Öffentlichkeit and Law's Behind the Scenes: Theatrical and Dramatic Appearance in European and US American Criminal Law

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Special Issue – *Law's Pluralities*

Öffentlichkeit and the Law's Behind the Scenes: Theatrical and Dramatic Appearance in European and U.S. American Criminal Law

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Abstract

In the present situation, law's *Öffentlichkeit*, or its principal "open-ness to the public," needs to be distinguished from its being the object of publicity as dominated by modern media. Law's public open-ness has historically been dependent on, and determined by, two theatrical modes of appearance: The theatrical-proper and the dramatic. Paradoxically, in both cases the jurisdictional "openness to the public" works not only through forms of visibility but also forms of invisibility. These two theatrical modes—and their dynamic play with visibility and invisibility—have been portrayed in works of art that have influenced the way general audiences imagine the law to work. These works also correlate with the different histories and public appearances and openness of the European and the Anglo-American systems of law. Historically speaking, the European system has been more theatrically inclined, in the context of a distinctly imperial trajectory that has been dominated by the desire to stage the law and to follow correct procedure. The Anglo-American one, by contrast, is more dramatically inclined, and has followed a distinctly anti-imperial trajectory—whether anti-royal or anti-state—influenced by the desire to stage trials in which peers determine the dramatic outcome. Although both systems are basically open to the public, they both work via a dynamic of protective invisibility. Yet due to current developments, the elements of invisibility in both systems tend to predominate over the elements of visibility. This suggests that both systems are moving toward a form of legal closure that is averse to the original theatrical and dramatic appearance and openness of law.

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In Dutch and in German, the public nature and testability of legal cases is indicated by comparable terms: *Openbaarheid* and *Öffentlichkeit* respectively. Both terms can be translated as *publicity*. Yet, in both Dutch and German, and in both systems of law, the English term publicity as a loanword has produced a pivotal distinction. As the German Duden dictionary indicates, the noun *Die Publicity* means "durch Medienpräsenz bedingte Bekanntheit in der Öffentlichkeit" ("the way in which things become known by means of news media in public openness"). Apparently, there is *Öffentlichkeit* on the one hand and publicity on the other. The same distinction is made in Dutch, and has been made by legal scholars studying the relation of law to publicity in terms of both the law's principal openness to the public and in terms of its being made known to the public via the media. The two imply radically different modes of public visibility and have different implications for the way legal order is perceived as legitimate.

In their study of the Dutch situation, legal scholars Marijke Malsch and Hans Nijboer note that in daily practice only a small part of case material is actually made publicly visible. Moreover, about 90% of all criminal cases in the Netherlands are resolved outside the courtroom by means of dismissal, penalty orders, administrative punishment, or forms of transaction.[1] The situation in the U.S. is similar. At present, 94% of U.S. criminal cases, for instance, are determined on the basis of plea bargaining.[2] This is not to say that cases settled outside the court are not public. They are, in the sense that they are open and can be checked, but they lack the public visibility and collective testability that characterizes cases taken to court. The tiny portion of cases resolved publicly, openly, and visibly in court is thus pivotal—as Marsch and Nijboer argue—for the way citizens perceive the legitimacy of the legal system, especially in the criminal law context.[3]

Publicity is considered, then, as partly incompatible with or perhaps even as contrary to *Öffentlichkeit.*[4] In fact, the very transition from the latter to the former has been considered a threat to the status of legal procedures. The media tends to choose court cases by using criteria of news value and amusement rather than legal correctness. The prospect of trial-by-media may have become a real danger,[5] while a more immediate threat may be that the law's *Öffentlichkeit* is no longer really open to the public because of the media's selectiveness. This is nothing new. One could argue that—for decades, even centuries before

[1] M. MALSCH & J.F. NIJBOER, DE ZICHTBAARHEID VAN HET RECHT 4–7 (2005). The figure of 90% they give is from 2005; the situation has not changed since then.

[2] GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 163–64 (2003).

[3] MALSCH & NIJBOER, *supra* note 1.

[4] MALSCH & NIJBOER, *supra* note 1, at 100–06.

[5] In the Dutch context, the issue was addressed by, for instance, Y. Buruma, *Invloed van de media op de rechtspraak*, TREMA 305–12 (1979); M.S. Groenhuijsen, *Openbaarheid en publiciteit in strafzaken*, 27.5 DELIKT & DELIKWENT 417 (1997).

the modern media targeted juicy court cases—newspapers have been doing the very same thing. However, there is a distinction between the modern media and a medium that, from the very beginning, has been intrinsic to the law's openness in the sense of its public visibility and testability. This basic medium is not so much language as theater.[6]

In this context, this Article focuses on the way in which the theatrical, public visibility of law—its *Öffentlichkeit*—has been shaped historically by two distinctly different modes: The theatrical-proper and the dramatic. Specifically, this Article focuses on the unfortunate rhetorical effect of the contrast between *Öffentlichkeit* and publicity. Rhetorically speaking, the selective publicity of media driven by economic and private interests appears to stand in contrast to the pure transparency of an open and objective legal system. Yet, as will become clear, theatrically speaking, this "openness" of jurisdiction not only works through forms of visibility, but also requires modes of invisibility.

The two theatrical modes at stake and their distinct dynamics of visibility and invisibility have been dealt with in works of art that have influenced the way in which a general audience imagines the law to work. This Article focuses on two iconic works of art: Franz Kafka's novel *Der Prozess*, published in 1925 (though written earlier) and Sidney Lumet's film *12 Angry Men* from 1957.[7] These works of art find their points of departure in two different systems of law: The European and the U.S. American, each with its own specific history. Both systems have been, and still are, struggling with different aspects of the relation between *Öffentlichkeit* and publicity. Before delving into these, however, I shall outline the two modes of theatricality at stake.

A. Staging Law: The Theatrical-Proper and the Dramatic

In a seminal article on current developments in the socio-cultural and political representations and practices of law, Julie Stone Peters makes a fundamental distinction concerning the issue of how law should be assessed and made to work. It concerns the distinction between what Plato called *theatrocracy* and *nomocracy*; the rule of public theater versus the philosopher's rule of law on the basis of a given *nomos*. At stake was not just a biased opposition between the uninformed and pathetically inclined multitude, and

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[6] The theatrical nature of the law's appearance through court is evidenced in many scholarly studies. *See, e.g.*, Julie Stone Peters, *infra* note 8. *See also* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE (2011); the work of law historian PIERRE LEGENDRE, *LA 901E CONCLUSION: ÉTUDE SUR LE THÉÂTRE DE LA RAISON*, LEÇONS I (1998); theatre scholar JODY ENDER, MURDER BY ACCIDENT (2009); and media theorist YASCO HORSMAN, THEATERS OF JUSTICE: JUDGING, STAGING, AND WORKING THROUGH IN ARENDT, BRECHT, AND DELBO (2010). Horsman, in turn, based his work on arguments brought forward by Hannah Arendt. On Arendt and law, see HANNAH ARENDT AND THE LAW (Marco Goldoni and Christopher McCorkindale eds., 2012).

