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Article

Feel, Show, Tell: affect and legality in the trial as performance

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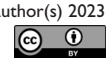

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Abstract
In this article I aim to rise to the bait thrown my way by Greta Olson where she posits (*From Law and Literature to Legality and Affect*, p.121) that law-and-affect scholarship is anti-narrative, and provocatively imagines that I would shake my head and chuckle, asking what one is to do with the questions asked by scholarship on emotion and affect in actual legal practice. As one spending most of her time in judicial practice I am not only firmly convinced of the importance of narrative in law, what is more, I often have to steep myself in the legal effects of emotion and affect and ask what consequences they should have for the people involved. I will therefore consider the trial as a performance, i.e., a show trial in the positive sense that as a performance shows and tells that it has read well what is brought before the court.

Keywords
affect, Spinoza, legality, George Floyd/Derek Chauvin, Dominic Ongwen, show trial

"My lord, I see you're moved."[1]
"Trust Shakespeare to have been there before"[2]

I. Preamble

On May 13, 2021, an immigration enforcement van in which two men had been detained prior to their removal was spotted in the streets of Pollockshields, Glasgow. Some 200

1. W. Shakespeare, *The Tragedy of Othello the Moor of Venice* eds. S. Greenblatt *et al., The Norton Shakespeare* (New York and London, 1997), Act III, sc. 3, line 229.
2. A. Damasio, *Looking for Spinoza, Joy, Sorrow, and the Feeling Brain* (London, 2014), p. 27.

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Glasgow citizens prevented the immigration officers from taking the men away. One banner read "Migrants & refugees welcome here;" people chanted "these are our neighbours, let them go."[3] The detainees were released. These protesters expressed what they experienced was wrong with the immigration laws and the Home Office's policy. In short, they expressed their *Rechtsgefühle*, feelings about law that Greta Olson elaborates upon in *From Law and Literature to Law and Affect*, claiming with her title that *Law and Literature* should enter a new stage by critically analyzing expressions of the legal in the broadest sense, or rather legality as "the totality of what people perceive to be binding norms,"[4] to which affective experiences contribute.

II. Show, Feel, Tell?

Law's perceived indifference to its own theoretical and practical correctness – its 'justness' –its legitimacy and its own discursive nature have been picked up in numerous ways since *Law and Literature* sprang up in the U.S.A. in the 1970s because of a growing critique of the legal process school and legal positivism, on the view that a separation of law and ethics, and a tendency to ignore questions of justice were no longer tenable.[5] Robert Cover addressed the problem of the judiciary's "jurispathic office" that excludes the narratives of those whose deeply felt normative convictions the law does not consider.[6] *Law and Literature*'s canonical works of the 1980s and 1990s, Melville's *Billy Budd* and Shakespeare's *The Merchant of Venice* are full of affect, though not denoted as such in the scholarship of the era. But are not Billy Budd's bodily reactions to Claggart's accusation a form of affect with disastrous result? And does not a bodily reaction, e.g., revulsion in paedophilia or HIV transfer cases, often lead to the excuse of self-defence in criminal law? And is not Shylock's craving for the law a deep feeling of what the law ought to be, yet tragically denied?

Both trials are show trials in the negative sense, sham trials in which the decisions are pre-determined from the start. Human history and world literature are fraught with examples of such sham trials, mostly political, from Socrates, Galilei, Heinrich von Kleist's *Michael Kohlhaas* and Harper Lee's *To Kill a Mockingbird* to Jozef Stalin's purges within the communist party, fiercely denounced by Alexander Solzhenitsyn in *The Gulag Archipelago*, and *United States v. Dellinger* (461 F.2d 389 (7th. Cir. 1972), a.k.a. the trial of the Chicago Seven. In other show trials the legality of the court is controversial. The suicide by potassium cyanide on November 29, 2017 by former Bosnian Croat commander Slobodan Praljak when he heard his 20-year sentence for war crimes in Bosnia in the 1990s by the International Court for the Former Yugoslavia (ICTY, the Hague) is a dramatic example. Praljak denied he was a war criminal and rejected the court's

3. https://www.theguardian.com/uk-news/2021/may/13/glasgow-residents-surround-and-block-immigration-van-from-leaving-street, last accessed May 17, 2021.
4. G. Olson, *From Law and Literature to Legality and Affect* (Oxford, 2022), p. 6.
5. For the development of *Law and Literature*, see J. Gaakeer, *Hopes springs eternal, an introduction to the work of James Boyd White* (Amsterdam, 1998).
6. R. Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97, nr. 4 (1983), pp. 4–68.

ruling.[7] As a political act, it showed that Praljak – like Slobodan Milosevic before him – did not consider himself bound to the legality and sovereignty of the court (often in dispute with international tribunals).

The term show trials, by contrast, can also be used in as a positive expression of the legal and hence as a form of legality as Greta Olson denotes it,[8] when a court's performance moves beyond addressing issues of legality in the strict sense only, and when in the way the trial is conducted and the decisions given the court shows and tells that it has seen the parties and/or victims, 'read' their narratives and acknowledged affective experience. This is important not only for the parties to a case but in controversial cases also for the legitimacy of the decision in the court of public opinion. The trial, specifically the jury trial in Anglo-American jurisdictions with its procedural feature of cross-examination, is dramatic and often cathartic like Greek tragedy. Its participants aim to persuade their narratees (and to reach this goal, may manipulate or fabricate their stories of facts) by "suiting the action to the word, the word to the action" as Shakespeare has Hamlet say, an instruction well-suited to playwrights and jurists alike.[9] As Milner Ball noted in 1975, "Trials and oral arguments are as essential to the judicial system as performance is to drama."[10] Ball was one of the first scholars to highlight the importance of the spatiality of court architecture. That courts be truly open to the public was essential to Ball. Thus, "theater as a means to judgment" encourages impartiality as much as it provides a stage, so that its theatrical function, when justice is seen to be done, "becomes an end in itself," channelling emotions, feelings and affect by holding up a mirror to society, and imagining a "lawful political community."[11] A normative mirror, therefore, that the participants in the trial should take good notice of if they are to optimize their legal performances.[12]

