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Towards Legality and Affect

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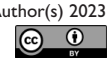

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Abstract

The contributions to this special issue on "Towards Legality and Affect" engage with Greta Olson's recent challenges to the discipline of Law and Literature in From Law and Literature to Legality and Affect (Oxford UP 2022). They grapple with Olson's reconceptualization of legality and her emphasis on the role of affect by way of case studies that include diverse media and transnational perspectives.

Keywords

Greta Olson, Law and Literature, legality, affect studies, popular legality, transnational approaches to Law and Literature

Introduction

When Donald J. Trump was indicted on April 4, 2023, and appeared for his arraignment in a New York court, news outlets – nationally and internationally – covered every step of the process in minute detail. They explained the meaning and consequences of the indictment, the various legal actors involved, and the burning question whether a person under criminal charges or convicted of criminal charges could still run for the office of President of the United States (legally speaking: yes, they can). Trump supporters declared the indictment part of the "Radical Democrats'" war against Trump, Democrat lawmakers distanced themselves from the New York DA's actions, and commentators consequently debated the politicalness of the legal measures taken against Trump. Numbers of support for Trump among registered Republicans spiked during the two

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weeks after the indictment, as did financial support for Trump's campaign: donations amounted to $15.4 million during those two weeks, as compared to $18.8 million during the first quarter of the year. The public debate about a legal event such as Trump's indictment is not, in fact, about law and justice and about legal actors, but about law's and legal subjects' enmeshment with other realms of society, from politics to economics to celebrity culture. Reactions to legal actions are contingent not upon an analysis of the actual charges and proceeding, but on highly entrenched affective alliances: the surging support for Trump after the indictment speaks to the way in which his purported status as an outsider to the nation's elite institutions, including its courts, continues to rally supporters around their perceived, shared exclusion from the establishment, and thus around issues of resentment and anger.

The over-determination of legal processes by public affect is, of course, not only evident in the U.S. American context. Between January and April of 2023, the French government led by Emmanuel Macron pushed their new pension bill through the National Assembly and the Senate with shorter-than-usual debate times and with the aid of a supplementary budget that political opponents viewed as unconstitutional. Massive protests had been anticipated ever since Macron first announced the government's intention to restructure the country's pension system, and massive protests did indeed shake the nation between late January and mid-March. The rushed process and lower legislative threshold for the additional budget were widely interpreted as strategic decisions to create a *fait accompli* as quickly as possible and thus cut protests short. By April 2023, the law had passed, and its constitutionality been (largely) confirmed. The French people's feelings about their society's legal fabric – their anticipated and then publicly displayed anger – had undeniable effects upon the way in which their democratic government exercised its legislative duties.

The French example also highlights the news media's role in harnessing their audience's emotional predispositions to impact the formation of such opinions. In neighboring European countries as well as certain outlets in the U.S., media reports reduced the complex legal reform to an attempt to raise the retirement age from 62 to 64 years. Given that most European countries have a notably higher legal retirement age, and the U.S. has none at all, these short news items easily resonated with negative cultural stereotypes about France and its protest culture, eclipsing the ways in which the law would impact social and economic equality, labor safety, and most workers' actual retirement age. Instead of sparking similar exhibitions of dissatisfaction ("Why are *we* forced to work until the age of 67?"), the condescending message went: "Look at those French rioters acting up again; at least *we* have the good sense and the work ethic to work as long as we reasonably should." Dismissing the protests thus also served the purpose of preventing unrest at home and, by extension, preventing any demands for changes in domestic pension legislation.

