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Targeting Legality: The Armed Drone as a Socio-technical and Socio-Legal System

Alex Holder,¹ Elizabeth Minor,² & Michael Mair³

"[The] United States has taken lethal, targeted action ... with remotely piloted aircraft commonly referred to as drones ... To begin with, our actions are effective ... Dozens of highly skilled ... commanders, trainers, bomb makers and operatives have been taken off the battlefield. Plots have been disrupted. ... Simply put, these strikes have saved lives. Moreover, America's actions are legal ... We are at war with ... organization[s] that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort, and in self-defense."⁴

"[A very great] ... danger threatens [us today] ... [namely that] the approaching tide of technological revolution ... could so captivate, bewitch, dazzle, and beguile [us] ... that calculative thinking may someday come to be accepted and practiced as the only way of thinking."⁵

I. Introduction

This article is the product of an ongoing collaboration between two sociologists and a researcher working for an organisation which campaigns against the unnecessary harms caused by the use of certain weapons systems, "Article 36".⁶ We came together as a result of a shared interest in exploring 'actually existing' practice around the use of armed drones, more specifically the situated practices of

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⁴ Barack Obama, 'Remarks by the President at the National Defense University' *The White House*, (23 May 2013) <<https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>> accessed 27 November 2017.

⁵ Hubert Dreyfus, 'Heidegger on Gaining a Free Relation to Technology' in Kristin Shrader-Frechette and Laura Westra (eds.), *Technology and Values*. (Rowman & Littlefield Publishers 1997).

⁶ In its own words, "Article 36 is a UK-based not-for-profit organisation working to prevent the unintended, unnecessary or unacceptable harm caused by certain weapons. Article 36 undertakes research, policy and advocacy and promotes civil society partnerships to respond to harm caused by existing weapons and to build a stronger framework to prevent harm as weapons are used or developed in the future. The name refers to Article 36 of the 1977 Additional Protocol I of the Geneva Conventions that requires states to review new weapons, means and methods of warfare", Article 36, <<http://www.article36.org/about>> accessed 27 April 2018.

legal reasoning engaged in by military personnel to justify drone strikes in theatre – an ‘ethnomethodological’ orientation predicated on studying practical methods of action and reasoning in combat settings.⁷ Together we are seeking to determine how military personnel work together as part of drone operations to frame and organise their actions in practice with respect to a range of legal and quasi-legal frameworks. These include local rules of engagement as well as the military codes and regulations that govern the conduct of combat missions;⁸ the protocols and agreements which set out the respective roles of different kinds of units and services, e.g. air force vis-à-vis the army and so on, about their respective roles and their limits during joint operations;⁹ and overarching frameworks including the mosaic of national legal systems that drone operations regularly traverse (and many would suggest regularly violate) alongside International Humanitarian Law (IHL) and International Human Rights Law (IHRL).¹⁰ By analysing how armed drone strikes are actually conducted with a focus on targeting practices and legal reasoning within them, the goal is to open up their practical and practiced grounds.

A study of this kind links to contemporary research on armed drones in several ways. Problems with the legality of drone strikes, especially outside officially designated armed conflicts, are widely recognised and have been voiced for some time.¹¹ Yet the practice continues, indeed is spreading and becoming ever more stabilised as we discuss below, and calls to uphold legal standards have so far been inadequate to prevent or halt unnecessary harm. What is more, despite refusing to release the legal advice on which their position is based due to national security considerations, drone-using states continue to claim their expanding operations are legal whatever opinions to the contrary may suggest. Our view, one we work through in what follows, is that we need to return to the phenomenon – the social, technical and legal organisation of drone operations themselves – and study it in its own terms

⁷ Ethnomethodology is a field of sociological inquiry focused on members of society’s methods – or ethno-methods – of practical action and reasoning in ordinary as well as specialised settings. We shall say more about ethnomethodology and our study below. For a useful introduction to ethnomethodology’s distinctive place within the social sciences, see Michael Lynch ‘The Origins of Ethnomethodology’, in Stephen P. Turner and others (eds.) *Philosophy of Anthropology and Sociology: Handbook of the Philosophy of Science, Volume 8*, (Elsevier 2007).

⁸ And see here the illuminating discussion in Jon R. Lindsay, ‘Target Practice: Counterterrorism and the Amplification of Data Friction’ (2017) 42(6) *Science, Technology, & Human Values* 1061.

⁹ As discussed in, e.g., Andrew Cockburn, *Kill Chain: Drones and the Rise of High-Tech Assassins* (Verso 2015).

¹⁰ While not explicitly focused on the armed drone, see Lena Jayyusi, ‘Discursive Cartographies, Moral Practices: International Law and the Gaza War’, in Baudouin Dupret, Michael Lynch, Tim Berard (eds.), *Law at Work: Studies in Legal Ethnomethods* (Oxford: Oxford University Press 2015); Craig A. Jones ‘Lawfare and the Juridification of Late Modern War’, (2016) 40(2) *Progress in Human Geography* 221; Maja Zehfuss, *War and the Politics of Ethics* (Oxford University Press 2018).

¹¹ For an overview of the legal arguments, see, e.g., Alston, Philip, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings, UN Doc. A/HRC/14/24/Add.6, at 3, 54, 85-86*. (UN General Assembly 2010); Megan Braun and Daniel R. Brunstetter, ‘State of the Union: A Decade of Armed Drones’, (2013) 19(2) *The Brown Journal of World Affairs* 81; Christof Heyns and others, ‘The International Law Framework Regulating the Use of Armed Drones’, (2016) 65(4) *International & Comparative Law Quarterly* 791.

if we are to understand what has produced and what sustains this state of affairs but also what we might do to challenge it. If, as we shall argue, particular ways of interpreting legal frameworks and obligations are built into and put to work in conjunction with the socio-technical arrangements of the drone and the calculative reasoning it embodies, that means we have to treat the socio-legal as interwoven with the socio-technical rather than externally regulating it. Once we clarify what we are dealing with when we engage with the use of armed drones, i.e. a socio-technical assembly that makes it possible to produce 'legal' airstrikes in ways that are tailored to the individuated circumstances of particular missions while diffusing accountability across its distributed operational architectures, we suggest the challenge the drone poses is revealed to be primarily political not legal in character. While we draw widely on existing literature in arguing this, we also refocus that literature in doing so. Our view that an interrogation of the socio-technical and socio-legal system of the armed drone should be the starting point for any analytical engagement with its use commends itself in two key respects. First, it provides a clear basis for collaboration across a range of approaches, collaborations necessary to adequately make sense of the ramifying complexities of contemporary drone operations. Second, it helps support demands for restrictions on those operations at the political level by making the socio-technical and socio-legal machineries of drone warfare visible and accountable. In order to make this case, we begin our discussion with an examination of the armed drone's growing use.

II. The Use of Armed Drones

17 years after the first attempted use of an armed drone¹² in an airstrike by the US on 7th October 2001¹³ and 16 since their first 'successful' use by the US in a 'targeted killing' on 4th February 2002,¹⁴ armed drones have become an increasingly central feature of the contemporary landscape of global politics and conflict. With these two events marking the moments when drone technology made the jump from intelligence, surveillance and reconnaissance (ISR) platform to fully-fledged weapons

¹² Despite the slipperiness of the terminologies used in this field, particularly references to 'unmanned' aerial systems, it is important to note that the armed drone is not a species of Lethal Autonomous Weapon System or LAWS, and should not be confused with one. Drones are piloted, just remotely so; they do not and cannot fly themselves. Indeed, as we will show, more people are involved in flying armed drones than are involved in flying conventional military aircraft. In that sense, they are highly socialised or 'peopled' technologies not 'independent' technological agents. That they afford scrutiny by more pairs of eyes among wider groups than conventional aerial warfare – from intelligence operatives through legal advisors and senior military strategists right up to Presidents – is precisely one of their attractions given the complex contemporary military-political involvements in which the US and its allies are engaged. This is not to say LAWS would not be illuminated by a sociotechnical and socio-legal analysis, just that the nature of the practices which underpin their development, deployment and use would take us into different territory to that within which the armed drone is situated.

¹³ Chris Woods, 'The Story of America's Very First Drone Strike' *The Atlantic* (30 May 2015).

¹⁴ John Sifton, 'A Brief History of Drones' *The Nation* (7 February 2012).

system,¹⁵ there are many ways in which the dramatic growth in drone warfare that has taken place since can be measured.

A pioneer of armed drones and a central protagonist (or antagonist) in the controversies which surround them, the US has led the way in their use – and is our primary focus in what follows for this very reason. Despite being shrouded in secrecy, the scale, distribution and modulating intensity of the US's drone wars around the world from 2001 onwards has gradually become clear through the work of journalists, monitoring groups and the communities targeted in them. According to the Bureau of Investigative Journalism,¹⁶ which tracks the use of armed drones in Pakistan, Afghanistan, Yemen and Somalia, as of April 2018 there have been 4,788 minimum confirmed strikes since 2004, leading to between 7,497 and 10,858 deaths, with between 738 and 1,569 civilians killed of whom 242 to 337 were children.¹⁷ Those rates have not been static. From 2005 to 2014, the number of drones in active service rose from 5% to over 40% of all US military aircraft.¹⁸ The increasing demand for armed drones this indexes was fuelled by the increasing demand for drone strikes. From a relatively low figure under the Bush administrations of around 50, there were dramatic increases under the Obama administrations and a further acceleration in the initial stages of the Trump administration. Recent estimates suggest that while President Obama approved a drone strike every 5.4 days, President Trump has been approving one every 1.25 days.¹⁹ In 2006, Predator and Reaper drones flew 55,000 hours in combat service but by 2016 the US's drone fleet saw 350,000 hours of active combat duty, reflecting their increasingly widespread use in both covert and more conventional operations against the Islamic State in Iraq, Syria and Libya.²⁰ As Anna Jackman has noted, by 2015 armed drones were releasing “more weapons than manned aircraft in Afghanistan” and this is becoming the norm in other conflicts too.²¹ The overall picture is, therefore, clear: more missions flown, more airstrikes launched, more casualties among combatants and non-combatants alike.