This is also to say that the move to *Law and Affect* deserves careful scrutiny. While bodily affect may lead to emotion that, in turn, is translated into action and narrative, either by public opinion, a party to a case or a court, we should bear in mind – an expression that Baruch or Benedict de Spinoza would be loath to use – that affect, emotion, and narrative may, unconsciously or deliberately, deceive us and/or the bodies that we are. The one individual may be affected differently from the other by the same event or object. What is more, law as theatre has its discursive and performative limits precisely because of its legality. In what follows, I will, firstly, turn to Spinoza's views on affect, then highlight some salient points made by Awol Allo on the 'show' in the show trial to provide a background for, finally, a discussion of two exemplary show trials and their broader legalities. My guide is the important distinction between affect as the human

7. Cf., on Praljak, T. de Zeeuw, *Postdramatic Legal Theatres: Space, Body, Media and Genre* (unpublished dissertation, Leyden, 2021).
8. Olson, *From Law*, p. 6.
9. W. Shakespeare, *The Tragedy of Hamlet, Price of Denmark* eds Greenblatt et al., *The Norton Shakespeare*, Act 3.2, lines 16-17.
10. M. S. Ball, "The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater," *Stanford Law Review*, 28 (1975), pp. 81–115, p. 82.
11. Ball, 'The Play's the Thing', pp. 100 and 110.
12. Cf., J. Stone Peters, "Theatrocracy Unwired: Legal Performance in the Modern Mediasphere," *Law and Literature* 26, nr. 1 (2014), 31–64; M. Leiboff, *Towards a Theatrical Jurisprudence* (Milton Park, UK, 2020).

ability "to react emotionally to different objects and events," emotion as the outward, public part of the process of chain of events, i.e., visible to others, and feeling as the hidden, private part.[13]

III. Affective Equilibrium in Law and Literature?

Feel

The Cartesian idea(l) that "we are pure mind, distinct from body, and our normal way of seeing ourselves is a regrettable confusion," led to the growth of instrumental reason accompanied by "an ideal picture of a human thinking that has disengaged from its messy embedding in our bodily constitution, our dialogical situation, our emotions, and our traditional life forms in order to be pure, self-verifying rationality."[14] In law since the Enlightenment, this was translated into a form of legality that prided itself on core values such as logocentric reasoning and judicial independence including the demand that the judge steer clear of emotions, also her own, so that the rule of law rather than of men could be guaranteed.[15]

In *Law and Literature*, by contrast, emotion in the form of empathy, a "feeling for" the other person, took center stage with Martha Nussbaum's *Poetic Justice*,[16] and was soon followed by Susan Bandes' edited volume, *The Passions of the Law*.[17] The moral and legal imagination of what it is like to be in the other person's shoes re-entered legal studies and promoted a cognitive component for judging, i.e., empathy as a second-order judicial emotion, a, "mode of being in touch with the emotions, feelings, expectations, and vulnerabilities of others," and as "the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others."[18] A threshold test of empathetic success, also in view of justice Benjamin Cardozo's thesis about the unity of form and content of legal texts, more specifically of judicial decisions,[19] is the reaction of those affected by a judicial decision. Cold and logocentric judicial narratives and performances easily lead to violent emotions of the narratees and/or audiences. The empathetic strand in *Law and Literature* also incorporates in law the idea that literary works appeal to the emotion as well as to the intellect. Ideally, the combined study of law and literature joins cognitive insights[20] with empathetic understanding of the plight of those

13. Damasio, *Looking for Spinoza*, p. 11.
14. Ch. Taylor, *The Ethics of Authenticity* (Cambridge, MA, 1991), pp. 101–2.
15. T. Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field," *Law and Human Behavior* 30, nr.2 (2006), pp.119–42, p. 120, "A core presumption underlying modern legality is that reason and emotion are different beasts entirely."
16. M. C. Nussbaum, *Poetic Justice, the literary imagination in public life* (Boston, 1995).
17. S. Bandes, ed., *The Passions of the Law* (New York, 2000). Cf., S. Bandes *et al.*, eds, *Research Handbook on Law and Emotion* (Cheltenham, UK and Northampton USA, 2021).
18. Th. Morawetz, "Empathy and Judgment," *Yale Journal of Law and the Humanities* 8, nr. 2 (1996), pp. 517–31, p. 523.
19. B. N. Cardozo, "Law and Literature," *Yale Review* (1925), pp. 699–718. Cardozo is also known for his attention to emotion in the judicial process.
20. M.C. Nussbaum, *Upheavals of Thought, the Intelligence of Emotions* (Cambridge UK, 2001).

affected by (the narratives of) law's performance, and that then becomes a norm for judging human relations.[21] By way of disclaimer: the emphasis on 'feeling with' does not promote a disposition of legal romanticism in adjudication that would have private feeling dominate judging.[22]