As these recent examples show, law and affect are not antithetical, they are deeply enmeshed. That inevitable enmeshment of the law with human emotions, however, may be anathema to those situated within legal fields. The assumed antithesis of law and anything to do with feeling, with what is generally understood to exist outside of reason and logic, has deep historical roots. Newer developments in the field of Law and Literature indicate, however, that it is time to liberate affect from its pariah status and

consider its role as an integral part of legislative procedures, of legal practices, and of the way in which the law interacts with and serves the societies in which it operates. A recent publication, Greta Olson's *From Law and Literature to Legality and Affect*, tackles this challenge through a rigorous reassessment of the field's object of analysis as well as its critical goals. Taking affect seriously and where it operates in the interstices between the law and social and individual lives, Olson crucially rethinks and expands the concept of legality. *From Law and Literature to Legality and Affect* reconceptualizes legality by integrating critical affect studies into existing definitions of the legal as well as into the delineations of what falls under Law and Literature's purview. With Olson, the essays in this LCH special issue on *Legality and Affect* thus turn to the fundamental questions of what it actually is that we investigate, to what end we do so, and which tools are required to successfully expand the field's jurisdiction.

Olson understands legality as *affectively felt law*. Legality then denotes, on the one hand, "the totality of what people perceive to be binding norms [including their] impassioned feelings about their legal environments" and, on the other, "all expressions of the legal" that become manifest in institutions and practices, and in all areas of daily lives and culture.[1] Affective legality emphatically includes popular engagements with the legal in diverse forms and media, and it encompasses individual and group feelings about the law and the legal as well as the expression and representation of either the legal itself or the feelings directed at it. *From Law and Literature to Legality and Affect* calls for a radical shift in the interdiscipline's perspective towards legality and affect understood in this way. Thus, centering on affective social and individual positionings towards the law, Olson's concept of legality implies that Law and Literature can and should move forward as an intrinsically political project. In her contribution to the debate about the futures of Law and Literature, Olson explores the ways in which affect's entanglement with law can be made visible and given the analytical traction needed to decipher its involvement in diverse arenas of cultural-political reality.

The essays in this special issue heed Olson's call to take legality seriously, and to take seriously especially the affective dimension in popular, non-expert discourses around the law and its functions. Each of them engages critically with Olson's conceptions of legality and affect and expands the interdiscipline's objects of study to include modes and media of the legal that come into view when legality is conceived of as felt law and its manifestations. They explore the role of affect in on-screen storytelling (Thiem), postcolonial history writing (van Engelenhoven), courtroom narrative (Stern), constitutional law (Borchert), global populist politics (Korsten), and international human rights law (Gaakeer).

The essays in this issue also rise to a more implicit challenge that the augmented notion of legality presents to the nationally focused, and often Anglo-American, scope of many studies in the field of Law and Literature – a challenge that Olson, over a decade ago, had put forward in a much-debated essay on "De-Americanizing Law-and-Literature Narratives."[2] Since then, it has become ever more apparent that only through a plurality

1. G. Olson, *From Law and Literature to Legality and Affect* (Oxford, 2022), pp. 6–7.
2. G. Olson, "De-Americanizing Law-and-Literature Narratives," *Law and Literature* 22 (2010), 338–64; see also Olson, 2022, pp. 24–25.

of transnational perspectives can a cultural analysis of the legal in all of its expressions and representations meet the demands of the current age of global politicized and politicizing affect. Our authors look at populist political leaders' legal conduct in Brazil, the U.S., and Italy (Korsten); examine Dutch colonial history and its (re)appraisal in public monuments (van Engelenhoven); analyze criminal show trials in the U.S. and the International Criminal Court (ICC) in The Hague (Gaakeer); and, from a German perspective, consider anti-transgender laws in the U.S. and their implications for global gender-rights activism (Borchert).

The instrumentalization of affect in legal practices and by legal institutions emerges as one of the unifying global trends from these trans-national perspectives. In the remainder of this introduction, we discuss how our authors use, critique, or reconceptualize legality and affect as analytical tools and how their case studies contribute to diversifying the interdiscipline's conception of legality by engaging a range of modes and media of the legal.