¹⁵ For more on the genealogy of the armed drone see Derek Gregory, 'From a View to a Kill: Drones and Late Modern War', (2011) 28(7-8) *Theory, Culture & Society* 188; Jeremy Packer and Joshua Reeves, 'Romancing the Drone: Military Desire and Anthropophobia from SAGE to Swarm', (2013) 38(3) *Canadian Journal of Communication* 309; Cockburn (n. 9); Madeleine Clare Elish, 'Remote Split: A History of US Drone Operations and the Distributed Labor of War' (2017) 42(6) *Science, Technology, & Human Values* 1100.

¹⁶The Bureau of Investigative Journalism, 'Drone Wars'

<<https://www.thebureauinvestigates.com/projects/drone-war>> accessed 28 April 2018.

¹⁷ See also Lucy Suchman, Karolina Follis and Jutta Weber, 'Tracking and Targeting: Sociotechnologies of (In)security' (2017) 42(6) *Science, Technology and Human Values* 983.

¹⁸ Thomas Grose, 'Are Unmanned Drones the Future of Global Transport?' *Newsweek* (18 July 2014).

¹⁹ Alex Moorehead, Rahma Hussein and Waleed Alhariri, *Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Force* (Columbia Law School Human Rights Clinic and Sana'a Centre for Strategic Studies 2017), 23.

²⁰ W. J. Hennigan, 'The U.S Is Now Routinely Launching 'Danger-Close' Drone Strikes So Risky They Require Syrian Militia Approval' *LA Times* (15 August 2017).

²¹ Anna Jackman, 'The Personnel Behind The US Drone Programme and National Bird' (2017) *Open Democracy* <<https://www.opendemocracy.net/anna-jackman/personnel-behind-us-drone-programme-and-national-bird>> accessed 28 April 2018.

While the world's primary user, armed drone use is not, however, restricted to the US. By 2012, Britain, China, France, Germany, India, Iran, Israel, Italy, Russia and Turkey were all in possession of armed drones²² and the number of state and non-state actors with armed drones has increased substantially since. The New America Foundation, which tracks the use, possession, development and import/export of drones around the world, suggests twenty-eight states currently have armed drone systems, eleven countries have used armed drones, and eight first used them in the past three years.²³ As drones have proliferated so have conflict sites, with drone strikes rumoured but not confirmed in countries like Mali and the Philippines.²⁴ Claims about the effectiveness of drones have undoubtedly contributed to their spread. However, figures inside as well as outside the military and defence establishments argue their use extends and exacerbates conflict rather than resolving it.²⁵ Far from having a stabilising effect, the 'turn to the drone' in military affairs across the world has coincided with a period where the situations in Afghanistan, Iraq, Libya, Syria and Yemen, to name just a few among the 'hottest' current theatres of war, have been far from stable. We have every reason, therefore, to take the critics' charges seriously: that drones make the problems they were designed to address worse not better, perpetuating armed conflict, drawing increasing numbers of the uninvolved into those conflicts and exposing them to the risk of violent death and injury as a result – in the absence of negotiated political settlements, itself a potent means of ensuring cycles of violence continue to spiral on and thus a source of harm and suffering in its own right.²⁶

When it comes to specifying the nature of the problems they pose, however, armed drones present a rather particular set of challenges. Chief among them is working out what we are actually referring to when we talk of the armed drone.²⁷ Drawing on recent social, political and legal research, in what follows we seek to make an analytical contribution to the debate on that question, arguing armed drones constitute a specific kind of socio-technical and socio-legal system, i.e. a means for bringing together diverse components, forms of expertise and infrastructures for particular military, legal and political ends at particular moments in time. Armed drones are not separable from the systems they are embedded in nor from the activities they allow, and we believe efforts to restrict their use will only gain ground by taking the networked socio-technical and socio-legal character of the armed drone into account. Following this line of argument through, we argue the use of armed drones not only opens up space for specific kinds of activities by state actors but demands specific kinds of analytical and political response in return.

²² The Guardian, 'Drones by Country: Who Has All the UAVs?' *The Guardian* (3 August 2012).

²³ New America Foundation, 'World of Drones' (2018) <<https://www.newamerica.org/in-depth/world-of-drones/>> accessed 28 April 2018.

²⁴ Task Force on US Drone Policy, *Recommendations and Report of the Task Force on Drone Policy* (2nd edn, Stimson 2015).

²⁵ See Clare Algar, 'How Can Secret Drone Campaigns Really Make Us Safer?' *CNN* (12 March 2014); Cockburn (n. 9); Task Force on US Drone Policy (n. 24).

²⁶ Cockburn (n. 9); Task Force on US Drone Policy (n. 24); Zehfuss (n. 10).

²⁷ In this connection see also Elish (n. 15).

III. Armed Drones as Socio-technical and Socio-Legal Systems

It is easy to get side-tracked in discussions of armed drones, losing the thread of important issues in the sea of technical details that arise whenever they are discussed. The technical details are important, and we will tease out aspects of them below, but they should not be given undue weight or be regarded as decisive. As Grégoire Chamayou puts it in *Drone Theory*:

*“Go look at the weapons, study their specific characteristics. Become a technician, in a way. But only in a way, for the aim here is an understanding that is not so much technical as political.”*²⁸

This caveat is important because if we separate off the technical from the social, political, legal, moral and ethical at the outset, armed drones lose coherence as an issue and become just one more expression of steady technological progress in the field of weapons systems. From this starting point, it becomes hard to state exactly what the specific problems with armed drones might be. However, as the Task Force on US Drone Policy put it: “while ... [armed drones], *as such*, present few new moral or legal issues, the availability of [these] lethal ... technologies has enabled US policies that likely would not have been adopted in the[ir] absence.”²⁹

Put most simply, the reason why armed drones have proven so attractive, why they have spread so quickly and why they have generated the problems they have is that they make it possible for military commanders and their political leaders to do things they could not or would not otherwise have done or have done in the same way had armed drones not been available.³⁰ In terms of what armed drones make possible, the Task Force on US Drone Policy offers neat summaries of their five core ‘affordances’:³¹ their “persistence ... and ability to loiter over a specific area for

²⁸ Grégoire Chamayou, *Drone Theory* (Penguin 2015), 15.

²⁹ Task Force on US Drone Policy (n. 24), 21, emphasis added.

³⁰ Nicolas Gianni, *How Can Actor-network Theory Assist in Rethinking Approaches to Banning or Restricting Lethal Autonomous Weapon Systems?* (Unpublished Masters Dissertation: University of Leiden 2017); see also Daniel Greene, ‘Drone Vision’ (2015) 13(2) *Surveillance & Society* 233; Jackman (n. 21).

³¹ We are drawing here on the substantial body of work that has built on J.J. Gibson’s theory of ecological perception and the concept of an ‘affordance’ introduced as part of it – see J.J. Gibson, *The Ecological Approach to Visual Perception* (Houghton Mifflin 1979), esp. chapter 8. In Ingold’s terms, affordances are “properties ... of any particular object, that [happen to] commend it to the project of a user” (Tim Ingold, *The Perception of the Environment: Essays on Livelihood, Dwelling and Skill* (Routledge 2000, 194). Different users will find technologies ‘afford’ them different possibilities for action depending on their projects and the circumstances in which they pursue them. Technologies do not determine their own uses, then; rather what they afford us hinges on our practical involvements and the conditions in which we take them up. Drone warfare and targeted killings, for example, may be thought to be ‘made for each other’ but we need to situate their relationship within a highly historically-specific context of action – namely, the post-Cold War, post 9-11 world of national and international politics and military interventionism. As we shall go on to argue, what drones are ‘in themselves’ is for us secondary to how they are put to work, what that work actually involves, and what its users thus themselves ‘make of’ the armed drone.

extended periods of time, allowing them to capture and collect more information and ... users to observe, evaluate and act quickly”; their “precision ... [with] sensor technology ... [promising] more accurate targeting as well as ... surveillance”; their “operational reach ... offering longer flying times ... [and thus the ability] to project force from afar in environments that may otherwise be inaccessible or too dangerous”; their use in “force protection ... allow[ing] the user to have a military presence in areas that otherwise would be impossible politically, capacity/resource prohibitive, too dangerous to risk being shot down, or topographically inhospitable”; and, finally, their “stealth ... [with most drones] relatively small, quiet and capable of being flown at high enough altitudes to avoid detection by the individuals being surveilled or targeted.”³² In a geo-political context in which, according to the retired general Stanley McChrystal, US political leaders and military commanders had been seeking effective means to show that “we can fly where we want, we can shoot where we want, because we can”,³³ the armed drone’s affordances have made it situationally useful indeed.

Sociologists working in the field of science and technology have for decades stressed that technologies should be treated as social and technical in character, i.e., that they constitute socio-technical systems,³⁴ and in the case of armed drones that emphasis is particularly important. Why becomes clear when we start to examine the working architecture of drone operations, starting with their human staff. As the US Air Force puts it: “The basic crew ... is a rated pilot to control the aircraft and command the mission, and an enlisted aircrew member to operate sensors and weapons as well as a mission coordinator, when required.”³⁵ At this point, the set-up seems familiar, much like that of any conventional two-person aircraft, pilot and co-pilot working with an overseeing controller. However, drone operations also involve intelligence analysts feeding in information to guide the pilot and sensor operator in their actions. Drone operations are thus revealed to routinely involve not three but a minimum of four primary actors. Yet there is more. Again, in the words of the US Air Force: “The primary concept of operations, remote split operations, employs a launch-and-recovery ground control element for take-off and landing operations at the forward operating location, while the crew based in the continental United States executes command and control of the remainder of the mission *via* beyond-line-of-sight links.”³⁶ The networks of connections and their distribution thus continues to expand, covering units for launch and recovery at forward operating locations as well as, by implication, those personnel responsible for maintaining satellite link-ups so control can be passed between units at different points in a flight. Nor are drone

³² Task Force on US Drone Policy (n. 24).

³³ Adam Clark Estes, ‘Even Stanley McChrystal Realizes How Much the World Hates Our Drones’, *Atlantic Wire* (7 Jan 2013)

³⁴ See for example in this context William Walters, ‘Drone Strikes, Dingpolitik and Beyond: Furthering the Debate on Materiality & Security’ (2014) 45(2) *Security Dialogue* 101; Ezio DiNucci and Filippo Santoni, *Drones and Responsibility: Legal and Philosophical and Socio-technical perspectives on Remotely Controlled Weapons* (Routledge 2016); Elish (n. 15); Suchman, Follis and Weber (n. 17).

