> *Id.* at 130.

<sup>63</sup> *Id.* at 133.

place in his imagination. In this *self-trial*, Pashukanis critically reassesses his own theses, the Russian revolutions, and his short-lived ascendancy to the position of the most important legal theorist in the Soviet Union. He finally begins to reflect on his possible complicity in the construction of the Stalinist system of terror.

In the play, Pashukanis's (imaginary, dystopian) trial is repeatedly interrupted by contemporary legal scholars in the spirit of Brecht's epic theater. They appear either all together as the CHORUS OF PROFESSORS or as individual figures. They observe and comment on the events and the protagonists in the play; they are a play within a play.

The scholars in the play are not really, or at least not primarily, concerned with the material they are presenting to the audience and commenting on for them. Rather, they are concerned with their self-representation and their own insatiable quest for knowledge. This does not even stop while watching in astonishment and commenting on the collective execution of the protagonists in the last scene of the play. At the same time, the scholar-figures help the audience to categorize and understand what is happening. Without them, there would be no story, no narrative arc, no beginning, and no end. Like the role of the protagonists in the play, their role is therefore ambivalent. They play themselves and at the same time are trapped in a (scientific) system that unremittingly demands their self-presentation and self-marketing.

In this way, the play is a tragedy of current academia. It exposes the dilemma of criticizing the law and the social conditions associated with it—the *framework conditions* of legal scholarship—while remaining trapped in this exact same frame. This dilemma cannot be resolved by reproducing the dualistic logic of legal judgment (guilty/not guilty, constitutional/unconstitutional, legal/illegal)<sup>64</sup> or the jurisprudential, text-based form of presentation. Rather, what is needed is a break with both logics. This break can only take place in a different form that is removed from the needs of a specific (legal) case and the requirements of a specific legal practice. A form in which we can try things out together, across academic borders, in which we as *demos* can “speculate, dream and desire.”<sup>65</sup>

### ***B. Making Systemic Structures of Crime Visible: Anger as Empowerment***

*The audience is welcomed at the entrance and is led in groups towards the auditorium. Three people stand in front of the auditorium and ask the audience the following questions: When was the last time you donated? What is your taxable income? Do you remember what you did on November 17, 2016?*<sup>66</sup>

*After answering the questions, the audience receives a booklet on which a complicated ticket number is written. 2016/11-17, E 1567/6, 78359901437/1 (2, 3, 4, 5, or 6, depending on the value of taxable income), 899 ff., etc.*

<sup>64</sup> For criticism of the dualistic judgment structure of law, see also Christoph Menke, Critique of Rights 223-92 (pt. IV “Revolution: The Dialectic of Judgment”) (Christopher Turner trans., 2020).

<sup>65</sup> Greta Olson, The Utopian Desire for a Just Legal Order and *Rechtsgeföhle*, in *Utopie einer neuen normativen Ordnung* 11 (Daria Bayer et al. eds., 2025).

<sup>66</sup> The day on which the Hamburg tax authorities decided to allow the claims against Warburg Bank to lapse.

*Additionally, the following is written on the booklet: “We ask you to keep calm and, in every case, respect the seating arrangements.” The ticket numbers written on the booklets either do not exist, or the seats have been allocated multiple times, or there are already people sitting in the seats refusing to get up. There will be confusion and probably annoyance. There are ushers scattered around the room. If audience members ask them for help to find their seats, the ushers explain with a smile that they are not competent and refer to their colleagues. Soothing classical music plays in the background, as in a telephone queue. Boxes of files are piled meters high on the stage.<sup>67</sup>*

Cum Ex is considered “the biggest tax robbery in [German] history.”<sup>68</sup> The Cum Ex model allowed tax-exempt banks to get multiple tax refunds for taxes paid only once, thus making a profit out of taxpayers’ money. This (obviously) illegal practice has been practiced unnoticed since the early 2000s. Disguised in complex legal terms and economic interactions, bankers and big law firms have been able to confuse the *demos* and prevent them from penetrating the abusive system behind Cum Ex.<sup>69</sup> Since the “scandal” came to light, official mechanisms for coming to terms with it, such as criminal proceedings against over 1,700 defendants<sup>70</sup> or political investigations such as a Parliamentary Committee of Inquiry have been set in motion.<sup>71</sup> However, these investigative mechanisms do not appear to be sufficient to reveal and understand the fundamental structures behind the Cum Ex business model. Many questions remain unanswered for the public, most importantly, how this abuse can be prevented in the future.<sup>72</sup> This is all the more important because while the criminal investigations into Cum Ex are still ongoing, systematic tax evasion continues in other guises, such as the Cum Cum model.