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As Trump's very public indictment and the protests against the French pension reform have shown, affective engagements with the law are highly visible. Affect is everywhere in the public debate and in public responses to legal measures shaping the present – and also the past. On the level of media, expressions of and responses to affective engagement with the current legal-political realities dominate news reporting, political commentary, public protests, social media, and popular storytelling. As contributions by Annika Thiem, Gerlov van Engelenhoven, and Laura Borchert showcase, such affect, and with it a felt knowledge about what is just and what is unjust, is elicited through different forms of mediatization and harnessed by participants in the public debate both on the left and right.

Yet law and affect, are also enmeshed in *in*visible ways – and it is affect's very invisibility, the denial of its operations, that arguably makes it especially powerful. Affect informs and shapes legal institutions, their structures, rules, and customs, often precisely because its impact is systematically veiled. As Simon Stern, Jeanne Gaakeer, and Frans-Willem Korsten show in their contributions to this issue, the affective dimensions of courtroom rhetoric, court opinions and judgements, and the exploitation of the democratically guaranteed right to seek justice before a court of law become more effective—or are made possible in the first place—thanks to the legal field's denial of affect's efficacy. This raises questions about how legal systems can and should respond to its actors taking advantage of or playing with this deceptive entanglement of law and affect, especially when such strategies result in actual changes to laws and legal systems.

Each essay in this issue pays close attention to the role and the function(s) that affect fulfills in their case studies, and in doing so put spotlights on different cultural sites of legality. Annika Thiem and Gerlov van Engelenhoven showcase how emotional knowledge rather than legal know-how forms public opinions about the law and its institutions. Thiem considers Ava DuVernay's Netflix mini-series *When They See Us* (2019), which dramatizes the historical case of the so-called Central Park Five, four teenagers and one young man who were wrongly convicted for assaulting and raping a jogger in Central Park, New York, in 1989. All five were proven innocent on the basis of DNA evidence in

2002. Thiem situates the series within the social activist work of the Black Lives Matter movement and analyzes how the series makes viewers *feel* that the justice system was and is unjust in its treatment of People of Color. Thiem argues that the series elicits affect, that is empathy with the wrongly convicted and anger about the injustice they had to endure, by making viewers literally "see" them through formal strategies such as extreme close-ups. Moreover, Thiem demonstrates how such emotional understanding can be invited by a series for a very specific form of legal discrimination, in this case systemic epistemic injustice: scenes in which the protagonists repeatedly, often desperately, and from the viewer's perspective frustratingly, run up against the lack of credibility that is attributed to People of Color as they face legal institutions create an affective access to that specific systemic injustice in legal practice.

Thiem's essay focuses on a site of clearly *popular* legality – a site between the visual text and its recipient(s) in which affective responses to legal issues emerge. In this case, these are responses to the systemic problem of innocent convictions based on class and race discrimination which become especially evident in moments of epistemic injustice. She contextualizes the mini-series as a site of popular legality in the larger, affectively charged arena that Netflix constructs for negotiations of legalities via its emphasis on true crime shows and its flanking of *When They See Us* with an Oprah talk show. The talk show, which includes both the actual innocent convicts and the actors of their characters, stresses the series' documentary aspects and "authenticity." It also creates a link to director Ava du Vernay's other work that focuses on the American justice system and racism. It is a site of popular legality that is highly invested in "truth" and thus in the veracity of both documentary and fictional genres while generating attention through affect. Popular legality hence emerges in Thiem's analysis as a site that demands an attention to the inherent paradox between the show's offering avenues to rational, fact-based understandings of systemic injustices in American criminal law and its appealing to viewers as citizens by employing forms that elicit intense affective responses.