³⁵ United States Air Force, ‘MQ-1B Predator’ (Air Combat Command Public Affairs Office 2015), 1.

³⁶ *Id.*, 2, and see also the detailed discussion in Elish (n. 15).

missions self-directed: they are requested or called in, usually by field commanders. Both the drone crews and the field commanders are in turn supported by a host of secondary support personnel ranging from legal advisors to technicians of various kinds. Real-time video analysis for US drone operations, for instance, is handled *via* the US's Distributed Common Ground System, or DCGS, a massive communication, information and signals intelligence processing apparatus with centres across the US.³⁷ Thousands of DCGS analysts are recruited and employed by the DCGS in order to examine real-time video feeds and imagery from drones as they come in. As these considerations are factored in, it becomes clear that we are dealing with a sprawling enterprise of formidable technical sophistication enabling military personnel to work together in real-time cross-continently and cross-nationally.

When we take its operational architectures into account, all in all a 24-hour US drone patrol requires an estimated 180-200 people undertaking interconnected tasks as part of a transcontinental and indeed international division of military labour.³⁸ The work of the drone is thus grounded in geographically distributed collaborations across what Jackman calls “a range of human and machinic nodes”.³⁹ Fielding-Smith and Black add detail to and extend the initial sketch offered above of the three principal operational ‘nodes’ involved: those for launch and recovery, involving aircraft, pilots, sensor operators, maintenance crews and a ground station; mission control, involving a different set of pilots, sensor operators, maintenance crews, mission coordinators and ‘leadership’ personnel; and processing exploitation and dissemination, involving full motion video crews, signals intelligence operators, additional maintenance crews, a weapons tactics team and further leadership personnel.⁴⁰ These in turn connect outwards to, among other things, mechanisms of political and legal oversight as well as sites of knowledge production through military research and development. As Greene puts it, an entire assembly “comes together just-so at the point of the [armed] drone.”⁴¹

The armed drone as a socio-technical system is not, therefore, just composed of weapons, vehicles, munitions, sensors and cameras, it is also composed of intelligence gathering and communication systems in myriad forms, decision making arrangements of one kind or another as well as the large numbers of individuals with different roles, training, expertise and conditions of employment inside and outside government who are engaged in drone programmes both directly and indirectly. It is these shifting, heterogeneous assemblies we engage with when we engage with the use of armed drones. Significantly, the law is deeply implicated in these assemblies too with military lawyers, known as (Staff) Judge Advocates, involved in every stage

³⁷ Cockburn (n. 9); Elish (n. 15).

³⁸ See, for example Derek Gregory, ‘Drone Geographies’ (2014) 183 *Radical Philosophy* 7; Abigail Fielding-Smith and Crofton Black, ‘When You Mess Up, People Die’: Civilians Who Are Drone Pilots’ Extra Eyes’ *The Guardian* (30 July 2015); Greene (n. 30); Elish (n. 15); Jackman (n. 21); Amnesty International, *Deadly Assistance: The Role of European States in Us Drone Strikes* (Amnesty International Ltd 2018).

³⁹ Jackman (n. 21).

⁴⁰ Fielding-Smith and Black (n. 38).

⁴¹ Greene (n. 30).

of the process of undertaking strikes.⁴² Contemporary target ‘clearance’ practices around drone strikes represent a major shift in the role of the law in situations of armed conflict. In particular, the case by case, moment by moment involvement of military lawyers and legal support personnel in conducting specific drone strikes represents a tightening of the operational links between law and warfighting.⁴³ The destructive harm caused by armed drones in contemporary conflicts and through targeted killing programmes is closely bound up with the legal frameworks invoked by these embedded legal advisors to sanction their use *in situ*. Law, warfighting and indeed politics are not separate, here, but co-constitutive, channelling the use of force and its outcomes in particular directions.⁴⁴

Military legal scholars writing about this are remarkably candid. As DiMeglio for one puts it, the role of the Staff Judge Advocate as an “operational law attorney” is to “enhance the legitimacy of military operations in environments where evolving rules and a fluid situation require them not only to understand the underlying law and policy, but also to be innovative and nuanced in their legal analysis”.⁴⁵ In the words of a previous Commander of US Special Forces in Afghanistan, “Honestly I don’t take a shit without one [a legal assessment], especially in this business”,⁴⁶ an unusually frank statement of the contemporary entanglement of legal and military considerations. The law in this context is not a defined external constraint but a flexible relay internal to the system itself, enabling that which it is claimed to regulate and control.⁴⁷ If legal advice is as critical to the firing of a weapon as a trigger on a gun or a launch key for a missile, it is a much a part of the weapons system as the trigger or launch key. Under these conditions, legality becomes a by-product of the network; like the drone strike itself it is a collaborative accomplishment of military action.⁴⁸ In order to think seriously about the armed drone, then, we have to look beyond its technological expression alone, the machine with missiles in the air, to consider the social, political and legal practices which both animate and are given coherence by it as well. How we might do so while resisting any narrowing of our analytical and political field of vision provides the focus of the next section.

⁴² See, for example Pratap Chatterjee, ‘How Lawyers Sign Off on Drone Attacks’. *The Guardian* (15 June 2011); Greene (n. 30).

⁴³ Susanne Krasmann, ‘Targeted Killing and Its Law: On a Mutually Constitutive Relationship’ (2012) 25(3) *Leiden Journal of International Law* 665; Elish (n. 15)

⁴⁴ See also David Whyte, ‘Lethal Regulation: State-Corporate Crime and the United Kingdom Government’s New Mercenaries’ (2003) 30(4) *Journal of Law and Society* 575; Eyal Weizman, ‘Legislative Attack’ (2010) 27(6) *Theory Culture & Society* 11; Elish (n. 15); Zehfuss (n. 10).

⁴⁵ Richard DiMeglio, ‘Training Army Judge Advocates to Advise Commanders as Operational law Attorneys’ (2013) 54(3) *Boston College Law Review* 1185, 1189.

⁴⁶ Cited in Derek Gregory, ‘Angry Eyes (2)’, 2015 *Geographical Imaginations: War, Space and Security*, October 17 <<https://geographicalimagination.com/2015/10/07/angry-eyes-2/>> accessed 28 April 2018.

⁴⁷ Whyte (n. 44); Weizman (n. 44); Elish (n. 15); Zehfuss (n. 10).

⁴⁸ A relationship increasingly conceptualised using the term ‘lawfare’ to denote the degree to which law and warfare have merged. For further discussion see, e.g., Jones (n. 10); Joop Voetelink, ‘Reframing Lawfare’, in Paul A.L. Ducheine and Frans P.B. Osinga (eds.) *Netherlands Annual Review of Military Studies 2017* (T.M.C. Asser Press 2017).

IV. Countering the Logic of the Armed Drone: Linking the Analytical to the Political

This article opened with two epigraphs; one quoting US President Barack Obama in a speech justifying the use of armed drones in 2013 and another quoting the philosopher Martin Heidegger speaking some 50 years previously. The juxtaposition of those two epigraphs brings out some of the core issues we believe can help focus discussions about the use of armed drones. Obama points to the “just-so” individual rationality of any given use of an armed drone: individual strikes save lives; they disrupt plots; they make it possible to respond to threats in a calculatedly legal and proportionate way. Cumulatively, however, the results are deeply problematic. More people are killed; politics is ignored in favour of chimeric military solutions; conflicts fester; nothing is resolved. All the time the socio-technical system of the armed drone grows and spreads, is put to work more and more.

What President Obama’s words reveal, to turn to Heidegger’s warning, is a military and political establishment so in thrall to its own technological revolution that the socially and historically contingent modes of calculative thinking encouraged by the availability of the drone have come to be accepted and practiced as the only way of thinking. Drone vision, despite the promise of full motion video and total situation awareness, has turned out to be a form of tunnel vision, leading in the direction of more armed drones and further conflict – history repeating itself on a tightly closed remotely piloted loop.

Contrasted with, for example, the hierarchically-organised, centralising and collectivising socio-technical system of the nuclear weapon, the research which has charted it and the campaigns which have sought to counter it,⁴⁹ the individuating, diffuse, just-in-time, legally saturated and thoroughly associative work of the armed drone calls for analytical and political responses of a new kind, ones matched to *its* particular character. We believe a focus on the armed drone as a socio-technical and socio-legal system in the sense outlined above opens up a range of possibilities in this regard and, in the rest of this section of the article, we want to sketch different lines those responses can take and indicate one of the ways in which the analytical can be linked to the political through them.

Given the complex, massively distributed and proliferating “human machine configurations”⁵⁰ drone operations rest upon, no single study can ever hope to have the final word or claim complete comprehensiveness with respect to them. As each individual drone strike has its own unique characteristics, there will always be more to be said. Instead, and precisely because drone strikes are themselves collaborative and associative, we believe research into them has to be seen as a site for collaboration and association, too. The analysis we have presented is, in many

⁴⁹ For further discussion around nuclear weapons, see Matthew Bolton and Elizabeth Minor, ‘The Discursive Turn Arrives in Turtle Bay: The International Campaign to Abolish Nuclear Weapons’ Operationalization of Critical IR Theories’, (2016) 7(3) *Global Policy* 385.