[7] Kafka's novel was written under the title *Der Process* in 1914–1915, and then published by Max Brod as *Der Prozess*. The most recent version (Historisch-kritische Ausgabe, Stroemfeld Verlag, 1995) uses the original title again. Sidney Lumet, TWELVE ANGRY MEN (Orion-Nova Productions 1957).

the individuality of the well-informed, rational, and stable philosopher. Plato was more concerned with what he called the excess of theater and its possibilities for deceit. To counter this threat, he argued for the preservation of a rule of law that would answer to measure and reasonability. Still, at the end of her assessment of the current situation, Stone Peters calls Plato's distinction "an ideological ruse" because the individual philosopher or lawgiver does not exist.[8] In the case of nomocracy, law does not appear quasi-magically from one source, but is always the result of informed people acting not just with one another but in the eyes of one another—that is to say, dramatically. Yet, as Stone Peters states:

> If the opposition between theatrocracy and nomocracy is false . . . it is nonetheless integral to the theatre of law, internalized as part of—indeed essential to—the experience of legal spectatorship. This opposition operates to sustain the ideology of law's separateness (its "distinctive temporal and spatial borders," as Almog puts it), and thus the distinction between law and not-law. Much of law's legitimacy is, in fact, vested in this distinction, but the barriers are difficult to maintain.[9]

What is hidden in Stone Peters's argument—or at least not made explicit—is the internal differentiation she makes in describing the double constitution of the "theatre of law"; namely, the theatrical-proper and the dramatic. In the first case, the pivotal question is: How does the law appear on some sort of *stage*? In the second case, the pivotal question is: How is law acted out on some sort of podium? As discussed below, both relate differently, to spatial and temporal borders, and, more specifically, to the on and the behind the scenes. Put differently, they relate in distinct and separate ways to the law's necessary visibility and equally necessary invisibility.

Law appears to be primarily textual. This is why Stone Peters argues that originally law is "a domain committed to the sanctity of the verbal text."[10] Law's theatricality, however, is almost equally dominant because it is doubly motivated to show how the rule of law works and to open court procedures to the public for independent assessment by the people. The latter point is evidenced by Lord Chief Justice Gordon Hewart's often-quoted statement from 1924 "[T]hat justice should not only be done, but should manifestly and undoubtedly be seen to be done."[11] This phrase became far more famous than his *New Despotism*—

[8] Julie Stone Peters, *Theatrocracy Unwired: Legal Performance in the Modern Mediasphere*, 26.1 LAW & LITERATURE 58 (2014).

[9] *Id*.

[10] *Id.* at 39.

[11] *R v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, [1923] All ER Rep. 233.

published in 1929—where Hewart argued that the political powers of the executive were encroaching upon the legal system in such a way as to come close to subordination.[12] Here as well, the key issue was that such encroachment worked against the requirement that justice be seen to be done in the sense that legal responsibility has to be staged in a theatrical manner in order to appear in the public eye—and be put to a public test.

Chief Justice Hewart expressed this requirement for the public visibility of justice in response to a case where—unknown to the defendant—the clerk to the court was affiliated with the accusing party. For Hewart, even if said clerk had not participated in the judges' consultation, his bias was unacceptable precisely because this affiliation was not disclosed to the public; i.e. it had not been made public—publicly visible, that is. Hewart's key terms in the quote above are "manifestly and undoubtedly." These terms both point to the requirement that people must feel certain that a verdict is untainted by doubt, because of bias, for instance. To Hewart, these terms did not, of course, imply that the general public should be physically present at the private conferences of the judges. These conferences have to take place behind the scenes. Still, judges' decisions that result from these conferences should be manifest. Both the etymology and denotation of this term imply that something must be made evident as if at hand, but—most of all—tellingly visible.

Still, the "manifest" hints at a generic complication. When the law appears and operates theatrically, it works by means of display. At the same time, the law's very theatrical production is a result of actions behind the scenes. The crucial element of this theatrical behind the scenes production—indexically suggested by the terms "enter" and "exit"—has acquired attention in the field of literature and law, yet it has received relatively little theoretical consideration within theater studies or in discussions of theatricality. Moreover, when Peter Goodrich states that "[w]e have literally to look behind the scenes, into the emptiness that is filled by images and imaginings, to apprehend the staging of law as a theatrical and present drama,"[13] he refers to the behind the scenes of the law's language, the emptiness of which, apparently, is filled by visual means. When Goodrich claims that the intrinsic theatricality of the law's language still lacks a general overview, he might also have added that the general history of the law's theatrical appearance requires much more.[14] In that context, the theatrical behind the scenes—which can only be sensed or disclosed with some effort and, even then, only in hindsight—would be pivotal.

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[12] The very phrase "new despotism" was not new: It was brought forward by Alexis de Tocqueville in 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1840), and in his case, he hinted at the potential that democracy would end up in securing the lives of people against any risk.

[13] Peter Goodrich, *Specters of Law: Why the History of the Legal Spectacle Has Not Been Written*, 3.1 U.C. IRVINE L. REV. 773, 811 (2013).

[14] *Id*. at 779.

With respect to theatrical invisibility, the first question I want to ask is how the behind-the-scenes that is inherent in court cases relates to the two generic aspects of the law's theatrical constitution already mentioned: The theatrical-proper and the dramatic—a distinction that also plays a role in Goodrich's analysis with his "theatrical and present drama."[15] In the case of the theatrical-proper, the question concerns from whence someone or something appears in terms of the law and where it goes when it leaves the stage. With the dramatic, the question concerns whether or how we can conceive of the legal drama that takes place in or behind the scenes—that is, with or without an audience. This difference between the theatrical and the dramatic is captured paradigmatically in two still images. The first is taken from the 1962 Orson Wells adaption of Franz Kafka's novel *Der Prozess*. The second is taken from Sidney Lumet's *12 Angry Men*.[16]

Still from Orson Welles, *The Trial*.[17]

[15] *Id*. at 811.

[16] Lumet, *supra* note 7.

[17] Still: Victoria Brathwaite, *Orson Welles: "The Trial"*, THE MUSEUM OF FILM HISTORY, https://eng3122.wordpress.com/group-5-main/1960-to-1965/thetrial/.

Still from Sidney Lumet, *12 Angry Men*.[18]

In the first image, there is a clear theatrical distribution of roles. The protagonist Josef K. appears in the process of defending himself publicly in a court before a judge and in the presence of an audience, which in turn can be divided into the audience that is made up of the ensemble of legal actors—such as the judge, prosecutor, lawyer, accused, and witnesses—and the audience members watching the action. K. undoubtedly finds himself on some sort of stage. Within the theater that frames the actions on this stage, there are procedural rules to be followed even if K. does not exactly know what they are. He has been brought on to a stage where others are already present, yet where did they come from and where shall they go? Josef K. is clearly in the scene while having no clue what produced the very stage on which he finds himself. He does not know—and will not come to know—what is going on behind the scenes.