Enter, now, affect studies to critique the juxtaposition of law and emotion differently. As with definitions of law, emotion and empathy, affect and affect studies, I suggest, often suffer from definitional varieties easily leading to confusion.[23] While Spinoza's *Ethics* (1677) is rightly invoked as the *locus classicus* of the critique of Descartes' one-sided rationalism, many analyses of affect build on secondary sources. What is more, much in these sources as well as in Spinozean primary sources, depends on translation in the literal sense, for what Spinoza calls *affectus* in the Latin original of the *Ethics* is usually rendered as "emotion" in various English translations. Adequately gauging the relevance for law of the secondary sources thus depends on the primary source employed. It should also be noted that since Spinoza used the term *affectus* and recognized the lacunae in his own knowledge of the body,[24] the state of the art in the study of emotions, including the neurosciences, has immensely changed. We cannot, therefore, unilaterally translate Spinoza's *affectus* and *affectio* to affect studies without residue and losses. Comparable to how we critically elaborated upon the "turn to interpretation" in law and the social sciences (1970s), the "turn to literature" in law (1980s and 1990s), and the "turn to narrative" in law (2010s), we should now face the "affective turn" in its move from the social sciences to *Law and Affect* in the same vein. We should not forget either that Spinoza's challenge of the Cartesian, unbridgeable divide between *res cogitans*, the human being that thinks, and *res extensa*, an object such as the human body, by positing the unity of mind and body, and hereby equaling the body in all its beauty and squalor to the Cartesian loftiness of the rational mind,[25] is at the same time embedded in a deterministic world view, heralding the Enlightenment and modernity. This sits uneasily with law espousing free will in the rationalist tradition, with due consequence for *mens rea* and *actus reus* in criminal law. And then we have not even taken into consideration that to Spinoza, the (individual or collective) body can be affected in many different ways by

21. Cf., R. West, 'Communities, texts, and law: reflections on the Law and Literature movement', *Yale Journal of Law and the Humanities*, 1 (1988), pp. 129–56; S. Mulcahy, "Can a Literary Approach to Matters of Legal Concern Offer a Fairer Hearing than that Typically Offered by the Law?," *Law and Humanities*, vol. 8, nr.1 (2014), pp. 101–26. For a critique of literature's presumed empathetic effects, see S. Keen, *Empathy and the Novel* (Oxford, 2007).
22. For an example of empathy going spectacularly wrong, see Moment judge recognised school friend in dock - BBC News - Bing video, last accessed January 2, 2022.
23. Cf., R. Reichman, 'Law's Affective Tickets', in E. S. Anker and B. Meyer (eds), *New Directions in Law and Literature*, (Oxford, 2017), pp. 109–22.
24. B. de Spinoza, *The Ethics*, trans. R.H.M. Elwes, 1883, Part III, proposition 2, "No one has hitherto gained such an accurate knowledge of the bodily mechanism, that he can explain all its functions," available at The Project Gutenberg E-text of The Ethics, by Benedict de Spinoza, last accessed January 23, 2022.
25. Cf., B. de Spinoza, *Ethics and treatise on the correction of the intellect*, trans. A. Boyle, (London, 1993), Part III, prop. 2, Note "The mind and the body are the same thing, which is now conceived under the attribute of thought, now under the attribute of extension."

the same thing, and that in law and elsewhere cultural differences may (socially) condition with respect to what counts as an appropriate emotion and (re)action, and in which situation, In short, all human dispositions matter.[26] And while contemporary affect theory may be anti-individualistic,[27] "affects are radically particular."[28] What matters for interdisciplinary work on affect is precisely the definition of *affectus* and *affectio* used in cooperating disciplines, from neurobiology, psychology and cognitive studies generally to, if at all we follow Greta Olson, *Law and Literature*. So, is *affectus* 'emotion' and is *affectio* a modification of the body? Or should we not even bother to translate, and if we do so, do we fully grasp what Spinoza meant by *affectio*?[29] I (think) I know my body because it manifests itself to me by its different aspects or attributes, i.e., my mind's idea of my bodily manifestations, [30] such as anger, fear, or the shivers.[31] Yet, is my idea of my *affectio* (as a mode of substance)[32] of my *affectus* correct or is my *affectio* mere *pathos* in a negative sense?[33] What Spinoza says in the first part of definition 3 with respect to the body's power to act is all too often reduced to a power to re-act to another body,[34] often to the detriment of the second part of the definition, i.e., that *affectus* also comprizes "the ideas of such modifications," i.e., what the human mind thinks of what

26. Cf., Spinoza, *The Ethics*, Part III, prop. 51 and Definitions of Affects, XXVII, Explanation.
27. Olson, *From Law*, p. 99.
28. B. Lord, *Spinoza's Ethics* (Edinburgh, 2010), p. 100.
29. B. de Spinoza, *Ethica*, Part III, def. 3, "Per affectum intelligo corporis affectiones, quibus ipsius corporis agendi potentia augetur, vel minuitur, juvatur, vel coercetur, et simul harum affectiones ideas," Latin-Dutch edition, trans. H. Krop (Amsterdam, 2003); B. de Spinoza, *Ethics preceded by On the Improvement of Understanding*, trans. J. Gutmann (New York, 1954), Part III, def. 3, "By emotion I understand the modifications of the body by which the power of acting of the body itself is increased, diminished, helped, or hindered, together with the ideas of these modifications"; Spinoza, *The Ethics*, Part III, def. 3, "By emotion I mean the modifications of the body, whereby the active power of the said body is increased or diminished, aided or constrained, and also the ideas of such modifications"; B. de Spinoza, *Ethics* (Harmondsworth UK, 1996), Part III, def. 3, "By affect I understand affections of the body by which the body's power of acting is increased or diminished, aided or restrained, and at the same time, the ideas of these affections."
30. Spinoza, *The Ethics*, Part II, def. 3, "By idea, I mean the mental conception which is formed by the mind as a thinking thing."
31. Spinoza, *The Ethics*, Part II, Prop. XIII, Proof, "the object of the idea constituting the human mind is the body, in other words a certain mode of extension which actually exists and nothing else."
32. Spinoza, *The Ethics*, Part I, def. 5, "By *mode*, I mean the modifications of substance, or that which exists in, and is conceived through, something other than itself." Cf., B. Robinson and M. Kutner, 'Spinoza and the Affective Turn: A Return to the Philosophical Origins of Affect', *Qualitative Inquiry*, 25, nr. (2019), pp. 111–17, p. 113.
33. *Affectio* is also the translation of *pathos* which in Greek philosophy since Aristotle denotes that which belongs to a substance, an emotion of affection of the soul, and the undergoing of an activity (of another substance), see Spinoza, *Ethica*, p. 521. Cf., Eugene Garver, *Aristotle's Rhetoric, an Art of Character* (Chicago, 1994), p. 109.
34. S. Keen, "Affect and Empathy Studies," in S. Stern et al., eds, *Oxford Handbook of Law and Humanities* (Oxford, 2020), pp. 181–97, p. 185, referencing Brian Massumi.