In our play, our focus therefore lay on the audience, as the subject and representative of the *demos*. The *demos* is hurt by the “tax robberies” without realizing it, because tax evasion is not directly perceptible to the individual taxpayer. Therefore, we created a space in which this violation can be felt at a symbolic location: the Hamburg City Hall, where the political investigations are also taking place.

In the play, the audience goes through the various phases of the Cum Ex complex: they are initially confused by being seated in non-existent or doubly occupied seats at the

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<sup>67</sup> Based on Daria Bayer, Jule Martenson, & Leokadia Melchior, PubliCum Ex—Ein Publikumsuntersuchungsausschuss, premiere 2024, Hamburg City Hall (<https://perma.cc/BY8B-LFQ7>) (my translation).

<sup>68</sup> See the research by Correctiv, The CumEx Files—A Cross-Border Investigation (<https://perma.cc/Y47M-V8UC>).

<sup>69</sup> On the concept of creative compliance regarding Cum Ex, see Lucia Sommerer, Criminology of Crime Avoidance: Creative Compliance Delinquency in the Borderlands of Legality, 8 Compliance Elliance J. 30 (2022).

<sup>70</sup> For a (slightly outdated) overview, see Finanzwende e.V., Chronik von CumEx, Oct. 4, 2023 (<https://perma.cc/CH6V-XZ5E>).

<sup>71</sup> See the interim report of the Hamburg Parliamentary Committee of Inquiry, Feb. 28, 2024 (<https://perma.cc/KFP7-76SX>).

<sup>72</sup> See generally Correctiv, CUMEX FILES, Oct. 21, 2021 (<https://perma.cc/QZ3R-RT44>).

entrance. This is a first test for the audience: will they obediently comply and remain standing on the edge or fight over seats, or will they defy the (obviously pointless) rule and simply sit down somewhere?

This is followed by the appearance of our investment advisor, Marvin Nettler, who initially tries to charm the audience with gummy bears and steer them “like an invisible hand”: *Please*, Nettler shouts into the confusion, *have a seat!* He then introduces us to his “Cum Ex” business model which, according to Nettler, is extremely lucrative but technically highly complicated, which is why he doesn’t want to explain it in detail so as not to bore the audience. However, as Nettler and the top lawyers from a major international law firm can assure us, it is not necessary to understand the investment model in detail, as it is “totally legal” in any case—that’s a promise!

The audience leader, Lee Winter, then turns against the appearance of legal over-complexity produced by Nettler, which is intended to conceal the obvious illegality of the business model. She begins to ask critical questions and thus sets in motion an alternative process of coming to terms with Cum Ex that goes beyond the criminal proceedings and the political investigations, because it takes place directly before the eyes of the audience and is co-determined by them. The “evidence” includes files, secret video recordings, diary entries, insights into the day-to-day work of the tax authorities, and the public questioning of the mayor.

Together, Winter and the audience reveal the structures behind Cum Ex, which are in fact very simple: “We call it: Fuck the taxpayer system.”<sup>73</sup> This is the motto of some bankers who feel they are above the law, actively supported by some lawyers as their assistants and some politicians and civil servants as their silent accomplices. When it becomes clear, at the end of the play, that the systematic “tax theft” continues, disguised in the Cum Cum model, the audience is no longer confused. It is enraged. And begins to discuss other solutions to the problem, after the play has ended.

PubliCum Ex thus turns the feeling of powerlessness in the face of overarching structures into productive anger. Anger (about injustice) has been used from the ancient tragedy to intersectional-feminist fights as empowerment.<sup>74</sup> Anger can be distinguished from revenge. Anger is a reaction we may have when seeing something we think is not fair, according to our intuitive feeling of justice (or, as Greta Olson calls it with Rudolf v. Jhering, “Rechtsgeföhle”). We can take this affective anger and turn it into a fight for justice. Revenge, by contrast, consists of the suppressed, slowly simmered memories of anger, not aiming at structural change but at individual satisfaction. Anger gives the audience back its voice, constituting itself as a collective of taxpayers who defend themselves against the ongoing “tax theft.” The audience gets empowered to debate the issue of tax justice

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<sup>73</sup> Anonymous quote from a Cum Ex banker.