In the second image, the protagonists as members of the jury find themselves in an enclosed space—with the door locked—deliberating on whether or not someone is guilty. Their deliberation will have to result in a public disclosure, but the dramatic deliberation is invisible to the public eye and the outcome is uncertain. Yet the members of the jury function as a synecdoche for the public at large, and they know as such that they are acting in the imaginary eye of a public on some sort of (legal) podium. In this case, the actors are clearly behind the scene considering what has happened on the scene in court with the sole purpose of disclosing their verdict back to that very scene. In both cases, then, theatricality

[18] Still: *Great Movie Moments: '12 Angry Men' – Turn Your Back*, POPOPTIQ, http://www.popoptiq.com/great-movie-moments-12-angry-men-turn-your-back/.

exists in the fact that actors appear or disappear, publicly and explicitly, from a place where they were not to be seen or to a place where they are not to be seen. Yet, there is a generic twist that is pivotal: Theatrically speaking, what occurs behind the scenes is not theatrical. Dramatically speaking, what happens behind-the-scenes can still be dramatic.

In two different legal systems—the European-continental and the Anglo-Saxon, especially as the latter has evolved in the U.S.—law's theatrical and dramatic aspects have been dealt with in the realm of cultural representation. The two systems just mentioned have been the topic of intensive comparative studies,[19] and one might even sigh, "why compare them again?" because the comparison has been plagued by clichés. In a special issue devoted to this comparison, the clichés are captured in the description of the German-American legal scholar Herbert Bernstein, who is noted for his dislike of generalities, as having "little time for shortcut phrases that described the Anglo-American legal system as 'adversary' but the continental systems as 'inquisitorial'."[20] In an attempt to be specific, this Article focuses on the aforementioned generic aspects of theatricality that do not so much characterize and separate the two systems, but have marked the ways in which both have been represented iconically in the cultural domain. More specifically, this Article considers the differing forms of the law's theatricality in dominant modes of cultural representation.

Drama has generally been defined in Aristotelian terms as the development of the plot, which explains why Bertolt Brecht wanted to re-theatricalize theater by dismantling plot.[21] Yet, plot is a distinctly narrative-based concept. The etymology of drama emphasizes something else: *Dran* means "to do." The basic distinction, then, is one between actors dramatically acting with one another on a podium, or their actions being seen by an audience, theatrically. When the action is watched by an audience, the podium becomes a stage—as Walter Benjamin made clear.[22] Further, the connecting term between a podium

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[19] MIRJAN R. DAMAKASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986) was a landmark study, which was as favorable to the American System as was John Langbein to the European, or German one: John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823–28 (1985). I was also inspired by Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61 (2003).

[20] Donald L. Horowitz, *Foreword: Compared to What?*, 13 DUKE J. COMP. & INT'L L. 1, 2 (2003), http://scholarship.law.duke.edu/djcil/vol13/iss3/2. The distinction in play was central to DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986). Damaska described the continental and Anglo-Saxon or American model as an opposition between an adversarial vs. inquisitorial system with two different ideals of officialdom—the coordinate one and hierarchical one—that had procedural implications: Concentration on proceedings vs. methodical succession. The two systems were characterized, moreover, by different objectives of the legal process in their relation to a reactive state vs. activist state that in turn used legal processes to resolve conflicts or to enforce state policy—in the sense of policy-implementing.

[21] See Brecht's notes to his opera *Aufstieg und Fall der Stadt Mahagonny* from 1927, published as an essay later; see BERTOLT BRECHT, BRECHT ON THEATRE (1964).

[22] *See* Walter Benjamin, *What is Epic Theatre?*, *in* UNDERSTANDING BRECHT 1 (Stanley Mitchell ed. & Anna Bostock trans., 2003).

and a stage would be the floor. One can take the floor, and the very distinction between taking it and watching it being taken determines whether we are talking about a podium or a stage.

In the context of law's theatrical-proper, the law must be formally staged with a distribution of roles to play; a general audience must be able to see and hear the law enacted, not just be able to check on whether everything proceeds fairly, but also be able to witness how the law works. They should be able to see how a case gradually unfolds on the basis of a procedurally speaking predictable plot aimed at closure—although the outcome itself may be unpredictable. As Hannah Arendt and—in her line of thinking—Yasco Horsman have noted, controversial cases will always spill over to the realm of society in a theatrical way.[23] For instance, a case may be completed in legal terms but cannot readily be resolved for a politically divided public.

By contrast, dramatically speaking, there are actors acting with one another on a podium, and it is probable that an audience is present but not necessary. The actors do not know one another or what the others are thinking and they are not aware of what the next act is going to be. There is no clear-cut distinction between those who act and those who witness, and there is no way of escaping their working toward an outcome that cannot be predicted and as such is open. Even after a specific case has been completed legally, it can still dramatically linger on as unresolved business.

In what follows, this Article argues that cultural representations of European-continental criminal law are colored theatrically, whereas representations of the Anglo-American criminal law system are colored dramatically. Here, "color" is analogous to its use in quantum theory where colors indicate not a surface or decoration but a quality or property that relates one color to a counterpart. The use of the term is also motivated by the fact that—whether theatrically or dramatically—something must be brought to light, or—in other words—must be made visible. By implication this means that there must also be something invisible. This Article traces how different characteristics in both systems provoke generically colored cultural representations of how things are being brought to light legally. Here, the two works of art already mentioned—*Der Prozess* and *12 Angry Men*—will be considered as paradigmatic.

B. Theatrical Display: Stability and Imperial Behind-the-Scenes—the European Case

Kafka's novel was conceived in manuscript form in the years 1914–1915 under the title *Der Process* and then published—as supervised by Kafka's friend Max Brod—under the title *Der Prozeß* in 1925 (see note 7). Tellingly, Kafka's novel has always been translated in English as

[23] YASCO HORSMAN, THEATERS OF JUSTICE 15–45 (2010) (focusing on Arendt's dealing with the Eichmann case).

The Trial, which is also the title of the Orson Welles film adaptation.[24] *The Trial*, however, is an incorrect translation. Yet this incorrect translation signals, as we shall see, the very principal difference between the two generic aspects. Indeed, one aim of this Article is to chart differences between these two in terms of their cultural and generically captured "un-translatabilities."[25]

Funded by German, Italian and French money, Welles's film was released in France and Germany in 1962 under the titles *Le Procès* and *Der Prozeß*, respectively. The legal term "process" is derived from *processus*, which is in turn derived from *pro cedere*, or "to go forth." The term had its legal birth in medieval church law to indicate the procedural development of a judicial case.[26] In contrast—and "contrast" is used here intentionally to connote the issue of color—the term "trial" is derived from the Anglo-French *triet*, which means "to test," "to experiment," "to put to proof," or "to try." As we will see, such testing, trying, or putting to proof, is something that serves the manifest nature of legal procedures, and is—as such—distinctly dramatic. For now, the point is that a process implies a procedure that can be best defined as theatrical because it begins with Act I, Scene 1, and proceeds through subsequent acts and scenes.