In his essay on the public debates around and protests against a statue of seventeenth-century Dutch colonizer Jan Pieterszoon Coen, van Engelenhoven demonstrates how controversies over postcolonial memory unfold as negotiations of conflicting legalities. Coen's statue was installed in the Dutch city of Hoorn as a memorial to a national hero. The statue itself, its position in the city center, and the text on its accompanying plaque serve as an example of efforts to enable and enhance nationalist identification with the colonial past by concealing or euphemizing the violence against and the strategic oppression of colonized populations and foregrounding the colonizers' economic achievements instead. Van Engelenhoven situates the statue as well as the person it celebrates within their historical contexts while discussing the various controversies that the statue has elicited since its placing in the late nineteenth century.

In his analysis of the discourse surrounding Coen's statue, van Engelenhoven focuses on recent articulations of disapproval and support, both of which stem from "an affective legal relationship" to the monument. To its supporters, removing the statue would constitute an unwarranted erasure of history while its opponents see the glossing over of colonial violence as an unethical act of distorting national history and memory. Those voices who want to see Coen honored as a colonial hero – despite his key role in the genocide of the indigenous Bandanese population in what is today Indonesia – appreciate the feeling

of collective national pride inspired by such celebratory postcolonial memories. Those who protest and argue against the statue refuse to overlook, legitimize, or justify Coen's and, by extension, the Netherlands' colonial crimes. Their arguments, as van Engelenhoven shows, are various, but they all spring from the same affective source: the statue "*feels wrong*." Van Engelenhoven leaves no doubt on which side of the debate he stands. Reading the statue itself as well as the conflicting responses it produces as articulations of legality, the essay critiques practices of "repressive tolerance"—a concept developed by Herbert Marcuse—which aim at silencing protests by verbally yet non-performatively confirming their existence. As van Engelenhoven puts it in his essay, "officially acknowledging criticism may . . . help postpone acting upon it indefinitely." This strategy of dismissal through acknowledgement produces *felt* results that alter and strengthen certain legalities.

The two opening essays of this issue each present a close reading of a popular cultural text – a television series and a public statue – and the production of legalities in and around that text. In his discussion of omniscient narrative modes in courtroom trials, Simon Stern offers his close reading of a structure while tracing the implications of narrative perspective and narrative discourse for trial strategy and legal doctrine. Stern's re-assessment of the role that conceptualizations of narrative play in the field of Law and Literature foregrounds how Olson's notion of narrative can benefit interdisciplinary legal research fields that have recently begun to pay attention to affect and emotion. With a wider view across the disciplinary intersections that connect law to cultural, political, and social scholarship, Stern demonstrates how a return to the basic literary differentiation between "showing" and "telling"—and to the narratological tools that allow for a detailed analysis of both modes—makes explicit the narrative strategies underlying courtroom argumentation.

The essay's two central case studies – the jury trial and the nineteenth-century emergence of the "fellow-servant" rule in England – practice the shift of analytical focus that Stern proposes in his introduction. He reads both examples in the way a narratologist would, shifting from *what* is being told to *how* it is being told. Uniting Stern's two vastly different case studies is their use or evocation of an omniscient narrative perspective and the implications this entails for a jury's, a solicitor's, or an audience's emotionally rooted assessments. Both prosecution and defense strategies tacitly rely on the various omniscience effects, as Stern shows in the first half of his essay. The second half illustrates how an analysis of the less obvious yet very effective gesture towards an omniscient narrative stance within legal doctrine can reveal the often-overlooked affective work performed by an assumption of complete knowledge. His application of the fundamental narratological concept of omniscient narration to legal doctrine and courtroom rhetoric is merely "a helpful place to start," Stern concludes, because of "the importance that the law attributes to intentional states – including motives, aims, and desires"—all of which are inseparably linked to and fueled by affect.