⁵⁰ Elish (n. 15), 1101.

respects, indicative. Organisations whose work has informed our position, like Airwars, Amnesty International, the Bureau of Investigative Journalism, Reprieve and the Stimson Centre, among others, have been and will remain pivotal to understanding the organisation of drone operations internationally. Their open-source, open-access ethos allows for investigations that delve deeper into the structures they collectively contribute to documenting in the course of their ongoing work. We have drawn extensively on that work and, indeed, would not have been in a position to talk about a series of issues without it. Research done outside academic institutions is thus critical and constitutes a key resource for others to build upon. Most importantly, as those who undertake such research have practically demonstrated, sharing knowledge and ensuring it is widely distributed across open public networks is an extremely effective way of countering the closed and secretive logic of the armed drone at the analytical level – a form of epistemic and evidential politics it can be easy to overlook.⁵¹

What the sharing of resources outside and against “the universe of classified information”⁵² and the apparatus of “official secrets”⁵³ makes possible is a range of contributions from across disciplines and research traditions, reflected in the diversity of studies referenced in this article. Those contributions we have cited situate themselves, in the main, at the meeting point between science and technology and socio-legal studies. Nonetheless, while pitched on socio-technical and socio-legal terrain, it encompasses a group which includes anthropologists, geographers, historians, journalists, lawyers, literary scholars, philosophers, political scientists, social and political theorists and sociologists, among others, all of whom have converged on the problem of the armed drone from a range of different angles. There is, therefore, a tremendous variety of approaches on display. That said, amidst that variety, we would point to three methodological tendencies within this emerging interdisciplinary and dialogical field which together lend it coherence.

The first is broadly philosophical or theoretical. The figure of the armed drone here works as a point from which to question and challenge the ideas of ‘legality’, ‘proportionality’, ‘right’, ‘morality’ and so on, that are routinely deployed to justify its use. The socio-technical is less a focus in its own right in work of this kind and more a point of departure for a critical and deconstructive response to the moral, legal and political arguments which the armed drone’s socio-technical elaboration embodies and channels.⁵⁴ Work in this vein is complemented by a second kind of response, one which seeks to trace the socio-technical system of the armed drone outwards and backwards from the stabilised machineries of contemporary drone operations to the wider social, political, legal and economic arrangements from which they emerge and

⁵¹ Michael Mair and others, ‘The Violence You Were/n’t Meant to See’, in Ross McGarry and Sandra Walklate (eds.), *The Palgrave Handbook on Criminology and War* (Palgrave Macmillan 2016).

⁵² Peter Galison, ‘Removing Knowledge’ (2004) 31(1) *Critical Inquiry* 229; Peter Galison, ‘Secrecy in Three Acts’ (2010) 77(3) *Social Research* 941; see also Braun and Brunstetter (n. 8).

⁵³ Maximilian C. Forte, *Force Multipliers: The Instrumentalities of Imperialism* (Alert Press 2015), esp. chapter 7.

⁵⁴ See, e.g., Chamayou (n. 28); Zehfuss (n. 10).

derive support but which they also condense and give a material focal point to. This can involve explorations of the diffuse sites, practices and bodies of expertise the armed drone is bound up with, as well as genealogical investigations examining the various developments and events which have made drone operations possible today – often, indeed, both at once.⁵⁵ Work of this kind expands our understanding of the scope of the networks of connections that are constitutive features of the use of armed drones and helps us link up aspects of the worlds around us to the figure of the drone in new ways.

These are, in turn, complemented by a third kind of response. Where the first steps back and the second moves outwards to more expansive and historically-situated conceptions of the socio-technical and socio-legal systems involved, the third moves inwards, seeking to get closer to the activities which animate the armed drone and how it is actually put to use. Our own research is of this kind. Part of its value, we would suggest, is that it highlights why a focus on the socio-technical in socio-legal research is important but also why maintaining that focus moves us away from a narrow concern for legal issues alone, something we shall elaborate on further below.

Our approach is ethnomethodological, as noted above, and that means it builds on the foundational work of Harold Garfinkel⁵⁶ and Harvey Sacks⁵⁷ to study the *in situ* or endogenous forms of practical action, interaction and reasoning that are constitutive features of drone operations. Ethnomethodologists, following Garfinkel and Sacks, have examined legal practices and legal reasoning in the past⁵⁸ and we draw on that work in our research. However, our project proceeds more directly from ethnomethodological studies of friendly fire incidents and civilian deaths as a result of misidentifications during air combat missions, studies which offer innovative ways of analytically getting to grips with military practices and battlefield legal reasoning in their socio-technical details.⁵⁹

Using audio, video and transcript data, in our research we painstakingly reconstruct engagements action by action, communicative exchange by communicative exchange, as they unfold in real time. A highly focused form of

⁵⁵ See, e.g., Cockburn (n. 9); Elish (n. 15); Greene (n. 30); Gregory (n. 15); Gregory (n. 38); Jones (n. 10); Packer and Reeves (n. 15).

⁵⁶ Harold Garfinkel, *Studies in Ethnomethodology* (Prentice Hall 1967); Harold Garfinkel, *Ethnomethodology's Program: Working out Durkheim's Aphorism* (Rowman & Littlefield Publishers 2002).

⁵⁷ Harvey Sacks, *Lectures on Conversation* (Blackwell 1992).

⁵⁸ See, e.g., Baudouin Dupret, Michael Lynch, Tim Berard (eds.), *Law at Work: Studies in Legal Ethnomethods* (Oxford University Press 2015).

⁵⁹ Lena Jayyusi, 'The Power of Technology and the Technologies of Power', (2011) <<http://english.dohainstitute.org/release/6b034830-433c-4ba2-9ed5-66ccf9ede776>> accessed 28 April 2018; Michael Mair and others, 'War-Making and Sense-Making: Some Technical Reflections on an Instance of 'Friendly Fire'', (2012) 63(1) *The British Journal of Sociology* 75; Maurice Nevile, 'Seeing on the Move: Mobile Collaboration on the Battlefield', in Pentti Haddington, Lorenza Mondada and Maurice Nevile (eds.) *Interaction and Mobility: Language and the Body in Motion* (De Gruyter 2013); Michael Mair and others (n. 51); Chris Elsey, Michael Mair and Martina Kolanoski, 'Violence as Work: Ethnomethodological Insights into Military Combat Operations', (2018) 8(3) *Psychology of Violence* 316.

investigation, it provides insights into drone operations that cannot be arrived at in any other way. One focus of our project is a transcript released by the L.A. Times detailing interactions between US military personnel in the run up to a coordinated drone-led attack which resulted in the deaths of 27 Afghan civilians in the province of Uruzgan in 2010.⁶⁰ Precisely because this lone transcript remains one of the few sources of unrestricted data to open a window on drone operations, it has already been examined a number of times and in various ways.⁶¹ Our treatment is, however, distinctive. A detailed ethnomethodological reworking and analysis of the transcript provides an empirical anchor for a wider examination of the technologically-mediated work of military personnel actively engaged in identifying ‘threats’ and the part situated legal reasoning plays in their targeting decisions. Although much discussed, the interactional organisation of that work in the Uruzgan incident and the role legal reasoning played within it has not yet been subject to line by line analytical scrutiny. While our research remains in its early stages, we want to make some initial observations about what work on the transcript reveals. Our focus will be the following excerpt from it:⁶²

01	01:03	K97SO	The screener is reviewing, they think something is up with
02			that dude as well. I’ll take a quick look at the SUV guys, sorry
03			
04	01:03	JAG25	SLASHER03 JAG25
05	01:03	K97SO	What do these dudes got, yeah I think that dude had a rifle
06	01:03	K97P	I do too
07	01:03	JAG25	SLASHER03 JAG25
08	01:03	JAG25	SLASHER03 JAG25
09	01:03	SL03	JAGUAR25 go for SLASHER
10	01:03	JAG25	Roger, given the distance and the lack of weapons PID we
11			are having a hard time (garble, garble) and also the same
12			with fires, (garble) to bring them in so we can engage but
13			we really need that PID to (garble, garble, garble) start
14			dropping
15	01:04	K97SO	Yeah they called a possible weapon on the MAM mounted in
16			the back of the truck
17	01:04	K97MC	The MAM that mounted the bed of the truck had possible
18			weapon

⁶⁰ See David S. Cloud ‘Anatomy of an Afghan War Tragedy’, *Los Angeles Times* (10 April 2010); Data Desk, ‘Transcripts of U.S. Drone Attack’, *Los Angeles Times* (10 April 2010).

⁶¹ See, e.g., Chamayou (n. 28); Cockburn (n. 9); Gregory (n. 46).

⁶² Data Desk (n. 60), 13-14.

19	01:04	K97P	All players, all players from KIRK97, from our DGS the MAM
20			that just mounted the back of the Hilux had a possible
21			weapon, read back possible rifle
22	01:04	JAG25	Again the other two on the east side of the river are also
23			static with all folks loading
24	01:04	JAG25	Kirk we notice that, but you know how it is with ROEs, so
25			we have to be careful with those, ROE's

This short, complicated excerpt, taking up less than half a page within a 76 page document and covering less than two full minutes of communicative interactions in an operation which lasted over 5 hours,⁶³ exemplifies many of the challenges we confront when we begin to look at the practice of drone warfare in detail but also the lessons we can draw when we start to do so. We cannot offer a full analysis here but we can outline some of the structural considerations we believe relevantly arise from analytical engagements with it.

The excerpt captures exchanges between the three-person drone crew of KIRK97 flight, the Pilot (K97-P), Sensor Operator (K97-SO) and Mission Coordinator (K97-MC). As this was a US military operation involving air and ground forces those exchanges also included a Ground Controller, JAGUAR25/JAG25, whose role it was to coordinate action between them. Finally, we have SLASHER03, the pilot of an AC-130 Gunship, one element within the heavy air support units also involved in the incident. The role of KIRK97 flight in this case, with its powerful cameras and sensors, was to act as the command's 'eyes' on the situation on the ground and so as the spotter for the heavy support units rather than as a strike force in its own right, though it was equipped with munitions of its own if needed. Translating the acronym and argot laden language they employ, in this excerpt they are discussing 'PID', positive identification, 'MAMs', military aged males, 'DGS', Distributed (Common) Ground System, 'ROEs', Rules of Engagement, and 'dropping', i.e. attacking or firing upon enemies or 'MAMs'.

Once we have this knowledge in hand, it becomes possible to make better sense of what this excerpt captures. Having already spotted the convoy of Afghan civilian vehicles (SUVs, Hiluxes) and suspecting it to be a Taliban force, in it we see the crew of KIRK97 flight conferring with the Ground Controller, other air units and intelligence operatives working in the D(C)GS, i.e. 'screeners',⁶⁴ to verify those

⁶³ The second column in our slightly modified version of the original transcript indicates the time that has elapsed since the start of the mission in hours and minutes.