The fact that the term process originates in medieval church law implies it is part and parcel of an ultimately imperial understanding of law. Much of Pierre Legendre's work attempted to show how the Roman Catholic Church appropriated Roman law; Legendre used the term "hostile take-over" to describe this process.[27] The obvious impulse behind this endeavor was to transpose the imperial power of Rome to that of the Church as a papal organization.[28] To make this possible, continental law was shaped in the later Middle Ages on the basis of Roman emperor Justinian I's compendium of existing laws from the sixth century (529–533). In a major attempt to avoid conflicting or contradictory laws, Justinian reduced the body of legal writings back from 1,500 books to fifty with statutory force. In hindsight, this was one of the great moments in what might be called the history of the codification of European

[24] It is possible that Welles explicitly wanted to pun on the issue of fascist showtrials. *See* Anne-Marie Scholz, *"Josef K von 1963...": Orson Welles' 'Americanized' Version of The Trial and the changing functions of the Kafkaesque in Postwar West Germany*, 4.1 EUR. J. AM. STUD. (2009), http://ejas.revues.org/7610.

[25] On conceptual un-translatability, see DICTIONARY OF UNTRANSLATABLES: A PHILOSOPHICAL LEXICON (Barbara Cassin ed., Emily Apter, Jacques Lezra & Michael Wood trans. and eds., 2015).

[26] On this, see JAMES BRUNDAGE, MEDIEVAL CANON LAW 120–53 (2013).

[27] PIERRE LEGENDRE, DOMINIUM MUNDI: L'EMPRIRE DU MANAGEMENT 79 (2007); PIERRE LEGENDRE, LE BALAFRE: DISCOURS A DE JEUNES ETUDIANTS SUR LA SCIENCE ET L'IGNORANCE 69–82 (2007); PIERRE LEGENDRE, ARGUMENTA & DOGMATICA: LE FIDUCIAIRE *SUIVI DE* LE SILENCE DES MOTS (2012).

[28] Legendre studied the issue from his earliest work onwards in PIERRE LEGENDRE, LA PENETRATION DU DROIT ROMAIN DANS LE DROIT CANONIQUE CLASSIQUE (1964).

law.[29] Law became codified in the *Digest*, or the *Digestorum, seu Pandectarum libri quinquaginta*, which along with the *Code*, the *Institutes*, and the *Novels*, formed the so-called *Corpus Juris Civilis*. The *pandectarum* indicated that these fifty books were "all encompassing."[30] It is evident that Justinian strived for the unification and centralization, one could also say the stability of the legal system in the Eastern Roman Empire. Yet, what is often ignored is that he did so in preparation to expand and restore the entire Roman Empire as a whole, including Northern Africa and Western Europe. This restoration had its consequences. In effect, Justinian's conquering of the Western part of Europe turned out to prefigure the Frankish kingdom and future empire under Charlemagne, and inspired medieval efforts to centralize and unify. In light of my general argument about the connection between the law's theatrical mode and visibility, it is telling that when Charlemagne was made sacrosanct in 1167, his bones were forever sealed and made invisible, thus mystically supporting or underpinning the visible manifestations of power and legal order.

Late Roman and medieval processes of centralization and moments of codification led to new "appearances" of law. Individual cases now fell under general rubrics, and—instead of these cases expressing a mediating judge's particular decision—the judge now transformed into a staged character that expressed imperial and centralized power and served the stability of this order. As the classics scholar William Turpin contends: "Roman law was transformed by the acquisition of an empire: rules derived from a deep republican distrust of magisterial powers gave way to those of an authoritarian imperial government."[31] In this light, I argue that the obsession with the abstract theatricality of the legal system in Kafka's novel is not coincidental. This obsession can be best understood in the context of the Austro-Hungarian Empire. It may be right that—as Walter Benjamin noted in 1934—"Kafka's world is a world theater. For him, man is on the stage from the very beginning."[32] Yet, the very content and nature of what happens to the protagonist in *Der Prozeß* is not as universal as suggested. Kafka wrote the novel at a time when the Austro-Hungarian Empire—*K & K*: *Kaiserlich und Königlich*, both imperial and royal—was still fully functioning. Similar to previous European imperial systems and late nineteenth and early twentieth-century European empires, criminal law functioned primarily in *theatrical* terms. Its pivot was the

[29] There is abundant literature on Justinian's codification. *See, e.g.*, DAVID JOHNSTON, ROMAN LAW IN CONTEXT, 2012; PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (2003); Caroline Humfress, *Law and Legal Practice in the Age of Justinian*, *in* THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN 161–84 (Michael Maas ed., 2005).

[30] DIGESTORUM, SEU PANDECTARUM LIBRI QUINQUAGINTA, LUGDUNI APUD GULIELMU[M] ROUILLIUM (1581). BIBLIOTECA COMUNALE "RENATO FUCINI" DI EMPOLI.

[31] William Turpin, *Formula, Cognitio And Proceedings Extra Ordinem*, 46.3 *REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE* 499, 499 (1999), http://local.droit.ulg.ac.be/sa/rida/file/1999/TURPIN.pdf.

[32] WALTER BENJAMIN, *Franz Kafka: On the Tenth Anniversary of his Death, in* ILLUMINATIONS 111, 124 (Hannah Arendt ed., 1981).

public display of a procedure that would commence in Act I, Scene 1 and proceed in good order towards a final conclusion.

One passage in *Der Prozeß* testifies to this. When K. returns to the theatrical space of the court—or better, the space behind the scenes that allows for access to that stage—he looks into the now empty courtroom stage with a table of books and says:

> "Can I have a look at those books?" asked K., not because he was especially curious but so that he would not have come for nothing. "No," said the woman as she re-closed the door, "that's not allowed. Those books belong to the examining judge." "I see," said K., and nodded, "those books must be law books, and that's how this court does things, not only to try people who are innocent but even to try them without letting them know what's going on." "I expect you're right," said the woman, who had not understood exactly what he meant. "I'd better go away again, then," said K. "Should I give a message to the examining judge?" asked the woman. "Do you know him, then?" asked K. "Of course I know him," said the woman, "my husband is the court usher." It was only now that K. noticed that the room, which before had held nothing but a wash-tub, had been fitted out as a living room.[33]

The entire passage is illuminating not only for its illustration of the theatrical operation of law in an imperial context, but also for revealing the mysterious nature of the court's behind the scenes. In terms of the imperial display of law, ordinary citizens only know the judge indirectly via a court usher. The judge's operations are not based primarily on his dealing with the confrontation between the parties involved but instead on law books that determine how the court proceeds—how it "does things." The intricacies of the law captured in these books escapes the uninformed layman, who—even when innocent—is forced to simply play a passive role in the procedures. Even when K. is standing behind the scenes, it does not provide him with inside knowledge because the space is no longer the behind the scenes of the court; its nature is fluid.