modifies the human body.[35] So I fully agree with Suzanne Keen where she writes "Employing affect theory may provide a way of bringing to light the centrality of emotional experience to all lived experience, . . . Less clear is how precisely legal theory could usefully take up these contested terms from affect theory, given their strong ordinary meanings in everyday life."[36] It is precisely because affect and emotion in whichever definition one prefers, in Spinoza and elsewhere, are contested concepts that "this now fashionable area" runs the risk of conflating or reducing the one to the other,[37] and becoming a fad, for in scholarship, too, Blaise Pascal's wisdom that "The heart has its reasons of which reason knows nothing"[38] has its currency.

Show

What aspect of legality, then, can be captured in a show trial in the positive sense? In what sense is its theatrical function an end in itself? As Awol Allo has pointed out, "[T]he courts of law provide a platform for the powerful, the invisible, the inaudible, the excluded, and the marginalized. The courtroom . . . is viewed as a strategic platform for spectacles of resistance."[39] To be exemplary in its showing aspects of legality in the legal sense as well as "senses of the legal"[40] that individuals and groups within society cherish, a criminal trial must perform the combined feat of exuding impartiality, legitimacy and authority, and of assuring all participants that the court 'feels with' them, as well as providing them with the opportunity to tell their story and be heard. Only then can it be *paideic* and start a process of healing what was broken, both in terms of the rehabilitation of the convicted person as a member of the social contract by means of punitive measures, and as far as the shock and trauma of victims or public outrage are concerned. This goes for hard cases as well as easy cases, for international tribunals as well as for the district court.

Essential to all criminal trials, according to Allo, is "an element of risk – namely the risk that the accused may be freed,"[41] and then the expectations of other participants may be thwarted, and their emotions and feelings will find no legal channel. In exemplary trials with "consequences . . . far beyond the courtroom"[42] this risk – if one calls it so – [43]

35. Cf., Robinson and Kutner, 'Spinoza and the Affective Turn', p. 115, "Although affects are precisely those relations of affections that either strengthen or weaken human bodies, they are simultaneously the human mind's idea of those relations of affections."
36. Keen, 'Affect and Empathy Studies', p. 186.
37. Robinson and Kutner, 'Spinoza and the Affective Turn', p.111; cf. Olson, *From Law*, Ch. 3.
38. A.B. Pascal, *Penseés*, trans. A.J. Krailsheimer (Harmondsworth UK, 1995), unclassified papers nr. 423, p. 127.
39. K. Allo, "The 'Show' in the 'Show Trial': Contextualizing the Politicization of the Courtroom," *Barry Law Review* 15, nr. 1, article 3 (2010), 41–72, p. 42, available at https://lawpublications.barry.edu/barrylrev/vol15/iss1/3, last accessed December 22, 2021.
40. Olson, *From Law*, p. 9.
41. Allo, 'The "Show"', p. 45, footnote omitted.
42. Op. cit., p. 50.
43. To me, any impartial judge should show civic courage and refuse to bend to legal-political and/or societal pressure and be a bulwark to protect the defendant against the state.

and its realization in an acquittal can be addressed by a careful, public scrutiny of all the evidence and by highlighting procedural and substantive aspects of the trial such that all understand that truth-seeking is limited to the highest degree of 'beyond reasonable doubt'. This also makes the communication of the justificatory narrative that any courtroom session and written verdict ideally are, very important.[44] In adversarial systems, for example, juries are like black boxes that do not give the reasons for their decisions, and neither do they have an active role in the actual proceedings in court. Judges in inquisitorial systems actively seek the truth and have to justify their decisions by giving the reasons for an acquittal or guilty verdict. In this sense, the trial is verifiable. I respectfully disagree with Allo where he differentiates between the ordinary criminal trial as "an impersonal and objective application of general norms to self-evident facts of criminality,"[45] and the high-profile trial in which societal issues are at stake. It is precisely because at the end of the day in any criminal trial an individual's fate is decided, that the justness of the spectacle at all levels is at stake, always.