⁶⁴ It is important to note that scores of other individuals were involved too, including a Staff Judge Advocate, but their input is 'off-transcript' because the transcript only captures the exchanges the drone crew were directly party to – just a small sub-set of the relevant interactions and something that reveals the analytic dangers of taking too 'operator-centric' a view of drone warfare. When it comes to identifying 'where the action is', we need to resist the temptation to treat drone crews and their immediate interlocutors as the be-all and end-all of drone operations. They are just one set of (human and non-human) protagonists within a much bigger

suspicions based on the real-time video feed from the drone which is being shared among them all. Hours before the convoy was engaged, they are trying here to get evidence good enough to 'confirm' the individuals they are monitoring are targetable, that they are 'military aged males', and that they possess weapons and so can be legitimately attacked under their rules-of-engagement in line with IHL as operationally interpreted by US forces. While the screeners and the Ground Controller argue the criteria for initiating an engagement have not yet been satisfied, the conditions under which they will be in a few hours' time – a positive call by the screeners on the presence of weapons on what basis and with what degree of certainty – are now largely in place.

It is very difficult to portray this as an unsanctioned or rogue operation. No one here was deliberately and knowingly setting out to act illegally, it is not akin to the 'Marine A' case.⁶⁵ It is much more troubling than that. Instead what we see is the protagonists working together in real-time through the chain of command to gradually construct a legal rationale for and hence defence of the attack in advance. As the excerpt shows, they are continually referring back to and attentively checking the potential legality of their projectable lines of action and prospectively modifying them as a result. Crucially, this locally-built legal rationale for justifying action holds whatever the outcome. In another possible world, the individuals targeted could, of course, have turned out to be combatants. But in this world they did not; they were a mixed group of men, women and children, the majority of whom were either killed outright or permanently and cruelly maimed in the attack.⁶⁶

Operating in dialogue with the first two modes of research, what even a preliminary examination of something like the Uruzgan incident along these interactional lines brings to light, we would argue, is a set of practices bound up with the armed drone which are indifferent to the status of those targeted by it. That the legal rationale and hence justification for the attack holds irrespectively of whether an attack is actually justified – i.e. whether those targeted are in fact combatants or not – is the issue we want to bring to the fore. We might put things this way: that the people who have been categorised as 'enemies' may subsequently turn out to have been wrongly so categorised carries no implications. Where we think such work feeds into political responses is that a public acknowledgment of this as an evidenced feature of drone operations would shift the terms of the drone debate. One aspect of the US's strategy, as Obama's speech makes clear, has been to claim legality on behalf of its drone operations. But if legality is a designed in by-product and the law-as-interpreted an enabling condition of those operations, that defence starts to look rather empty: drone strikes are legal because they are locally and contingently configured by those involved to deliver legality as an outcome, as much

ensemble, as is clear from the constant invocation of unseen others, e.g. the screeners (and in the background, those directing them), in this excerpt and indeed throughout the transcript.

⁶⁵ For an overview and transcripts from the incident which led to Marine A's court martial in 2011, see Steven Morris, 'Royal Marines Court Martial: Video Transcripts' *The Guardian* (25 October 2015).

⁶⁶ *National Bird* (Dir. Sonia Kennebeck, Ten Forward Films 2016).

as ‘successful’ kills – something the Uruzgan incident demonstrates all too perspicuously.

It is also important to acknowledge this, we suggest, because it shows why challenges to the legality or otherwise of drone operations could ultimately prove insufficient as a response to them.⁶⁷ While they certainly achieve a great deal, especially for victims, legal challenges must pragmatically accept the individuating logic of drone operations. As every operation poses different issues resulting in circumstantially-inflected legal decisions, an interrogation of what was done in any specific case must take up the specifics of the incident at hand. This means, however, that the generalised ways in which the socio-technical system of the armed drone works to block demands for accountability evade sustained scrutiny. The diffusion of accountability across distributed operations is not something the law on its own is particularly well-equipped to address.⁶⁸ The Uruzgan operation was deemed legal, yet few, even within the US military itself, argue it was acceptable. Documenting the routine ways in which such outcomes are produced *via* the machinery of drone warfare is thus no small matter and represents one way in which we can link the analytical to the political to useful effect.

V. Conclusion

The call that has been articulated by civil society, international organisations, and some states for greater transparency around drone strikes, recently reiterated by Reprieve⁶⁹ and Moorehead, Hussein, and Alhariri,⁷⁰ represents one step towards addressing the issues posed by armed drones. Drone strikes should be subjected to thorough examination from various angles and states need to release comprehensive information about the actual workings of the socio-technical systems of the armed drone for that to be possible. By insisting states release information including audio, video, imagery, digital communications, available intelligence and the legal advice presented in theatre, drone programmes will be drawn ‘out of the shadows’⁷¹ and brought to greater public account,⁷² addressing concerns around the secrecy and erosion of democratic oversight that have gone hand-in-hand with – and indeed are best seen as internal to – the development of these programmes in any and all of the

⁶⁷ As the success of the International Campaign to Abolish Nuclear Weapons (ICAN) in 2017 with its partners in states and international organisations shows – most notably through the achievement of the Treaty on the Prohibition of Nuclear Weapons and the award of the Nobel Peace Prize – it can be politically unproductive to get embroiled in legal argumentation around the use or potential use of particular weapons systems, whilst a refocusing of debate on to humanitarian harms can produce movement towards the tightening of international standards. See, e.g., Bolton and Minor (n. 49).

⁶⁸ Elish (n. 15), 1117-1121.

⁶⁹ Reprieve, *Opaque Transparency: The Obama Administration and Its Opaque Transparency on Civilians Killed in Drone Strikes* (2016) <<https://www.reprieve.org.uk/wp-content/uploads/2016/06/Obama-Drones-transparency-FINAL.pdf>> accessed 28 April 2018.

⁷⁰ Moorehead, Hussein and Alhariri (n. 19).

⁷¹ *Id.*

⁷² Greene (n. 30).

ways outlined above.⁷³ Greater knowledge of the assembly of practices, equipment and infrastructures associated with drone warfare, including battlefield law, would in turn help establish a better understanding of what restrictions on armed drone use might be most effective where, and how best to achieve them.

Beyond transparency, however, it is also important to ensure greater information does not merely serve to further stabilise these problematic practices in the international public sphere. Socio-legal researchers working on this issue should thus be encouraged to think about how their work can support challenges at the political level by connecting their work with the work of others to subvert the logic of the armed drone. As we hope to have established in the course of this article, the use of armed drones demands the sort of public and political accounting drone programmes are set up to evade and studies which lay out the interlinked socio-technical and socio-legal logics implicated in those uses can help make that demand increasingly difficult to resist and those evasions increasingly difficult to maintain. It is by opening up the closed world of the armed drone in ways that make it public and afford possibilities for its critical examination, therefore, that research can make one of its most direct contributions to the contemporary politics of the drone. While legal challenges are a necessary element within such efforts, they are not themselves sufficient. Instead a preferably international political process is needed to address the unnecessary harms caused by the use of armed drones. Our view is that research of the kind that has provided the focus of this article can add to the pressure on drone-equipped states to enter such a process by making it clear what the use of armed drones involves and what it leads to in practice.

⁷³ Krasmann (n. 43); Task Force on US Drone Policy (n. 24).

Law as Code for Power and Ideology: The Use of Legal Language in Public Land Debates

Matthew D. Schwoebel¹

“Native people relate to rock art with our hearts...We do not view these panels as just art, but almost like a coded message that...informs our life and reality as humans.”

Malcolm Lehi, former Ute Mountain Ute Tribal Councilman

I. Introduction

In 2016, President Obama designated Bears Ears National Monument (“National Monument” or “the Monument”) to protect 1.35 million acres of land in San Juan County, Utah managed by the Bureau of Land Management and the U.S. Forest Service. The Bears Ears area is known for its high density of cultural resources such as rock art, ancient cliff dwellings, granaries, towers, ceremonial kivas and other artefacts across an impressive landscape of sandstone canyons, forested highlands, meadow mountaintops, and desert mesas.² The Proclamation recognised that these ancient sites form an integral and interconnected cultural landscape³ for contemporary tribal peoples. Local and regional Native people continue to use the land for collecting firewood, piñon nuts, and medicinal herbs and gathering materials for crafting baskets and footwear, as well as for conducting ceremonies. Other locals graze their cattle and use the land for recreation.

The designation followed nearly 80 years of tribal advocacy to protect the land, efforts that were later joined by archaeological, recreational, and environmental organisations and private individuals. A proposal was delivered to President Obama by the five tribal governments, namely – Hopi, Navajo, Ute Mountain Ute, Zuni and Ute Indian Tribe of the Uinta Ouray, to create not only a protected land status, but also to establish a new institution so that tribal knowledge and perspectives could be utilised in the co-management of the land. A collaborative approach would be carried out between the federal agencies and a newly established institution, the Bears Ears Inter-Tribal Coalition, composed of representatives from the five tribal governments. Co-management arrangements have taken form sporadically across the United States

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² William H. Doelle, ‘Bears Ears Archaeological Experts Gathering: Assessing and Looking Ahead Report’ *Archaeology Southwest and Friends of Cedar Mesa* (Report prepared by Archaeology Southwest and friends of Cedar Mesa 2017).

³ Various definitions for cultural landscape exist. One concise definition is proffered by Álvarez Munárriz Luis as “cultural areas created by members of a given culture, which serves as the setting that shapes thought, behaviour and orientation”. See, Álvarez Munárriz Luis ‘The Cultural Landscape Concept’ (2011) 6 *AIBR* 50, 63

but have generally been limited to fish and wildlife management.⁴ The Bears Ears National Monument represents the first co-management arrangement developed as a comprehensive land managing strategy for an entire expanse of federal land.⁵

The designation of the National Monument has reignited a heated, sometimes vitriolic and even confrontational, debate across Western states over who owns and controls public lands. The Trump administration in December 2017 set forth a new proclamation that rescinded portions of the National Monument and greatly reduced its existing boundaries by 85%, from 1.35 million acres to just over 200,000.