In Kafka's text, the European theater of law displays quasi-imperial powers in the figure of the judge. Script, in this context, is not only the basis and result of this theater, it is also an icon for another kind of theatrical behind the scenes by embodying an invisible legal space that defines theatricality as much as does its public display. The invisibility and the display of imperial power is rendered manifest in the document, the book, and the archive, all of

[33] FRANZ KAFKA, THE TRIAL 60 (David Wyllie trans., 2003).

which emphasize stability, and serve the theatrical procedure. In the end, however, they overrule it. As Stone Peters indicates, law is "committed to the sanctity of the verbal text."[34] This may explain why a little later Josef K. considers his options as follows:

> He was no longer able to get the thought of the trial out of his head. He had often wondered whether it might not be a good idea to work out a written defence and hand it in to the court. It would contain a short description of his life and explain why he had acted the way he had at each event that was in any way important, whether he now considered he had acted well or ill, and his reasons for each. There was no doubt of the advantages a written defence of this sort would have over relying on the lawyer, who was anyway not without his shortcomings.[35]

Here, K. is shown trusting the power of paper and, by implication, procedure and codification. He is well aware that the behind the scenes may be of greater importance than his public appearance.

K.'s ideas coincide with a consideration of law defined by a fascination, or perhaps even an obsession, with law's unknown origin and almost miraculous appearance. In his study of Derrida's reflections on law and Kant, Jacques de Ville argues that "for law as such (pure morality) to have authority, according to Kant, it is required that it does not have a history. The law (as such) must present itself as 'an absolutely emergent order, absolute and detached from any origin.'"[36]

Put differently, law's political, and, by consequence, intrinsically controversial origin needs to be hidden behind the scenes. As a result, law seems to enter the stage theatrically—in the imperial context, that is. Such an "emergent" form of theatricality is intrinsically related to language and especially to literature. As Derrida notes, literature is very well equipped to "play the law", capable of "playing at being the law," and as such—and this is a hallmark of theatricality—capable of "deceiving the law."[37] Behind this argument is Derrida's assertion that the foundational myths of law and the mystical foundation of its authority depend on the act of *fingere*—fictionalization in both the etymological and the common senses of the

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[34] Stone Peters, *supra* note 8, at 58.

[35] KAFKA, *supra* note 33, at 134.

[36] Jacques de Ville, *On Law's Origin - Derrida reading Freud, Kafka and Lévi*-Strauss, 7.2 UTRECHT L. REV. 11, 87 (2011), https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.163/. The quote is taken from Jacques Derrida, *Before the Law*, *in* ACTS OF LITERATURE 181, 191 & 194, (Derek Attridge ed., 1992).

[37] Derrida, *supra* note 36, at 212.

word. Etymologically speaking, the verb *fingere* initially meant *to shape* or *to form* and, only later, it came to denote *to pretend*. In its emergent appearance, literature is analogous to law and to theater here: Law has to emerge out of the domain of the invisible into the domain of the visible. Acts of constitution and foundation are precisely such appearances.

Like the curtain in the theater, the veil of fiction can be drawn away to show not the origin of law but rather the stage upon which legal characters are meant to appear. Such unveiling is radically different from the dramatic enactment of conflicts in a legal context. This Article now turns to the second theatrical mode of law's public appearance and focuses on how the U.S. American system has acquired a public face by means of cultural representations where the dramatic is pivotal.

C. Dramatic Invisibility: The Test of Truth Behind-the-Scenes—the Anglo-American Case

The film *12 Angry Men* is remarkable for its persistent behind-the-scenes focus. Only at the very beginning of the film do we see the stage of the courtroom upon which everything relevant to the case has occurred. The film then progresses with the members of the jury entering the deliberation room where they will remain until they come to a conclusion and a verdict. From then on, the viewers will follow the conflicts and the dramatic deliberations of the jury members, including flashbacks in which we see only the face of the accused boy, who allegedly murdered someone with a knife. The film's excision of the space of the courtroom is functional and telling, as the film provides a dramatic reenactment of a theatrical failure. The upshot is that the entire legal procedure must be repeated because what occurred in court may have been biased. The starting point for this reenactment is a single member of the jury who has doubts: Juror number eight (played by Henry Fonda). What was publicly tested in court is now tested again, outside of the public eye, though one could argue that the jury is the embodiment of that very eye. This public body now takes the floor, not in the form of a stage, but rather via a podium, in an open-ended action sequence where all actors have an equal say.

The dramatic reenactment at stake is a trial in the etymological sense of the word. As we have already seen, "trial" is derived from the Anglo-French *triet*, which means "to test," "to experiment," "to put to proof," or "to try." In this context, the translation of Kafka's *Der Process* or *Der Prozeß* as *The Trial* is a clear example of an incorrect translation, or rather, of an inescapable untranslatability. The untranslatability of culturally and linguistically disparate terms, like this one, were key to a project led by the philologist and philosopher Barbara Cassin, who published *Vocabulaire européen des philosophies: Dictionaires des intraduisibles*, which was translated in English as *Dictionary of Untranslatables: A Philosophical Lexicon*.[38] The principle behind this book was that there are words so specific to languages, and by consequence cultures, that they are untranslatable. As such, they

[38] DICTIONARY OF UNTRANSLATABLES, *supra* note 25.

provoke relentless attempts to achieve some sort of translation. One of the volume's translators, in turn, transferred the principle operating behind the dictionary to another domain. In *Against World Literature: On the Politics of Untranslatability,* Emily Apter argues that the study of texts from different cultures in university courses on world literature tends to take away the very thing that makes these texts specific.[39] The translation of *Der Prozeß* as *The Trial* represents an unacknowledged proof of this contention. The two terms denote different modes of cultural representation and differing systems of law.

Paradoxically, an identical term may also point to cultural un-translatabilities. For example, in the European continental tradition, *The Digest* can only be used to refer to Justinian's Digest. Yet, the Faculty of Law at the University of Oxford says this about the very same term:

> The Digest is a compendium of case law from the 1500s onwards. Originally called the *English and Empire Digest,* it includes cases from England and Wales; Scotland, Ireland, Canada, Australia, New Zealand and other Commonwealth countries; and EU and European Court of Human Rights cases. The Digest provides a brief summary of cases, and their subsequent judicial history, arranged by subject. It is particularly useful for finding older cases, which are not included in the Current Law series.[40]

As if to provide almost a mirror image of the continental Justinian Digest, this Anglo-Saxon version consists of fifty-two books—just two more than the Justinian Digest. To be sure, the reference to the European Union and the European Court of Human Rights makes clear that the distinction between the so-called common law tradition and the continental one should not be essentialized. As John Langbein stated three decades ago, "the familiar contrast between our adversarial procedure and the supposedly non-adversarial procedure of the Continental tradition has been grossly overdrawn."[41] Indeed, the traditions and systems have been gradually merging, in the case of the United Kingdom (U.K.), since the Middle Ages. Yet, there is no escaping the different meanings of the term "digest." It concerns the familiar distinction between a codified system of law installed by an imperial power, and a system that has come into being based on individual cases in terms of jurisdiction and jurisprudence.