Both the means and the ends matter, even though I obviously agree with Allo that sometimes what is at stake in the criminal charge is beyond law and morality, as in the Eichmann trial or other genocide cases.[46] Allo also claims that "depending on how many extralegal ends are attributed to the trial, the success of the second layer order depends on the successful manipulation and control of the first (i.e., the level of facts and substantive law, my note)," the extralegal functions being found in the way the hearing is conducted, the communication between participants and punishment.[47] However, when he claims that "To succeed in the second layer orderings . . .. One must choose between legality and justice on the one hand, and theatre and spectacle on the other,"[48] Again, I disagree. While the two layers can be distinguished for heuristic purposes, they form a unity, and that is precisely because of the consequences that may follow when something is amiss at either level. In other words, what Allo calls *extra*legal aspects are legal aspects. Justice finds its expression as much in how the case is actually tried as far as the applicable law and points of legality are concerned, as in the performative act of the trial itself. As judicial theatre, trials and their narratives should be "perceptual judgments of past events."[49] Jurisdictional differences may be of influence, as will be systemic differences between common law and civil law, but, ideally at least, both layers are co-dependent and co-constitutive for any trial to be just, or not.

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44. Op. cit., p. 49.
45. A.K. Allo, *Law and Resistance: Toward a Performative Epistemology of Law*, PhD thesis, University of Glasgow (2013), p. 11, available at http://theses.gla.ac.uk/4894, last accessed September 2, 2021.
46. M. Koskenniemi, 'Between Impunity and Show Trials', in J. A. Frowein and R. Wolfrum eds., *Max Planck Yearbook of United Nations Law*, 6 (2002), pp. 1-35, p. 2, citing Karl Jaspers writing to Hannah Arendt that "to address it [the Eichmann trial] in legal terms was a mistake."
47. Allo, 'The "Show"', p. 5.
48. Op. cit., p. 51.
49. M. S. Ball, "All the Law's a Stage," *Cardozo Studies in Law and Literature* 11, nr. 1 (1999), pp. 215–21, p. 216.

IV. Affective legalities?

Tell

To draw together the strings of my argument, I now turn to two "jurisprudentially dramatic" cases [50] to highlight different forms of affect and point to several culturally-significant factors. A criminal trial is always a public narrative because it is about something a society deems (extremely) reprehensible, either as an act in and of itself, or depending on the aggravating context of the specific case. Both cases are interesting for the ethnography of the legal performance of sentencing that uncovers affective legalities or not. Both trials are show trials in that they have had consequences beyond the courtroom and are to be understood "within different historical, normative, and political frames."[51] What is more, pre-trial publicity raises questions concerning the presumption of innocence and affect working on juries and judges alike. If pressured by the media for information, the police and the prosecutor may, for example, give in to confirmation bias, i.e., seek whatever evidence confirms their initial hunch, to show that they are on the case. Collective rage may put moral pressure on the trial, for example in the choice for a specific criminal charge. So while I agree with Greta Olson that the "anti-narrative quality of affect has consequences for legal theory,"[52] I would argue that these consequences are first felt in legal practice, precisely because what takes place in courts is ultimately narrated, and the stories about the underlying issues may 'co-judge' the decision.

Judging Derek Chauvin

On May 25, 2020, George Floyd allegedly used a fake $20 bill to pay for cigarettes. The police pulled him out of his car at 8:14 p.m.; they walked him to the squad car, whereupon Floyd told them he was claustrophobic and refused to get into the car voluntarily. On the ground face down, Floyd repeatedly said "I can't breathe" while officer Derek Chauvin had his left knee on Floyd's head and neck. Officer Lane voiced concern about "excited delirium." At 8:25:31 p.m. Floyd stopped breathing. At 8:27:24 p.m. Chauvin removed his knee from Floyd's neck. In hospital Floyd was pronounced dead.[53] Public outrage was enormous. In the week that followed between 15 and 26 million people participated in about 4,700 demonstrations across America, arguing that Black Lives Matter.[54] A darker, largely ignored side-effect was that "Some ten thousand Americans were arrested in the two weeks following Floyd's death. Arson and looting caused more than a billion dollars in damage, and at least nineteen people were killed."[55] Another

50. J. Stone Peters, "Legal Performance Good and Bad," *Law, Culture and the Humanities* 4 (2008), pp. 179–200, p.193.
51. Allo, 'The "Show"', p. 63.
52. Olson, *From Law*, p. 100.
53. All case materials are available at Minnesota Judicial Branch - 27-CR-20-12646: State vs. Derek Chauvin (mncourts.gov), last accessed February 14, 2022. The facts described here are from the 'Statement of Probable Cause' in the charge.
54. See https://www.nytimes.com/2021/06/04/us/black-lives-matter.html and https://nyti.ms/2ZqRyOU, last accessed February 11, 2022.
55. J. Cobb, "A Warning Ignored," *The New York Review of Books*, 19 August 2021, pp. 10–13, p.10.

form of affect was at work here, undoubtedly induced by poverty and by casual racism and systemic, institutional racism in U.S. American society, yet one should question this *Rechtsgefühl*'s legality.[56]

American history, sadly, is replete with examples of victims of police violence, predominantly people of color, from Marquete Frye (1965), Rodney King (1995), to Michael Brown, sparking the Black Lives Matter movement in 2015, and, shortly before George Floyd in 2020, Breonna Taylor, killed by police fire in her own home.[57] In April 2021, while Chauvin was on trial, Daunte Wright was shot by a police officer, "just down the road,"[58] allegedly by mistake, yet a sad commentary on police behavior.[59] It is unsurprising that to many "[T]he video footage of Floyd's death offered evidence of both an ideology (white supremacy) and the system that sustains it (racism) at their most fundamental level: state murder."[60] In terms of Allo's risk of an acquittal in show trials, the guilty verdict was not anticipated by most people, given the many acquittals in previous, comparable cases (American police officers kill 1,000 people each year but since 2005 only 11 police officers have been convicted of murder for on duty-killings).[61]