The Proclamation renamed the Monument *Shash Jaa*, the Navajo term for the area, despite its significance to over five tribal nations.⁶ The President's order also created two positions for county government representatives on the Inter-Tribal Coalition, previously a five-member body of tribal government cultural resource management officials. County Commissioners are perhaps the most outspoken opponents of monument designation. Areas removed from national monument status were in addition opened to new mineral leases within 60 days. Uranium, oil and natural gas deposits are known to exist in the area, with nearby facilities in operation. Some may suspect this move is part of the Trump administration's efforts to achieve 'American energy dominance' to replace former administrations' policy goal of energy independence.⁷

Various Anti-Monument groups have formed since the Monument's inception, including those founded by local Navajo residents, to voice their opposition and advocate for the Monument's rescission or modification. Tribal governments, Native American citizens, archaeologists, palaeontologists and recreational and environmental groups, local and national, constitute the base of the counter Pro-Monument movement. As expected, organisations involved, both pro- and anti-, speak out through online social networking sites. Social networking sites are now considered to constitute a public sphere for the debate and formulation of public opinion.⁸ This article will explore how different groups with divergent political goals

⁴ Ellen M. Donoghue, Sara A. Thompson and John C. Bliss. 'Tribal-Federal Collaboration in Resource Management' (2010) 14 *Journal of Ecological Anthropology* 1. See also, Mary Ann King, 'Co-Management or Contracting? Agreements between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act' (2007) 31 *Harvard Environmental Law Review* 2. See also, Martin Nie, 'The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands' (2008) 48 *Natural Resources Journal* 3.

⁵ The closest equivalent in terms of scope is the co-management of the Canyon de Chelly National Monument between the National Park Service and the Navajo Nation, but this monument is tellingly located on tribal lands, and co-management arrangements are largely piecemeal and focused on employment opportunities.

⁶ The name of Bears Ears was originally selected because in all tribal languages of peoples that use the area the term invariably translates to "Bears Ears". Bears Ears refers to two buttes located near each other.

⁷ Timothy Cama, "Trump vows to create "American energy dominance"" *The Hill*. (Washington, D.C., 29 June 2017). <<http://thehill.com/policy/energy-environment/340135-trump-rolls-out-actions-to-boost-nuclear-fossil-fuels>> accessed 5 November 2017.

⁸ Zizi A. Papacharissi, *A Private Sphere: Democracy in a Digital Age*, (Polity Press 2010).

frame and interpret 'protection' of the land through use of a vernacular legal language and forms of reasoning. More broadly, I want to explore how legal ideas are disseminated and reinterpreted at a general vernacular level through power and ideology. I discuss comments on Facebook pages of four organisations: the Bears Ears Inter-Tribal Coalition, a local Anti-Monument Navajo organisation, a local Pro-Monument Navajo organisation and a conservative think tank based in Salt Lake City. Each of these organisations has played a major public role in the controversy; however, my focus is on social media platforms (i.e., comment sections) and how they are used to advance ideology and debate positions. These four organisations are the only organisations on Facebook with group pages dedicated to discussing this issue. I focus my attention on Facebook group pages because they have become an important site of public commentary on controversial issues, and I want to know how legal language is used in public debates. Additionally, one-third of Utahns are members of Facebook and so it provides a space for which real-time interaction between competing groups within public debate can occur.

Among social media platforms, Facebook is seen according to some research as the ideal location for debate, rather than the dissemination of information as is more associated with networks like Twitter. Research has further indicated that social networks provide access to news that might be more concentrated on issue-based public affairs or otherwise go unnoticed.⁹ Facebook generally is used by ordinary citizens to share material and discuss topics that are of concern or interest to them.¹⁰ Group pages, in part, on Facebook allow members to join a set of participants interested in a matter of public concern. Group pages provide members with the opportunity to more freely exchange their views and political positions than might otherwise occur on personal pages where certain social conventions of friendships and familial relations might disincentive the exchange or expression of such ideas. Group pages enable and encourage public discussion and help to overcome the risk of social isolation that could be caused by public posts on personal pages. Therefore, group pages dedicated to a topic or issue offer an appropriate and even robust space for discussion and debate on matters of public affairs among the general population.

The comment sections for these groups were coded and analysed using NVivo software to identify how competing groups use a vernacular legal language in public debate. The comment sections of each group were made into transcripts which could then be coded. A codebook was developed using a grounded theory approach.

This article approaches public lands debates from an ethnographic semiotic approach. I first provide a theoretical framework for the article, and in the sections that follow I discuss various aspects of the theory of ethnographic semiotic research. The first discusses a vernacular legality discourse as it is used by pro- and anti-

⁹ Javier Guallar, Jaume Suau, Carlos Ruiz-Caballero, Albert Sáez, Pere Masip, 'Re-dissemination of News and Public Debate on Social Networks' (2016) 25 *El profesional de la información* 3.

¹⁰ Sussane M. Almgren and Tobias Olsson, 'Let's Get Them Involved' ...to Some Extent: Analyzing Online News Participation (2015) 1 *Social Media + Society* 2.

monument groups through social media. The subsequent section discusses the most salient points raised by these groups and how their use of legal language is framed. The final section discusses the style of speech that is used. Collectively, these sections provide the *what, why* and *how* of a vernacular legal language use.

II. Theoretical Approach

I develop here a social semiotics approach to the study of vernacular legal language use and its relation to power and political position of different interpretive communities. The meaning of language, including legal language, is attributed to power in social semiotics. Vannini explains, “[s]ocial semiotics locate the origin of meaning within the field of semiosis, or in other words, within the process of context-bound and conflict-laden interpersonal interaction.”¹¹ Interaction between interpretive communities contains various motives, goals and perspectives, and different individuals and groups have differing levels of access to power in the context of interaction (exo-semiotic contexts). Legal language use is often infused with power dynamics (e.g., judge-litigant-attorney relations) in role-bound, institutional settings (what Bourdieu calls the juridical field), but at a vernacular level legal language use concerns visions of power that index political affiliations, values and goals. As Volosinov put it: “the form of signs is conditioned above all by the social organisation of the participants involved and also by the immediate conditions of their interaction.”¹² A legal language that exists at a general vernacular level helps to understand how legal ideas and reasoning are disseminated throughout society, and may help to project the form and content of power-laden political rhetoric and the legal reforms that develop subsequently.

In social semiotics the study of power is a social process, and so particular interactions between persons may reflect the structures of socio-political domination.¹³ However, hegemony is unstable; meaning is not always affected in the ways speakers desire and meaning changes over time. New ideas may develop in advocacy campaigns to assert power, but these ideas may be challenged through legal, pragmatic or value statements. Social struggle over meaning in a particular context thus ensues and is amenable to analysis in the production of meaning. The development of contested, multiple meanings within various historical, cultural and institutional contexts is referred to as heteroglossia.¹⁴ I want to know how law, understood in this context, following Bourdieu, as a “universalizing attitude,”

¹¹ Phillip Vannini, ‘Social Semiotics and Fieldwork: Method and Analytics’ (2007) 13 *Qualitative Inquiry* 113, 115.

¹² Valentin Volosinov *Marxism and the Philosophy of Language* (Seminar Press 1973), 21.

¹³ Vannini, *supra* note 11.

¹⁴ Roland Barthes, *Mythologies* (Hill and Wang 1972); Mikhail Bakhtin, *The dialogic imagination: Four essays* (University of Texas Press 1981); Mikhail Bakhtin, *Rabelais and his world* (Indiana University Press 1984); Mikhail Bakhtin, *Speech genres and other late essays* (C. Emerson, Ed. University of Texas Press 1986); Robert Hodge and Gunther Kress, *Social semiotics* (Cornell University Press 1988); Theo Van Leeuwen, *Introducing social semiotics* (Routledge 2005); Volosinov, *supra* note 12.

becomes contested and develops variation in its meaning in social practice.¹⁵ I am interested in legal culture, not as an institutional site of power-laden roles and procedures, but as a “domain of struggle” between different interpretive communities at a general vernacular level.¹⁶ I look at ideological and political exo-semiotic contexts, affiliation with pro- and anti-monument organisations, to see how polysemic meanings related to monument status are produced, created, interpreted, and exchanged. Semiotics is not ‘pure’ theory, and so an understanding of the legal constructs used in speech about the law provides insights into the domain of political struggle about legal reform or enforcement of law. I narrow my focus by looking at discourse, semiotic functions (salience and framing,) and style, which help explain the *what*, *why*, and *how*, respectively, of semiotic resource¹⁷ use.

III. Discourse of Legality

Discourse, following Foucault, is a socially constructed body of knowledge that has material and symbolic associations through representation and mediation in social practice.¹⁸ For example, Vannini shows how a medical discourse is used by both proponents and antagonists of artificial tanning.¹⁹ Van Leeuwen explains, discourses “are versions of those practices plus the ideas and attitudes that attach to them in the contexts in which we use them.”²⁰ Discourse refers to the content of semiotic resources, and explains the what of their use. Political goals gain legitimacy and authority through legality discourses, for the law is a body of rules for governing society and resolving social conflict through a particular form of reasoning which is based on a universalising attitude.²¹ All sides of the Monument debate advocate for land protection, local well-being and a sacred view of the land, but the desired outcomes are mutually exclusive. It is the coexistence between discourses that produce the site of social struggle in regard to the Monument.²² Legality discourses enable interpretive communities to make rational arguments about their moral, aesthetic, and logical goals.

¹⁵ Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 5, 814, 830-831.

¹⁶ Joe L. Kincheloe and Peter McLaren, ‘Rethinking critical theory and qualitative research’ in Norman K. Denzin and Yvonna S. Lincoln (eds), *The landscape of qualitative research* (Sage 2003), 441.

¹⁷ Signs work as resources in the sense that they can function to accomplish a variety of goals, including informative (to provide information to others), imaginative (to create a fictional universe), heuristic (to enquire about the world without and within), personal (to make oneself known in the world), interactional (to establish and maintain relationships), regulatory (to control the actions of others), and instrumental (to satisfy material needs). M.A.K. Halliday, *Language as social semiotics* (Edward Arnold 1978).

¹⁸ Michel Foucault, *Power/knowledge* (Harvester Press 1980); Van Leeuwen, *supra* note 14; Webb Keane, “Market, Materiality and Moral Metalanguage” 8 *Anthropological Theory* (2008).