In her essay on two recent anti-transgender laws passed in the U.S., Laura Borchert treats the law itself as an arena in which plural legalities compete, and she does so from a transnational perspective as a scholar looking to the U.S. from Germany. As Borchert observes, there has been an increased vehemence with which people on both sides of the Atlantic have expressed their understandings of constitutional rights specifically in the context of legal measures during the Covid-19 pandemic. Individual citizens, as her

examples show, have a clear sense, a non-negotiable "feeling" about which measures are just and unjust and, by extension as well as equation, which ones are morally right or wrong. Such affective stances then become articulated through legal argument about the constitutionality of measures – often quite specific arguments about articles of Germany's Basic Law and the U.S. Constitution respectively. The law itself thus becomes a site of the negotiation of competing legalities. Legality then encompasses both: the affects and affectively grounded convictions about just and unjust, right and wrong, *and* their articulation by citizen's wielding of legal texts and doctrines themselves.

Borchert's explicitly activist aim is to show "how legality may speak back to law" and thus be utilized to strengthen political activism for LGBTQIAP* rights. Her detailed case studies of anti-trans laws in Arkansas and Idaho consider the public as well as legal-professional assessments of these laws' jurisprudential legitimacy, their cultural-political impact, and the forms of protest directed against them. Borchert demonstrates, for example, how the two bills that serve as her central case studies are strategically located within the legal ordering of the education sector and child welfare laws, effectively giving anti-trans laws the veneer of educational reform and preying specifically on oft-exploited and extremely affect-laden concerns around child abuse and child safety. The safety and integrity of trans bodies are then pitched against those of children's bodies as mutually exclusive, morally unequal, and highly politicized goals. That the battles over bodily integrity – be it around legal responses to Covid-19 or LGBTQIAP* rights – are increasingly being fought in the arena of constitutional law demonstrates a "tendency to appeal to a seemingly universal source of legitimacy" that aims to transcend the current moment. This once-and-for-all quality of recent calls for legal confirmation of the cis-gendered body's superior legitimacy is where Borchert sees chances as well as perils for activists' utilization of legality. In her concluding remarks, Borchert acknowledges the opportunity that Olson's call for a pluralization of legal norms presents for current gender-rights activism in its efforts "for a simultaneous transing, de-binarizing, and genderqueering of the law." At the same time, she also sounds a note of warning. Undifferentiated promotion of affect's validity vis-à-vis law and the legal, she cautions, entails the risk of benefitting the cis-affirmative position's use of affect-oriented strategies even more and might thus pose a greater danger to the already marginalized bodies in this struggle. To prepare for and hedge against this outcome, activism needs to target the "underlying narratives of the legal" first and, since these narratives are currently still informed by the normative expectations of cis-gendered and predominantly heterosexual bodies, activism must aim for a re-negotiation of those narratives' fundamental assumptions. With careful optimism, limited by the outlook towards more inevitable pain to come, Borchert asserts the transformative potential that lies in "the affective power of suffering injustice" and that just might do the trick over time.

The contributions by Thiem, van Engelenhoven, Stern, and Borchert consider legality in forms that include strong narrative and verbal components, even when they treat primarily visual expressions of legality, such as in television or sculpture. The two final contributions turn to forms of legality as affect that explicitly go beyond legalities' being moored in narrative and in the verbal. They look, in the first place, at legal practices and doings with the law – even if narrative makes its way back via expressions of affect in the second place.

In his essay on playful legalities, Frans Willem Korsten argues that recent right-wing populists — specifically Silvio Berlusconi, Donald Trump, and Jair Bolsonaro — have engaged the justice system of their respective nations as in a game. Korsten observes the power of massified instances of legal measures such as court cases as instantiations of legalities. He argues that they are employed by those aggressive players within the realm of the politico-legal in order to de-legitimize the justice system or carve out a space for themselves that cannot be touched by official legality. Developing Johan Huizinga's premises of the lawsuit as a battle or competitive game in his 1938 study *Homo Ludens*, Korsten suggests that the contemporary trial is not treated by those players as an institution that serves to establish the truth and restore justice, but as a game to be won or lost. This constantly performed, condescending attitude towards the law has effects on the way citizens, who are exposed to that playing and gaming thanks to endless media coverage, feel about the law and their justice system. Over time, the populists' lusory tactics cast them as successful players instead of legal subjects. This, in turn, creates a different affective landscape in which to take the law seriously or not, ignore it or take notice of it.