The legal procedure against Chauvin was not an easy ride in terms of affect, but its legality was not questioned. The district court had dismissed the initial charge of third-degree murder for lack of probable cause, though, a decision reversed and remanded by the State of Minnesota Court of Appeal. The defense had moved the district court twice for a change of venue, the jury pool being allegedly tainted due to excessive pre-trial publicity, for an anonymous jury and sequestration, for an order to disqualify the Hennepin County Attorney's Office from prosecuting because of inappropriate conduct with a medical expert witness and so on and so forth. Covid-19 raised safety concerns, the defense, however, moved for continuance to combat what they called rampant pre-trial publicity and because the State impeded trial preparation by its alleged violations of the discovery rules. As a result, the cases of the other three officers were severed from the Chauvin case and did not receive the same media attention.[62]

On March 8, 2021, the trial commenced. The trial was broadcast live. Chauvin did not take the stand. The prosecution played the footage of the police body cameras, and the video that Darnella Frazier, one of the 38 witnesses testifying, had made on her

56. Cf., U. Tabbert, *Täter im Bild* (Vienna, 2020), p. 45, on Hegel's theory of the mob as a group that has lost its human dignity and *Rechtsgefühl*.
57. https://www.nytimes.com/article/breonna-taylor-police.html, last accessed February 11, 2022.
58. https://www.newyorker.com/news/our-columnists/the-significance-of-the-derek-chauvin-verdict 2, last accessed February 11, 2022.
59. The officer was found guilty of 1st- and 2nd degree manslaughter on December 24, 2021. On February 18, 2022, she was sentenced to 24 months inprisonment, a downward departure, with the box 'Crime less onerous' ticked, see KP-SentencingOrder.pdf (mncourts.gov) and MSGC_Departure_Request (mncourts.gov).
60. G. Younge, "Out Hunting," *London Review of Books*, 29 July 2021, pp. 27–9, p. 27.
61. https://www.nytimes.com/2021/06/25/us/dereck-chauvin-22-and-a-half-years-georgefloyd.html, last accessed October 10, 2021.
62. As I write, their trial is set for June 13, 2022.

mobile phone and had posted to a social network site where it immediately went viral, thus igniting outrage again and again by way of continuous affect. Chauvin's lawyer was at pains to convince the jury that no racial element or social cause was involved, as if "the talk" in the lives of people of color were a fiction.[63] He also asked the jury to see the video in context because the bystanders yelling at Chauvin and the other officers – yet another form of affect in this case – had distracted their attention from Floyd's rapidly declining health.[64] Comparably though differently, and while acknowledging the trauma near where George Floyd was killed,[65] the prosecutor argued, "He's not on trial for who he was. He's on trial for what he did."[66] Yet, in his closing argument, he rhetorically emphasized the nine minutes and 29 seconds that Chauvin knelt on George Floyd for 22 times to bring home the message that it was murder instead of policing.[67] And he tried to elicit an affective response by asking the jury to imagine their first impulse on hearing about Floyd's death, saying, "This case is exactly what you thought when you saw it first, when you saw that video. . . . It's what you felt in your gut. It's what you now know in your heart."[68]

On April 20, 2021, after a two-day deliberation by a racially and gender-diverse jury, instructed not to draw any inference from Chauvin's not taking the stand and, as a general standard, urged to "resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or unconscious biases,"[69] and while the POTUS was praying "for the right verdict,"[70] Chauvin was found guilty of second-degree murder, Count I; third-degree murder, Count II; and second-degree manslaughter, Count III. The verdict, too, was broadcast live, with an estimated 23 million people watching.[71] Reactions were euphoric. After the verdict, juror No. 52 Brandon Mitchell, a Black man in his thirties, and Alternate juror Lisa Christensen told CNN that the protests had not influenced the jury's decision but that Chauvin's choice not to testify had "definitely" affected the outcome of the trial.[72]

63. Cf., *Utah v. Strieff*, 579 U.S. (2016), Sotomayor, J. dissenting, p.12, "For generations, black and brown parents have given their children 'the talk'— instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."
64. https://www.nytimes.com/live/2021/derek-chauvin-trial-explained, last accessed February 11, 2022.
65. https://www.newyorker.com/news/our-columnists/the-significance-of-the-derek-chauvin-verdict, last accessed October 10, 2021.
66. https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html, last accessed October 10, 2021.
67. https://www.nytimes.com/live/2021/derek-chauvin-trial-explained, last accessed October 10, 2021.
68. https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html, last accessed October 10, 2021.
69. Jury Instructions, p. 13.
70. https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html, last accessed October 10, 2021.
71. Trial of Derek Chauvin - Wikipedia, last accessed February 11, 2022.
72. Juror In Derek Chauvin Trial Says He 'Didn't See Any Remorse' | HuffPost Latest News, last accessed October 10, 2021.

Yet, with Spinoza, we can argue that images as external causes affect us to do this, that or the other. The images of the death throes of George Floyd form such an external Spinozean mode, triggering public outrage that may unconsciously influence those who judge Chauvin. Research has shown that gruesome audio-visual materials affect people more than textual descriptions of the same event, i.e., the medium co-constitutes the affect. And there is a connection between the level of gruesomeness, the vividness of the footage, and the kind of emotion it triggers. Anger, for example, is more likely to influence judgement (including bias) than grief,[73] and seeing immoral behavior can cause revulsion that in turn causes action-readiness to blame and, subsequently, convict.[74] So while gruesomeness is subjective, its effect on the act of judging should not be underestimated. *Law and Affect* studies would therefore do well to incorporate empirical research when theorizing.