¹⁹ Vannini, *supra*, note 11.

²⁰ Van Leeuwen, *supra* note 14 at 104.

²¹ Bourdieu, *supra* note 15.

²² Bakhtin, 1984, *supra* note 14; Hodge & Kress, *supra* note 14.

A. Relevant legal authority

The United States Constitution refers to public lands only once in a provision referred to as the Property Clause. The Property Clause of the Constitution enumerates congressional “[p]ower to dispose of and make all needful Rules and Regulations respecting [public property.]”²³ According to the U.S. Supreme Court, this authority in the context of public land management is “without limitation”²⁴ and it has been used to uphold federal authority to retain public lands and limit certain uses on them.²⁵

The Antiquities Act of 1906²⁶ delegates to the President the authority to designate national monuments in order to provide for an immediate means to protect lands that are of high scientific, archaeological or historic significance. The delegation of authority allows for rapid protective measures to be put in place in order “to prevent imminent and irreparable harm” to lands of major significance and sidestep the laborious legislative process. Presidents typically designate sites at the end of their tenure as part of their legacy, recognising such sites as Devil’s Tower, the Statue of Liberty and the Grand Canyon. The Act, however, grants narrow authority to the President in three principal ways. The monument must meet the requisite level of significance. The size must be “confined to the smallest area compatible with proper care and management of the objects to be protected.” In addition, the delegation of authority only expressly declares the power to establish rather than modify or rescind. The latter powers are, arguably, reserved to Congress under the Federal Land Policy and Management Act of 1976.²⁷ Several lawsuits are pending on the scope of presidential authority under the law.

The Proclamations themselves made moderate change in legal status to the lands. Much of the lands that comprise the Monument were federal lands managed separately by the BLM and USFS prior to designation. The change in a national monument designation concerns principally a set of permissible activities, particularly related to mineral development. Funding for land conservation was not altered by monument designation as it is dependent on the separate congressional appropriations process.

B. Legality Discourse

Facebook users apprehend differently the limitations set forth in the Antiquities Act and its overarching purpose of protecting public lands. One group of Anti-Monument

²³ U.S. Const. art. IV, § 3, cl. 2.

²⁴ See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–295 (1958).

²⁵ *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872), *U.S. v. Grimaud*, 220 U.S. 506 (1911), *Light v. U.S.* 220 U.S. 523 (1911), *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 405 (1917), *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936).

²⁶ Pub.L. 59–209, 34 Stat. 225, 54 U.S.C. §§ 320301–320303

²⁷ Mark Squillace, Eric Biber, Nicholas S. Bryner, and Sean B. Hecht, ‘Presidents Lack the Authority to Abolish or Diminish National Monuments’ (2017) 103 *Va. L. Rev. Online* 55.

users indicate the Monument is of “immense size,” “too big” or “excessive.” This group reasons monuments generally increase the presence of looters and so a small size is necessary for effective law enforcement. Other Anti-Monument users emphasise that Ancestral Pueblo ruins do not constitute the level of necessary significance deserving of a national monument, and so complete revocation is justified. Finally, a smaller group of Anti-Monument users argue that the legal implications of monument designations are ineffective in preserving objects of significance; a monument merely has a “feel good status” and creates problems rather than resolving them. There are other, “stronger laws,” so it is argued, that can achieve the goal of protection of archaeological sites and so a monument designation is superfluous. Therefore, this final group advocates for a complete overhaul of the Antiquities Act so that states may exercise greater control and to require public input. In the alternative, an amendment is proposed to the Antiquities Act in order to exempt the State of Utah from the legislation.

Pro-Monument users focus their legal interpretation of the Antiquities Act on procedural elements and Native rights. The Trump administration’s efforts to revoke and modify the National Monument are deemed unlawful, and therefore, a lawsuit is encouraged and used as a means for fundraising. Pro-Monument users also profess that protection enables by extension the protection of religious practices of Native peoples in the region, and so continued protective land status is paramount.

The Pro- and Anti-Monument users raise unique perspectives on the Antiquities Act, but do not directly challenge one another’s interpretations. For instance, Pro-Monument users do not debate the size of the Monument through reference to the concept of “cultural landscape” as referenced in Obama’s Proclamation. The vernacular legality discourse is incomplete, and given that users pinpoint separate legal provisions, interpretive communities generally talk past one another. Each political side, however, is consistent in emphasising criminal legal concepts in its interpretations of the law. Users declare the opposing authority to their view to have “stolen” land and that violation of the law should be remedied through “imprisonment” or “jail.” Such references perhaps stem from representations of law in popular culture²⁸ or from personal indignation of the situation, or a combination of both.

In discourse about the U.S. Constitution, more interaction between Facebook users is observed. Commenters extensively debate State Rights under the Constitution. Pro-Monument users only raise one constitutional provision to support their positions – the free exercise of religion clause under the First Amendment – but this provision is not addressed by Anti-Monument users. Pro-Monument users emphasise individual rights, whereas Anti-Monument users emphasise and debate with their counterparts the structural relations of government. The Property Clause

²⁸ Peter Robson, ‘The Portrayal of the Corporate Lawyer on TV: the US and British models from L.A. Law to Trust and Suits’ (2017) 2 *Journal of the Oxford Centre for Socio-Legal Studies*.

which authorises congressional action to create and delegate authority over public lands as expressed in the Antiquities Act is not referenced by either side.

Anti-Monument Facebook users make novel interpretations of constitutional provisions to solidify their points. Anti-Monument users argue the Antiquities Act is unconstitutional by isolating certain provisions and reimagining their significance, and Pro-Monument users debate these interpretations on the basis of historical fact and pragmatism. As one Anti-Monument user stated, “it doesn't matter how many antiquities acts you pass if you want to create federal lands you need to amend the constitution.” The unconstitutionality of the Antiquities Act is raised through reference to two relatively obscure constitutional provisions: the Equal Footings doctrine²⁹ and the Enclave Clause.³⁰ Both provisions lack robust or contemporary jurisprudence, but have been reimagined in federal land ownership debates and social movements across the Western United States. Both were explicitly referenced during the “Oregon Standoff” in 2016 to challenge federal ownership of public lands.³¹

The Equal Footings doctrine concerns the standards for admission of new states into the Union of the United States. The provision was enacted in response to a debate on whether Western states, then territories, should be admitted with equal “power, dignity and authority”³² to the original thirteen states, or whether limitations might be placed on new states so as not to overpower the authority of the original thirteen. Maryland also wanted to ensure that western claims of Virginia and Georgia did not allow those states to amass greater power by consolidating those lands into their own boundaries once recognised. The provision stipulates that all newly admitted state governments have equal sovereignty to their original counterparts and therefore the new states’ sovereignty may not be abridged through imposing conditions in acts admitting them to the Union. Anti-Monument Facebook users, however, reference the doctrine for a different purpose and through the construction of a novel applicable context.

Anti-Monument users claim that relatively large amount of federal lands in Utah (i.e., 66.5%), the second highest in the nation, should be grounds for a constitutional challenge. The high percentage of federal lands protected in Utah should justify a moratorium on creation of new federal lands so as to avoid economic hardships for citizens and further reductions in the territorial expanse of state authority. Constitutional law is interpreted under a principle of torts, *res ipsa loquitur*, meaning that establishing the existence of hardship should lead to a finding of a legal violation. While much of the federal lands in question were acquired at the time of statehood through an agreement with the state under the Utah Enabling Act, these users argue that federal designations following statehood are also covered by the provision. The Equal Footings doctrine applies to the terms under which a new

²⁹ U.S. Const. art. IV, § 3, cl. 1.

³⁰ U.S. Const. art. I, § 8, cl. 17.

³¹ See, Liam Stack, ‘What We Know About the Standoff in Oregon’ *New York Times* (New York, 3 January 2016) [electronically available at:

<https://www.nytimes.com/interactive/2016/01/04/us/04oregon-listy.html>].

³² *Coyle v. Smith*, 221 U.S. 559, 560 (1911).

state is admitted, thus making the Antiquities Act and the designation of Bears Ears National Monument inconsequential, but users utilise its central thrust of co-equal sovereigns to demand greater land ownership and control for states and their citizens at the exclusion of federal and tribal governments. Such users reimagine the provision to exist within contemporary factual circumstances as a legal means to rebalance the power scales that have presumptively been weighed too heavily in favour of the federal government. One Anti-Monument user states:

“The founders set up the EQUAL FOOTING ACT this is where any future State that comes into the UNION comes in under the SAME CONDITIONS AS THE ORIGINAL THIRTEEN! The federal government is USURPING POWER IT DOES NOT HAVE. All State Senators need to stand and declare NULLIFICATION that means the States will NOT comply with the federal governments usurpation of power!”

Pro-Monument users make various statements to contest this view, arguing that the State of Utah “willingly gave up” federal land holdings at the time of statehood by referencing the Enabling Act.³³ Furthermore, Pro-Monument users emphasise the importance of the federal system of checks-and-balances in determining what is considered “unconstitutional.” As one Pro-Monument user states, “Well, has a Supreme Court ever found it to be unconstitutional? No, they have not.”

Reference to “Article 1, Section 8, Clause 17” and comments that the federal government is not permitted to own or control more than 10 acres of contiguous land raise another constitutional matter. The so-called Enclave Clause deals with the location the new nation’s capital, a place that the framers felt should be in a district that was independent of any particular state government and subject only to federal control. A plan was adopted to create a federal district no larger than 10 acres. The provision does not preclude the federal government from purchasing or holding title to other land; however, Anti-Monument Facebook users have reimaged the provision under a rigid, exacting interpretation (rather than a legal deductive and analogic) as they argue the federal government is prohibited from creating or retaining public lands in excess of 10 acres. As one user noted, “With matters of the constitution, it is All or Nothing. All or nothing. All.” Anti-Monument users exclaim that the federal government should therefore be legally required to “give the land back.”