<sup>74</sup> See, e.g., Manuela Irrázabal Elliot, Anger in the Oresteia (<https://perma.cc/R9SL-XCM4>); Lesel Dawson, Introduction: Female Fury and the Masculine Spirit of Vengeance, in *Revenge and Gender in Classical, Medieval and Renaissance Literature 1* (Lesel Dawson & Fiona McHardy eds., 2018); Audrey Lorde, The Uses of Anger, 9 *Women’s Stud. Q.* 7 (1981).

themselves. As the actions of many of the play’s protagonists are so obviously illegal and immoral, it is easy (perhaps even too easy) to generate anger. The audience can easily relate to Winter’s anger since *Cum Ex* affects all (potential) taxpayers and therefore all citizens to a similar extent.

### *C. Making Subtle Structures of Discrimination Visible, or: The Silence<sup>75</sup> of the Law*

*I SHARE MY OWN STORY SO OTHERS CAN SHARE THEIRS.*

Raising awareness of more subtle structures of injustice is more difficult. In most cases, people who behave in a way that violates the law are not, as with *Cum Ex*, some “super villains”<sup>76</sup> who place themselves above the law. On the contrary, it may be their colleagues, people who have dedicated themselves to justice as their life’s work, be it as lawyers or scholars of ethics, political art, or humanities. Lawyers and legal scholars are trained to believe in the rightness of their actions (a kind of *déformation professionnelle*, because their job is to *be in the right*, in the double meaning of the word),<sup>77</sup> so much so that they fail to acknowledge and address their own hurtful behavior. Instead, they try to neutralize it using various techniques, and are supported by a system that promotes justice and gender equality on the outside but fails to provide adequate mechanisms for dealing with discrimination and sexual violence “internally.”

In the name of the “objectivity and neutrality” of the law, competing narratives of people being discriminated within the field of law and legal academia are silenced. To offer a counter-narrative, to make those daily discriminations visible (which can range from minor discriminations like women being always expected to brew coffee in the office to issues of sexual violence and harassment), we have gathered multiple voices and experiences of women working in the legal field. Combing through those experiences and narratives, I am working on a play—its working title being “nest/polluters”—that will focus on the insidious shifting of boundaries (for example, through grooming), neutralization techniques, and the complicity of sexist behavior patterns in the legal work environment. At the same time, the play will also reflect upon the systemic structures that cause people to look the other way, mainly existing power hierarchies within legal practice and academia.

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<sup>75</sup> We can differentiate between “unintentional gaps” (in German legal doctrine: “planwidrige Gesetzeslücken”), on one hand, which must be filled by an analogous application of law, and intentional “silences of the law,” on the other, which legal scholars think the law should not regulate (e.g., Peters, *supra* note 5, at 206 (heartbreak)) or the law claims to regulate on paper but in fact does not regulate to secure existing power asymmetries (e.g., anti-discrimination proceedings at work places that allow the victims to file a complaint, but never take any action on that complaint). We can speak about “silence of the law” only if the non-regulation results from such an intentional decision; and it is this intentional decision that we can make visible and criticize through theatrical means. This may be an answer to the questions raised by Peters, *id.* at 206-07.

<sup>76</sup> See also the contribution by Elise Wang in this Special Issue, Elise Wang, *Felon and Villain: The Literary Life of Felony*, 1 *Mod. Crim. L. Rev.* 169 (2025).

<sup>77</sup> Olson, *supra* note 11, at 5 (noting that “Recht has a double meaning in German and denotes both ‘rightness,’ in the sense of justice, and ‘law’”).

A major inspiration for this work in progress is the award-winning and currently widely performed play “Prima Facie” by Suzie Miller, as well as her novel of the same name.<sup>78</sup> It centers on an aspiring barrister, a first-time academic, who is raped by her colleague, a barrister from a good family, after a date. Apart from her testimony, the protagonist has no evidence of the crime, and she knows from her experience as a barrister that she will not be believed in court. Nevertheless, she feels that reporting the crime is the only possible way to address the injustice done to her and to communicate her suffering. Although the defendant is acquitted, having attacked the protagonist in court and treated her with contempt, the protagonist manages to reclaim her voice at the end of the play. She frustrates the social and legal expectations of her role as a witness and turns the trial into her stage. This second stage<sup>79</sup> is not about the guilt of her work colleague, but about the extent of the protagonist’s suffering.