During sentencing, Chauvin's mother gave an emotional statement. The prosecution played a video of George Floyd's daughter saying she deeply missed her father. On June 25, 2021, Chauvin was sentenced to 270 months in prison, the State having asked 360 months, a "double upward durational departure from the 180 months at the 'top of the box' of the presumptive guidelines range."[75] In an extensive sentencing order Judge Cahill explained that Chauvin's abuse of power and his treating Floyd "with particular cruelty" by preventing his ability to breathe, formed the basis for "an upward sentencing departure," the "prolonged restraint of Mr. Floyd" being "much longer and more painful than the typical scenario" of the three counts Chauvin had been found guilty of.[76] Referring to the mission of the Minneapolis Police Department, Cahill found that Chauvin had "treated Mr. Floyd without respect and denied him the dignity owed to all human beings and which he certainly would have extended to a friend or neighbor."[77] The latter seems either an obiter dictum that, to me at least, brings in exactly that which was to be avoided, the suggestion of racism, or, by contrast, it is a subtle call to have the police consider all U.S. American citizens equal at last.

However, the fact that Darnella Frazier and three other bystanders were minors who, or so the State contended, were traumatized by witnessing the incident, was not deemed an aggravating factor. The footage of the police bodycams had shown that they had been seen smiling and laughing during and after the incident.[78] One wonders, though, whether the outward appearance of their behavior at that moment is indicative of a positive emotion rather than their concealing their uneasiness, i.e., a bodily affect. What is more, as a witness during the trial, Darnella Frazier had voiced her regret that she had not done more to save Floyd.[79]

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73. S.A. Bandes and J.M. Salerno, "Emotion, Proof and Prejudice: The Cognitive Science of Gruesome photos and Victim Impact Statements," *Arizona State Law Journal* 46, nr. 4 (2014), pp. 1003–1499.
74. N.H. Frijda, "Emotion, Cognitive Structure, and Action Tendency," *Cognition and Emotion* 1, nr. 2 (1987), pp. 115–43; M.D. Alicke, "Culpable Control and the Psychology of Blame," *Psychological Bulletin* 126, nr. 4 (2000), pp. 556–74.
75. Sentencing Order, p. 19.
76. Op. cit., pp. 11 and 13.
77. Op. cit., p. 22.
78. Op. cit., p. 17.
79. https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html, last accessed October 10, 2021.

Chauvin immediately appealed, one of the issues to be raised in appeal being the denial of his motion for change of venue (i.e., the pretrial publicity issue). The family of George Floyd was disappointed by the sentence, although Reverend Al Sharpton eloquently voiced the underlying problem: "We got more than we thought only because we have been disappointed so many times before."[80] The POTUS pushed Congress to pass the George Floyd Justice in Policing Act that makes it easier to prosecute officers for wrongdoing.[81] Spinoza would be pleased, because "the role of the state is to provide conditions under which disagreeable encounters and accompanying affects of dysphoria may be minimized."[82]

Rendering such conditions possible requires theoretical, practical, and affective responses. Firstly, to take seriously, both theoretically and practically, the Black Lives Matter protests, also as Heideggerian *Stimmungen*—moods or fundamental ways of being (with others)—combined with, secondly, attention to the affects in and effects of gun violence in U.S. American society—the gun homicide rate being twenty-five times higher than in other high-income countries—may allow legislation to induce future "affective legalities." [83]

Judging Dominic Ongwen. On May 6, 2021, Dominic Ongwen, found guilty on February 4, 2021, of 61 out of 70 counts varying from crimes against humanity (a.o. murder, torture, enslavement, forced marriage) to pillaging and rape, was sentenced to 25 years of imprisonment by the International Criminal Court (ICC).[84] But was he a perpetrator only or merely a victim? At the age of nine, Ongwen had been kidnapped and abducted into Joseph Kony's Lord's Resistance Army (LRA) that opposed the Ugandan government. One of 15,000 child-abductees, Ongwen eventually became a high commander. In 2014, after 28 years in the LRA, he surrendered after an alleged threat that Kony was after his life. The Ugandan government decided that he should be tried by the ICC. The defense claimed that Ongwen had been a child, brainwashed and traumatized by his experience in the LRA, and could not be blamed for his acts since Kony would be notified by spirits of any insubordination and react accordingly, as Jackson Acama, a "clerk to the spirits" in the LRA, testified.[85] The ICC prosecutor Fatou Bensouda, while granting that Ongwen's childhood and adolescence in the LRA "must have been extremely difficult,"[86]

80. Op. cit.
81. H.R.1280 - 117th Congress (2021-2022): George Floyd Justice in Policing Act of 2021 | Congress.gov | Library of Congress, last accessed February 12, 2022.
82. S. D. Brown and P. Stenner, "Being Affected: Spinoza and the Psychology of Emotion," *International Journal of Group Tensions* 30 (2001), pp. 81–104, p. 91.
83. For 'moods', see M. Heidegger, *Being and Time* (1927). I derive the term 'affective legality' from I. rua Wall, 'The Ordinary Affects of Law', *Law, Culture and the Humanities*, pp. 1–19, p. 16. For gun violence, see F. Mari, 'How Can We Stop Gun Violence?', *The New York Review of Books*, June 10, 2021, pp. 10–4.
84. Trial Chamber IX, ICC-02/04-01/15, all materials referred to in this section are available at the ICC's website, Welcome to the International Criminal Court (icc-cpi.int), last accessed February 17, 2022.
85. Hearing October 25, 2018; cf., Joshua I. Bishay, "Cultural Experts at the International Criminal Court (ICC): The Local and the International," *Naveiñ Reet: Nordic Journal of Law & Social Research* nr. 11 (2021), pp. 123–50.
86. Prosecution Brief, para. 2.