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[39] EMILY APTER, AGAINST WORLD LITERATURE (2013).

[40] The Faculty of Law, University of Oxford, THE DIGEST (March 2016), https://www.law.ox.ac.uk/legal-research-and-mooting-skills-programme/digest.

[41] John H. Langbein, *The German Advantage in Civil Procedure*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 823, 824 (1985), http://digitalcommons.law.yale.edu/fss_papers/536/.

The clear commonalities between the two systems are due to the fact that the English system assumed its own quasi-imperial or royal coloring after the Norman conquest of England in 1066 when the French-speaking Norman elite came to control England's mixed set of peoples and communities (Angles, Saxons, Vikings, Danes, Celts, Jutes, and others). The most basic attempt to do so was embodied, just twenty years after the invasion, in the *Domesday Book*, which described all parts of the countries and laid down the lines of allegiance to, ultimately, the (newly established) king. For that reason, Theodore Plucknett stated, "[t]his opportunity of systematising the land situation enabled the Conqueror to make England the most perfectly organised feudal state in Europe."[42] Moreover, in the years that followed, the royal question was how to bring communities into line that were ruled by customary law, mostly consisting in the form of oral transmission, or how to bring cohesion and consistency to the many communal courts or other types of tribunals that were related to shires or baronies, for example. Enter common law—common, that is, to the realm of the kingdom. This very commonality was guaranteed by royal judges who traveled the country and came to decisions in the context of specific courts, communities, and on the basis of consultation, or by using juries. Yet, this process was always overseen by the *curia regis*, the council-court of the king. Consequently, a system of law based on regional differences developed with underlying principles of reason and continuity, and at some distance was ratified by a supreme power. Still, it did not come into existence because of a top-down, codified, systematic, and closed set of books with statutory force.

Moreover, although the logic underpinning royal rule was clearly analogous to the centralizing power at work in Justinian's empire, what colored the Anglo-Saxon and U.S. American system of law differently than the continental one was the distrust of royal or, by implication, government power—a distrust that is still active to this day, especially in the United States. In a rejection of despotism or uncontrolled imperial power, a line extends in European and Western history that connects the English *Magna Carta Libertatum* (1215) with the Hungarian *Golden Bull* or *Edict* (1222), and, centuries later, with the Dutch *Act of Abjuration* (1581), which, in turn, was studied by the Founding Fathers of the United States in preparing the *Declaration of Independence* (1776). The principle behind all four texts is the protection of the people against the abuse of imperial or royal power. In this context, the nineteenth-century American lawyer, anarchist, and staunch abolitionist Lysander Spoon (1808–1887) explicitly wished to recall what the aim and principle of judgment by jury meant, by repeating explicitly what the Magna Carta had stated:

> No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, or of his

[42] Theodore F. T. Plucknett, *A Concise History of the Common Law 13 64 (1956),* http://oll.libertyfund.org/titles/2458*; see also the common law lemma* in THE OXFORD COMPANION TO BRITISH HISTORY, *223–24 (*John Cannon & Robert Crowford eds.*, 2015).*

> free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.[43]

Spoon's recalling of this very passage needs to be understood both in the context of his efforts to end slavery as well as a principal defense of a people against any sovereign power. To that end, Spoon—like many others—offers an alternative to the theatrical display of legal power based on codified law books with statutory force. This alternative finds its anchor in "the lawful judgment of . . . peers." In terms of legal procedure, this comes down to the use of a jury; to counter the brute execution of power, individuals' rights must be protected by a trial, a test and judgment, by peers. I argue that such a test is not a form of theatrical display, but rather is distinctly dramatic by nature.

In her seminal study, *The Test Drive*, Avital Ronell considered that, "essentially relational and not static, testing admits of no divine principle of intelligibility, no first word of grace or truth, no final meaning, no privileged signified."[44] In the realm of the legal test, by means of a trial, this comes down to the refusal to presuppose a final meaning as contained in codified books. Peers decide a case based on the particular laws they adhere to, but not on the basis of a final imperial or royal word. In search of a truth that needs to be established, actors enter into the dramatic process of a test in the etymological sense of the word in order "to test," "to experiment," or "to put to proof." This search for truth by means of a trial, or test, is formally embodied in the jury as the icon or synecdoche of "the people." As the American Bar Association writes on its website, under the heading "Dialogue on the American Jury: We the people in action":

> The right to trial by a jury of one's peers is a cornerstone of the individual freedoms guaranteed by the U.S. Constitution's Bill of Rights. In a criminal case, trial by jury places twelve citizens between the power of the government and the rights of the accused. The government cannot take away someone's right to life, liberty, or property until it has convinced those twelve

[43] LYSANDER SPOONER, AN ESSAY ON TRIAL BY JURY (1852), giving his version of Article 39 of the Magna Charta, that in the most recent translation reads: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." *English Translation of Magna Carta*, BRITISH LIBRARY (Mar. 2016), http://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[44] AVITAL RONELL, THE TEST DRIVE 9 (2005).

> citizens of that person's guilt beyond a reasonable doubt.[45]

Formally, elements of staging are clearly involved here. Yet, the entire framework is dramatic due to the fact that the stage of the court can be overruled by a podium occupied by ordinary citizens: "peers."

This is what *12 Angry Men* portrays: The twelve members of the jury in their enclosed space provide us with a palette of socially diverse U.S. American citizens; although, as telling sign of the times in which the film was made, the jury members were all white men. Juror number eight, with whom the entire reenactment of the trial begins, can be seen as the embodiment of what Plato coined "nomocracy"; he is a reasonable, rational, measured, intelligent, and controlled man who stands up against the multitude. He is also the only one of the jurors not to sweat. The others' sweating is symbolic of their passions, irrational fears and desires, and uncontrollability. By implication, they represent the dangers of a system that depends on the whims of individual people that make up a collective—what Plato coined "theatrocracy." In a sense, the jury is a *mise en abyme* for a theatrical, or popular, rule that runs the risk of being biased. This systemic problem of biased juries was the major reason why the jury system was abolished in India and Pakistan during the 1960s, while in the U.K., the jury system has been gradually dismantled and is used only in one to five percent of all cases.