Technically, Miller accomplishes this by writing both the play and the novel as a monologue, told exclusively from the perspective of the protagonist. No one can doubt her credibility this way. In contrast to the criminal process, theater is allowed to subjectivize and expand. It is not bound to neutrality or impartiality. It does not have to protect the procedural rights of a specific defendant. It can even go so far as to completely remove the (hypothetical) defendant—and thus the perspective of the offending person—from the proceedings to focus solely on the perspective of the injured person(s).

This multi-layered perspective, in turn, is made up of a multitude of individual stories, injuries, and needs. To gather those experiences, we created a space in which (female) participants could share their own experiences of sexualized violence and discrimination in the work context.<sup>80</sup> Under our motto “I share my own story so others can share theirs,” projected in capital letters on the wall of the room, participants were able to anonymously place their stories in a box and draw other anonymous stories from this box and present them. According to a performative principle, whereby the person concerned is in the room or on stage, but her story is recited by another person (equally affected by the general experience, but not in the concrete form recited), the experience can be shared without attributing it to a single person alone, but to the group of performers present. This shows that what is described is not a “private matter,” but that the experience is shared by a group and therefore by more than one person. This can have a relieving effect on the person sharing the experience and at the same time allow other people to identify with what has been described.

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<sup>78</sup> In my view, the novel is more productive for the scenic work than the play, because it expresses the intersectional perspective and the effects of rape on the protagonist in even greater detail.

<sup>79</sup> On the self-reflexivity (of law) on the theater stage, see Christoph Menke, *Das Spiel des Theaters und die Veränderung der Welt*, in *Theater als Kritik* 37 (Olivia Ebert et al. ed., 2018).

<sup>80</sup> *kollektiv im Fenster*, Beyond Law Salon (<https://perma.cc/GXH9-JPRG>); as material, we drew on our own experiences, experiences from colleagues, as well as TV shows about female lawyers, such as Ally McBeal.

Building upon those principles, I also worked with director Henri Hüster and law students<sup>81</sup> on a rehearsal stage at Goethe University Frankfurt. The students were able to develop scenes based on Miller's play, theoretical texts we collected before and during the seminar,<sup>82</sup> as well as their own experiences. This allowed them to present their experiences and collectively reflect on them, without having to account individually for one specific story or blaming one specific person.<sup>83</sup>

## V. Outlook: Taking Affects Seriously

Political theater is a task of utmost reality and urgency. Remembering Greek tragedy, theater has a pleasurable and purifying effect on spectators and simultaneously a political dimension that transcends the individual spectator. People can live through and get rid of their negative feelings by seeing them portrayed on stage by other people. Furthermore, they can question the existing democratic structures, law-making processes, and foundations of criminal proceedings, and constitute themselves as a collective, a *demos*.

This bonding experience of political theater seems much needed today, with the current rise of right-wing populism, which aims to create a sense of identity based not on equality and democracy, but on authority and inequality. Political theater is a critical counter-practice, allowing individuals to feel themselves connected and at the same time empowered to become political and fight for democracy and human rights.

Political theater provides creators, actors, and audience alike with various means of addressing and reflecting on the *ambivalences of criminal proceedings*. As a result, through its critical reflection, it stabilizes the cultural groundings of democracy. The timeless repetition of staging the ambivalences of criminal proceedings in political theater reveals the social truth of modern criminal law.<sup>84</sup>

## Epilogue

### CHORUS OF PROFESSORS

A better life  
 A fairer world  
 A wish with which  
 We are concerned.  
 But the question is:  
 Concerned: how long?  
 The law must die.  
 The law lives on.<sup>85</sup>

<sup>81</sup> Although the seminar was open to all genders, all of the over fifty applications came from women.

<sup>82</sup> In the spirit of Ursula K. Le Guin, *The Carrier Bag Theory of Fiction* (2019).

<sup>83</sup> For further experiences by participants see Kora Ahrens et al., *Straflos, Sprachlos? Bericht zum Seminar Sexualisierte Gewalt, Theater, Strafprozess*, Frankfurt L. Rev. 2/2025 (forthcoming).

<sup>84</sup> See Peters, *supra* note 5, at 214.

<sup>85</sup> Bayer, *supra* note 1, at 61 (my translation).