Korsten's point of departure is the affective or, respectively, the numbing power of numbers. The overwhelming number of lawsuits in which each of the three politicians and their immediate family members have been involved over the past decades distorts the function of the legal system and its institutions, and it ultimately erodes the very distinction between guilt and innocence that the courts are supposed to establish. Being at the center of hundreds or thousands of lawsuits, either as plaintiff or defendant, dehistoricizes these cases and, as Korsten shows, renders questions of truth and justice, guilt and innocence less and less relevant. Lawsuits and the mediated performances surrounding them become indistinguishable, and the outcome of each individual case is drowned out by the sheer number of other cases still pending or being prepared. As in sports entertainment, the principal question is not one of guilt or innocence but of win or lose. When, as in sports and other games, the taking part is supposed to be what counts, even their losses enhance the players' position. The courts' and, eventually, the legal system's ability to fulfill its function is thrown into question. Korsten's essay reveals how treating the courtroom as a playground or sports arena has become a political strategy to distract people from the law itself by targeting their collective feelings of justice.

Jeanne Gaakeer studies legality as that which is often considered as the extralegal aspects of trials – the legal performances within show trials. She shows that these performances provide the non-legal framework for "law proper" to be effective, and thus relates legality to the paideic function of the law and, in the context of international human rights law, particularly to the function of social healing.

She focuses on two 2021 trials: the U.S. American trial of officer Derek Chauvin for the murder of George Floyd and the trial of Ugandan Dominic Ongwen, a commander of the Lord's Resistance Army, for crimes against humanity, pillaging, and rape before the International Criminal Court in The Hague, both of which resulted in convictions. Gaakeer analyzes the affective performances in each trial and their consequences for sentencing as well as for the public views on the justice of the sentences. Her focus on performance is central because it allows her to understand affect in a multi-faceted way, and in order to do so she returns to the origins of affect studies in Spinoza's *Ethics*, differentiating between *affectus* and *affectio* – that affect which is experienced internally,

privately, and that affect which becomes manifest on the body. To take that difference seriously is central because it is only the latter that can be perceived by others and interpreted, and in the space between *affectus* and *affectio* lies performance, and with it the possibility and danger of modification and deceit. Her contribution closes this special issue, because it is the most skeptical with regard to the workings of affect within legal practice as well as with regard to legal systems' abilities to entertain pluralistic conceptions of legality that would take effect in legal practice.

Focusing on the consequences of displays of affect in the Derek Chauvin trial, Gaakeer advises us to consider affect not as one-dimensional, not as transparent, not as "authentic" as one easily might if one does not differentiate *affectus* and *affectio* – given affect's rootedness in pre-verbal embodiment. Instead, she considers the ways in which affect, or an attention to affect, can be instrumentalized and in which ways affect can be subject to different interpretations and perceptions. Her example of the Ongwen trial demonstrates how the concept of legality in the International Criminal Court's Statute is hardly suited to accommodate a pluralistic, expanded view of legality. As a result, the Court, in sentencing Ongwen, rejected to consider both the traditional legality of *mato oput*, which local actors were willing to address to the case of Ongwen, and the authoritarian law laid out by the Lord Resistance Army's Joseph Kony, under which Ongwen was coerced as a child and socialized into violence.

With this special issue, we want to acknowledge the innovative force behind Olson's conceptualization of legality and its potential to stimulate more groundbreaking interdisciplinary research. The contributions gathered here showcase this potential by turning to various media and modalities and by exploring legalities from different academic as well as different (trans-)national perspectives. As we and our contributors have learnt from Greta Olson, the most expansive vision of the lives of law comes into focus when affective relations are taken seriously. Our affective relationships with Greta, quite similarly, have made our academic and other lived lives expand.