In the context of this argument, the issue is that the theatrically-framed public test enacted on stage in court can be overruled by the dramatic behind-the-scenes action, when the jury retreats to deliberate on whether the accused should be found guilty. This—invisible to the audience—dramatic behind-the-scenes, which is nevertheless public due to the composition of the jury, can be either the source of bias and injustice, or seen as an aspect of one of law's most basic requirements—the idea that potentially biased, unreasonable, or arbitrary results can be corrected by public control. Paradoxically, the public work of the jury embodies what Plato described as nomocracy, as an internal, in the sense of a dramatic, process between people that determines what kind of law should be made or upheld. For this very reason, Stone Peters argued that the opposition between theatrocracy and nomocracy is a false one. Indeed, in terms of rhetoric, the opposition is false. Yet, in terms of jurisdiction and legitimacy, a central distinction between the two functions is the pivot between the theatrical and the dramatic. It concerns the publicly visible or invisible law-enforcing, law-making, law-upholding, and law-innovating actions of judges or juries. These actions do not happen through public consultation, but rather, through internal dramatic debates that are only later theatrically presented to the public.

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[45] *Dialogue on the American Jury: We the people in action*, AMERICAN BAR ASSOCIATION (2016), http://www.americanbar.org/content/dam/aba/administrative/public_education/resources/dialoguepart1.authcheckdam.pdf.

D. Dissenting Opinion and Supreme Rule: Current Tendencies in the Two Systems

In the Supreme Court of the United States, as well as in the Federal Constitutional Court of Germany, judges are allowed—and expected—to vent internal differences of opinion in relation to the public decision or verdict of the court. One such voice of dissent has recently fallen silent due to the unexpected death in 2016 of Justice Antonin Scalia, who served on the Supreme Court of the United States for thirty years. In its obituary, *The Economist* sketched the picture of a man who "never tried for consensus, not rating it anyway, and increasingly sat with the minority, though always the most colorful and quotable."[46] Scalia's frequent dissents represent an example of how the dramatic and, in essence, the public, yet invisible, clashes among judges in the closed deliberations of the Supreme Court were theatrically re-staged for a general audience.

Such theatrical, public disclosures of dramatic dissent are inconceivable for the Court of Justice of the European Union. In fact, the European Parliament conducted a 2012 study asking whether the Court of Justice of the European Union should allow dissenting opinions.[47] To this end, the study considered existing practices in the member states. In Belgium, France, Italy, Luxembourg, Malta, the Netherlands, and Austria separate opinions of the judges on the Supreme Court are never accepted. Yet, in 2012,[48] all of the other twenty member states had varying practices regarding dissenting opinions. This variety of procedures lead the study to conclude that this "calls into question the validity of some traditional arguments against dissenting opinion, such as those related to legal cultures and differences in understanding the role of judges."[49] Yet, the argument that the simultaneous existence of dissenting opinions in different legal systems implies that they are not altogether that different—culturally speaking—and, therefore, the argument may not be very strong. Things that appear to be the same in different systems may have radically different meanings and connotations. In this context, it is telling that Raffaelli does not conclude that the Court of Justice of the European Union should include the practice of allowing for dissenting opinions because, as she contends, its authority and its precise relation to the systems of the member states is not sufficiently clear.[50] The drama of clashing

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[46] *Always right*, THE ECONOMIST (Feb. 20, 2016), http://www.economist.com/news/obituary/21693161-originalist-chief-devout-and-colourful-end-was-79-obituary-antonin-scalia.

[47] ROSA RAFFAELLI, *Dissenting Opinions In The Supreme Courts Of The Member States*, EUROPEAN PARLIAMENT 6 (Feb. 2016), http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

[48] This concerns the situation of 2012; Croatia became a member in 2013.

[49] RAFFAELLI, *supra* note 47, at 29.

[50] *Id.* at 39.

opinions is thus to remain behind closed doors. The borders of invisibility at stake here are intrinsically related to the court's authority, but in a double sense. As Justice Susanne Baer states in her contribution to this volume: "Indeed, this veil of the secrecy over deliberations protects me and the institution itself; it is highly functional."[51] Yet, this veil may serve the authority of the court in its theatrical appearance, staging itself as if it had only one voice, and dramatically, in implying the struggle of judges in getting to a decision.

In Europe, such struggle is not made public in terms of *Öffentlichkeit*, and the judges are not—and are not supposed to be—truly public figures. In contrast, in the U.S., the recently deceased Justice Scalia had a cultivated image: "Though he was not the only New Yorker on the bench, he was the only spoiled-rotten Italian kid brought up proud and scrapping in Queens and familiar with rude Sicilian gestures. 'Come right back at you!' was his motto, robed or not."[52] No comparable description of a judge in the Court of Justice of the European Union is thinkable. The reason may be that the U.S. American political and legal system is far more politicized than European ones, and here, the generic aspects of theater and drama may play a pivotal role in "coloring" of the different systems. Scalia is not described as an actor in his theatrical role as a justice, in which case the distinction between his being robed or not would make the difference. In fact, as the phrase "robed or not" suggests, a U.S. justice always plays a political role.

To this day, William Orville Douglas remains the longest sitting Justice of the Supreme Court of the United States, with thirty-six years of service (1939–1975), and he was certainly as controversial as Justice Scalia. Justice Douglas considered dissenting opinions to be crucial to America's democracy.[53] Many argue that the European Union is struggling to find its democratic colors—a struggle that concerns the parliamentary, the executive, and the judiciary branches. In this context, it may be understandable that the number of European citizens who can name even one judge on the Court of Justice of the European Union—even their own nationally appointed judge—is likely close to zero.[54] This would not be a vexing problem if the Court had only a minimal function. Yet, it is one of the most powerful centralizing forces within the European Union, and it functions so theatrically rather than dramatically, as it follows the judiciary logic of imperial powers with which Europe has long been familiar.

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[51] *See* Baer chapter in this volume.

[52] THE ECONOMIST, *supra* note 46.

[53] W. O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104 (1948).

[54] To my knowledge, there is no research on this. There should be. As long as it is not there, this is my hunch, which is informed by the fact that for some time I asked friends, colleagues, and people I met on the street whether they could name the Dutch Justice on the European Court of Justice. They could not.