argued that Ongwen stood trial for what he did as an adult and recommended a sentence between 20 years to 30 years of imprisonment. The defense asked for a lenient sentence because Ongwen would "go through the Acholi rituals requested of him by Ker Kwaro Acholi and the people of northern Uganda," [87] i.e., the Acholi Traditional Justice System that includes *mato oput* leading to reconciliation if payment of compensation is provided by the wrongdoer who also has to undergo "a ritual of reconciliation intended to prevent revenge killings."[88] This is the interesting point of the Ongwen trial in terms of affect and public outrage at various levels, and also in terms of legality. To start with the latter, for international crimes Uganda has an International Crimes Divisions in the High Court at Gulu; it had tried another LRA soldier, Thomas Kwoyelo. In the Ongwen case, the ICC Pre-Trial Chamber II had had to decide first whether the Uganda court met the criteria to try war crimes. What is more, other rebels had returned to Uganda under the Amnesty Act (2000) which offers pardon for acts of rebellion committed since 1986. The Amnesty Commission's mandate based on this Act ended in May 2021, so Ongwen would not be able to benefit from it upon return in Uganda. On *mato oput*, the participating victims in the trial had explained that victims outside the Acholi community would be excluded from this ritual, i.e., another question of legality both in- and outside the ICC procedure.

As to affect, before the trial, opinion leaders in Norther Uganda had already raised the question whether Ongwen should be tried or forgiven and "what layers of responsibility exist in Ongwen's case," i.e., child protection vs criminal responsibility, victim or perpetrator. [89] One of the Acholi Religious Leaders argued that "the Government, the army, the police, the community, the parents, the school, all different groups who failed to protect this child from abduction are liable," others argued that only Joseph Kony should be held responsible.[90] A study of public perceptions, conducted after the verdict by the Amani Institute Uganda, finds that responses range from fear among Ugandan villagers that they would miss out on compensation if Ongwen were to be acquitted to claims that the world and the Ugandan government had failed Ongwen, who needed counselling and help after having been terrorized by Kony and who, therefore, lacked *mens rea*.[91]

In Spinozean terms, Ongwen's *conatus* when seen under the attribute of the body, i.e., his striving to stay alive as a child under grueling circumstances, should be considered when deciding about his *conatus* under the attribute of the mind that made him commit crimes against humanity under the influence, because of the external causes, Joseph

87. Defence Brief, paras 182-83.
88. Sentence, para. 29.
89. Jackson Odong, 'Ongwen's Justice Dilemma, Perspectives from Norther Uganda', a report from the Refugee Law Project and the Northern Uganda Transitional Justice Working Group, 26 January 2015, pp. 1-15, p.1, available at Microsoft Word - 15 01 26 Correct Version of Ongwen's Justice Dilemma-Report.docx (refugeelawproject.org), last accessed October 20, 2021.
90. Op. cit., p. 5.
91. ' "Insensitive" Justice! Perceptions of Trial Justice in the Case of the Prosecutor v. Dominic Ongwen, A Survey Report by the Amani Institute Uganda', February 2021, available at Trial Justice Survey - Amani Report Feb 2021 (amaniuganda.org), last accessed December 27, 2021.

Kony and the LRA, that worked on him. Before sentencing, human-rights lawyer Stephen Oola had already called the verdict a miscarriage of justice because the judges had lacked the empathetic imagination to perceive what it was like to have been in Ongwen's shoes as a child-abductee when they found him guilty.[92] During the trial expert witnesses had voiced scepticism about *mato oput*. To the Court it was apparent that "Acholi traditional justice mechanisms are not in widespread use in Acholi areas in Northern Uganda, to the extent that they would stand *in lieu* of formal justice."[93]

In the clash of legalities at stake, the victims had emphasized that *mato oput* requires reparations first, then the ritual ceremonies, but only if Ongwen would ask forgiveness, which they doubted since he showed no remorse.[94] The Court did not take *mato oput* into consideration in the sentencing on the view that the principle of legality laid down in its Statute precludes the incorporation of elements of traditional justice, and that the facts underlying the submission for *mato oput* did not bear on the determination of the sentence.[95] So two spiritual systems were passed over in the Ongwen trial, *mato oput* and the system behind the presumedly Christian organization of the LRA, i.e., Joseph Kony's magic and rituals that, together with life threats, helped force the child-abductees into obedience. The Court held Ongwen fully responsible for who he had become and what he had done. Both cases show that the emotional sides of a case, the affect at work and the narrating or framing of those involved cannot easily be tied to a shared sense of law, justice and legality. Yet the legitimacy of, and trust in the justice system depends on it.[96] That is a good reason to promote interdisciplinary collaborations in *Law and Affect* that Greta Olson has unfolded for us.

Postscript: On December 15, 2022, the Appeals Chamber of the ICC found that the Trial Chamber had made no error in finding that the Acholi traditional justice system cannot be incorporated into the Court's applicable statutory framework. The Appeals Chamber confirmed, by majority, the joint sentence of 25 years' imprisonment.

92. K. Linder, 'Interview Stephen Oola', *NRC Handelsblad*, May 5, 2021, p.3
93. Sentence, para. 34.
94. Op. cit., paras 38-42.
95. Op. cit., para. 43.
96. M. Steinitz, "The International Criminal Tribunal for Rwanda as Theater: the social negotiation of the moral authority of international law," *Journal of International Law & Polic* 5, nr. 1 (2007), pp. 1–31.