For those who tend to think of European nation states only in their most recent form, it is worth recalling that just one century ago, before the start of the First World War in 1914, Europe was dominated by imperial powers. Consider, for example, the Russian Empire under the czar that included the current state of Finland, the Baltic States, and parts of Poland; the Austro-Hungarian Empire that encompassed the current states of the Czech Republic, Slovakia, Austria, Hungary, Serbia, Croatia, Slovenia and the biggest part of Romania; the Ottoman Empire that had only recently ceded what are now the states of Albania, Macedonia, and Bulgaria; and the German Reich that included parts of what are now Poland, Russia, and Denmark. Certainly, the United Kingdom, only a kingdom in name, was effectively the biggest empire of all with immense colonial possessions. France was a republic, and yet still had its own colonial empire to rule. Even tiny Portugal and the Netherlands had imperial territories. The Netherlands controlled the densely populated territory of what is now the state of Indonesia. As late as 1922, Dutch constitutional law was altered so that it could declare by law that the Kingdom of the Netherlands included the territory of the Netherlands, Surinam, six Caribbean islands, and Indonesia.[55] Though a democracy in more than just name, the Dutch legal system contended with the schizophrenia of defending a democratic European *Rechtsstaat*, on the one hand, while, on the other, maintaining an incredibly complex mixture of different systems of law under the umbrella of colonial rule.[56] In terms of *Öffentlichkeit*, the Dutch legal system opened itself up dramatically to Dutch subjects in terms of public testability. At the same time, it theatrically demonstrated its imperial power to colonial subjects.

The fact that the political organization of Europe was, historically speaking, recently imperial is relevant to understanding the European Union now. In name, the European Union is democratic, yet the individual member states are incomparably better structured than the Union to offer guarantees of democracy. Moreover, the European system of law that, legally speaking, "rules" the continent, has no clear democratic political underpinnings. Accordingly, the Union has a tough time appearing theatrically. For example, many citizens in Europe think that the Court of Justice of the European Union (CJEU) is important, but very few actually know where the court is located. Additionally, citizens often and easily confuse the CJEU with the European Court of Human Rights in Strasbourg, France—which is not an EU court. This shows that the CJEU's legitimacy is weak to say the least, as was confirmed by James L. Gibson and Gregory A. Caldeira. Their study, conducted for the European Commission, found that the CJEU was considered to be an important institute by about a quarter of the inhabitants of six member states.[57] Yet, although the authors of the study

[55] The original can be found at: https://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vi7ilzdchurk (last visited Mar. 1, 2017). The first article states: "Het Koninkrijk der Nederlanden omvat het grondgebied van Nederland, Nederlandsch-Indië, Suriname en Curaçao."

[56] On this see H.W. VAN DEN DOEL, HET RIJK VAN INSULINDE: OPKOMST EN ONDERGANG BVAN EEN NEDERLANDSE KOLONIE (1996).

[57] James L. Gibson & Gregory A. Caldeira, *Changes in the Legitimacy of the European Court of Justice,* 1 BRIT. J. POL. SCI. 63 (1998); *see also* Alicia Hinajeros, *Social Legitimacy and the Court of Justice of the EU*, 14 CAMBRIDGE Y.B. EUR.

found this impressive, they were more than pessimistic about the Court's legitimacy. Noting the absence of the court's theatrical appearance and testability, one is inclined to consider that invisibility has become more dominant than public visibility in the CJEU, and this implies a loss of the theatrical-proper.

In a different way, something comparable may be occurring in the United States, where plea-bargaining increasingly determines the outcome of most criminal cases.[58] In fact, in *12 Angry Men*, we are confronted with a rather outdated model of dramatic enactment. With plea-bargaining, there is no longer a public test nor a test performed in a legally protected space by peers. So, although the dramatic test is very much alive in terms of cultural representations in novels, films, and television series, these representations ignore actual legal practice. This discrepancy suggests that more research is required to understand what this means for the legitimacy of the system. Additionally, in both systems, the multiplication of different forms of media coverage has influenced the very ideas that many people have about systems of law.

Law has been topical in many forms of visual representation since the Early Modern period. Stone Peters argues that digital media has taken a quantitative change that, due to its omnipresence (with "a plenitude of moving images")[59] may have caused a qualitative change. According to her, in what she calls a digital theatrocracy, the danger is that, "in law, once the very epicenter of democracy, one can see the gradual infiltration of the vision machine: first the 19th-century diorama and panorama, then the photograph, then finger-printing techniques, then the infinitely replicating and increasingly surreal images that make up law today." [60] This Article argues that the problem is not the visual nature of representations, but rather their quasi-infinite replications and the speed of those replications. Due to the omnipresence of repeated and multiplied digital images, the operations of law threaten to become the topic of spectacle, and spectacle runs counter to the very idea of law's *Öffentlichkeit*. Spectacle is not about the ability to openly test something, but instead corresponds to the logic of the game, with winners and losers. In this sense, Stone Peters is correct that this "erodes our faith not only in law's truth-finding capacity, but also in its stabilizing power."[61]

LEGAL STUD. 615 (2012). The Court of Justice of the European Union is based in Luxembourg, Luxembourg, by the way.

[58] FISHER, *supra* note 2.

[59] Stone Peters, *supra* note 8, at 43.

[60] Stone Peters, *supra* note 8, at 43..

[61] Stone Peters, *supra* note 8, at 42.

There is no easy fix for this development. Moreover, some argue that there might be enormous advantages in using the explosion of visual media to deconstruct the invisibility of law and its perverse powers. Stone Peters, in her discussion with Peter Goodrich, considers what he has termed the "videosphere" as a powerful tool to disclose "the once-secret, invisible, or only partly visible practices at the heart of the law" and to transform law into a "transparent rite."[62] Yet, as this Article argues, and in agreement with Susanne Baer in this special issue, there are damaging, as well as pivotal and functional, aspects of those invisibility practices. Therefore, the question returns to what exactly should be rendered visible, or invisible, when law must appear open and to be made publicly testable. In his analysis, Goodrich emphasizes invisible actions as the potential source of law's power, perversion, and bias. He thus makes a plea for total visibility. In contrast, while not making this entirely explicit, Stone Peters appears to be more concerned with legal processes acted out by experts and lay jurors, who, in a balancing act, embody the requirement of law to be reasonable and fair. Thus, to Stone Peters, total transparency may result in totalitarian terror. Both Goodrich and Stone Peters make legitimate points; in a sense, they both prove that, despite the radical developments in media, the basic capacities embodied in theater and drama are still essential to the fair—specifically, open and public—operation of law. The theatrical and public display of stability, as opposed to the arbitrary actions of totalitarian or sovereign powers, is as much key as the openness of the judicial system to public participation and assessment.

In legal terms, drama needs a protected space. Such a space is, on the one hand, public. On the other hand, in certain practices, it must remain invisible, such as when jurors deliberate away from the gaze of the sovereign power, the eyes and ears of a totalitarian force, or the masses who may be manipulated by the media. Such a protected dramatic space is increasingly threatened in the present circumstances. In legal terms as well, law must be seen to work theatrically. Yet, the combination of a growing tendency toward spectacle and the increased invisibility of legal actions place the requirement of theatrical openness and public testability under pressure. Publicity is growing in importance, therefore. Law's *Öffentlichkeit*, in either theatrical or dramatic terms, is not truly served by pulling back all the curtains.

[62] Stone Peters, *supra* note 8, at 48 & 49; Peter Goodrich, *The Visial Line*, 14.4 PARALLAX 53 (2008).