Pro-Monument users challenge this interpretation with specific references to the terms under which Mexico ceded to the United States the area that became the territory of Utah. They note the lands were under federal control before Utah became a state and therefore there is “nothing to give back.” Pro-Monument users also make

³³ Section 3(2) of the Enabling Act of the State of Utah declares, “That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States...”

the pragmatic claim that if the federal government could not own more than 10 acres of land, it would prohibit the establishment of military bases. A Pro-Monument user states, “That’s so bogus. I guess we better close all Air Force bases. The Constitution doesn’t even allow an Air Force according to your logic.” To this claim, one Anti-Monument user, once again using an exacting interpretation of the constitution, replied with only one phrase, “Article 1, Section 8, Clause 17.”

IV. Social Media and the Salience and Framing of the Law

The dominant signs of an interpretive community are referred to as the “salience” of speech, and the way in which signs connect together is termed “framing.” Interpretive communities can be explained in terms of their conceptual frameworks, and those conceptual frameworks contain dominant concepts and networks of interconnected meaning. Salience and framing together explain the *why* of semiotic resource use. For example, when users on Facebook employ legal language they may be referring to their personal values and goals or visions for society, and so salience and framing help to explain why different groups use legal language in the ways in which they do.

The concept of **salience** simply indicates that some communicative elements are more functional (i.e., significant) than others.³⁴ Salience is indicated through points of emphasis that function to highlight an interpretive community’s dominant semiotic resources, their positions, affiliations, goals and values that motivate their speech. The following table lists the words and phrases most frequently referenced that were identified through word frequency analysis using NVivo:

Pro-Monument	Anti-Monument
American	Utah
National	Local
The people	The Navajo
Country	San Juan County
Sacred	Using
#standwithbears	#rescindthemonument
Support	Protect
Vote	Needs
Sue	Live
Greed	Roads
Money	Jobs

Framing refers to how, rather than “elements of a composition...[being] given separate identities [they are instead] represented as belonging together.”³⁵ Monument status on the Anti-Monument side is viewed alongside lifestyle, traditions,

³⁴ Vannini, *supra* note 11.

³⁵ Carey Jewitt and Rumiko Oyama, (2003) ‘Visual meaning: A social semiotic approach’ in Theo Van Leeuwen and Carey Jewitt (eds), *Handbook of Visual Analysis* (Sage 2003), 149.

wilderness, distant special interests and States' rights, and on the Pro-Monument side status is associated with economic development, law enforcement, free exercise of religion, political corruption, national identity and separation of powers. Historical contexts provide a means for framing people's opinions, values and views about monument status, for they demonstrate how overarching policy positions are situated within larger contexts, which create a starting point for deliberation on the matter at hand. Gamson and Modigliani make this point clear when they say frames are the "central organising idea or storyline that provides meaning"³⁶ or "a central organising idea for making sense of relevant events and suggesting what is at issue."³⁷

Pro-Monument users emphasise a national historical narrative, while Anti-Monument users index personal or local history to sustain their arguments. Pro-Monument users point to the general historical mistreatment of Native peoples in the United States, and particularly associate rescinding the National Monument with the history of the federal government's failure to fulfil treaty obligations with tribal nations. One Pro-Monument user stated, "A politician strikes an agreement with Native Americans. Soon after, another politician revokes that agreement - The History of America." Other Pro-Monument users place Bears Ears within a more contemporary national context, questioning whether rescinding the Monument will lead to another "major movement like at Standing Rock" with the Dakota Access Pipeline.³⁸ A legacy of broken promises for Native peoples, according to these users, could be curtailed in the present controversy.

Anti-Monument users point to personal or local history as a framing device. Personal life experience and the development of federal lands in the adjacent region are referenced as rationales for their accrued distrust. One user stated,

"I grew up in the Grand Staircase as a boy chasing cattle and being out there before any of your type of people were around where you could be out there for days and not see anyone. That's when the country was pristine and protected and free of all your so called 'protect the land for future generations' was even thought about. Since it was declared a monument under the chickenshit president Clinton all it's done is bring more people and trash that comes with it to this once sacred country."

Personal life stories of land use are referenced to highlight how the land and nearby areas were enjoyed prior to a period of federal interference. These stories emphasise the solitude and enjoyment the land once provided. The land, they reason,

³⁶ William A. Gamson and Andre Modigliani, 'The Changing Culture of Affirmative Action' in Richard G. Braungart and Margaret M. Braungart (eds) *Research in Political Sociology* (JAI Press 1987), 143.

³⁷ William A. Gamson and Andre Modigliani, 'Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach' (1989) 1 *American Journal of Sociology* 95, 1, 57.

³⁸ See, Charlie Northcott, 'Dakota Access pipeline: Is the Standing Rock movement defeated?' *BBC News* (Washington, 9 February 2017) [electronically available at: <http://www.bbc.com/news/world-us-canada-38924160>].

was once wild and enjoyed freely, but federal officials have needlessly restricted peaceful enjoyment of the land through intimidating practices. A national monument designation would embolden these officials even further to limit local use and enjoyment. One Anti-Monument user stated, “It started changing a few years ago. On one occasion I was threatened with a fine for not having a permit for too large a group. (We only had two in our party!)” A general distrust of federal policies by local Navajo communities is also mentioned, particularly regional or national historical events that had local effect. The relocation of Navajo people during the Long Walk of 1864 and forceful placement of Navajo children in boarding schools are mentioned as a basis for contemporary distrust of federal policies, the indexes of historical trauma. The selection of different historical moments allows for different kinds of individual deliberation. The contexts used are distinct based on geographic scale, national or local, the conceptual frameworks that permeate all monument-related speech. Through this kind of storytelling, monument status is framed as a remedy for past breaches of duty or as suspect and deserving of distrust because of past government action.

V. Style

Style refers to “metasigns that work by sustaining the difference and uniqueness of social agents.”³⁹ Style expresses individual feelings and social allegiances (solidarity, group identity and ideology),⁴⁰ and it works as a “marker of individual and collective identity, and as a telling characteristic of culture and subculture.”⁴¹ Irvine eloquently explains that style “crucially concerns distinctiveness; though it may characterise an individual, it does so only within a social framework; it thus depends upon social evaluation and, perhaps, aesthetics; and it interacts with ideologised representations.”⁴²

The study of style is primarily concerned with how people use semiotic resources. For example, Facebook users employ similar concepts, such as “sacredness” and “protection of the land,” but advocate very different legal and political measures to achieve those ends. In this case, style works as a marker of personal and collective political affiliations on the basis of views about the role government in people’s lives, either as a promoter of social benefit or harbinger of social ill; legal language use about public land thus is encoded with larger political ideologies. The benevolent government view rallies opponents of theft and damage and so protection and the sacredness of the land must be institutionalised through greater legal control and political attention. The draconian government view

³⁹ Vannini, *supra* note 11, at 135.

⁴⁰ Hodge and Kress, *supra* note 14, at 82.

⁴¹ Vannini, *supra* note 11, at 135.

⁴² Judith T. Irvine, “Style” as Distinctiveness: the culture and ideology of linguistic differentiation’ in Penelope Eckert and John R. Rickford (eds) *Style and Sociolinguistic Variation* (Cambridge University Press 2001), 18.

organises opponents of rural lifestyle change and so protection and sacredness must be preserved through limitations on government interference.

Legal language use on monument status is styled in “competing voices and competing interests”⁴³ of practice versus identity, localism versus national interest and freedom versus social care. In the words of Kress: “signs are always motivated by the producer’s ‘interest,’ and by characteristics of the object.”⁴⁴ An association, or lexicon rule, develops that connects monument revocation with ideals of local land use and monument designation with ideologies of American-ness. The object indexed is characterised as either protected land because it is managed through the force of law or protected land because it remains rural. As one Anti-Monument user stated, “Why is it that they don't think of the degradation more people using these fragile ecosystems will bring? Let the folks who know how to sustainably live in these areas continue their way of life.” The object is also indexed as sacred land that merits legal protection or sacred land that deserves to be left alone. As one Anti-Monument user stated, “This is a sacred place that a monument status only plain and simple destroys the sacredness. Leave it for public multi-use land.”

Anti-Monument Facebook users employ messages of ‘localism’ to establish their uniqueness and distinguish themselves from perceived or actual Pro-Monument views. Localism refers to comments that assert a preferential weight be given to the views and interests of local people. In this case, localism applies to statements of residents of San Juan County to continued land access and practices that existed prior to monument designation. Local rights and interests are bolstered by a claim to increased observation and knowledge of local conditions. Competing interests, it is maintained, should be weighed according to direct knowledge and experience gained through living in the area. Knowledge and experience give rise to a preferential politics of localism. The locality of interests supersedes the national significance of a national monument: local views first, then extend outward, or else the government practice should be deemed “undemocratic,” Localism is particularly acute in the case of statements regarding local Navajo people.

Anti-Monument Facebook users often profess that all local Navajo are against the Monument, and that Tribes in favour of the Monument are not, according to a common refrain, “even from Utah.” One Anti-Monument user stated, “What I've noticed over the last several years, is that local tribes were not in favour of Bears Ears while national tribes (who don't live in Utah) were in favour.” The sovereignty of the Navajo Nation extends into southern Utah, an area that borders the Bears Ears National Monument. The Tribe’s sovereignty, defined under the U.S. Constitution, treaties and Supreme Court jurisprudence, and the government-to-government relationship it enjoys with the federal government, easily gives way to a new social

⁴³ Robert Hodge and Gunther Kress (1997) ‘Social Semiotics, Style and Ideology’ in Nikolas Coupland and Adam Jaworski (eds) *Sociolinguistics* (Modern Linguistics Series. Palgrave MacMillan 1997).

⁴⁴ Gunther Kress, ‘Against arbitrariness: The Social Production of the Sign as a Foundational Issue in Critical Discourse Analysis’ (1993) 4 *Discourse and Society* 2, 169, 173.

category, “Utahn Navajos.” The views of local Navajos, under a localism politics, must take precedence over those of the tribal government, and therefore, the structural relations between the three kinds of sovereigns in the United States, federal, state, and tribal, should be secondary to local interests. The preferential treatment of local interest is justified along two grounds: a presumption of reversion to prior land use and status and an assertion of “locking up the land” by national monument designation. These two grounds assert that locals can manage the land appropriately and that a national monument would interfere with proper management and use.

Localism is often based on a presumption of reversion to prior land use and status. Anti-Monument statements assert that local residents have demonstrated their capacity to conserve and manage the land through accumulative knowledge and practices. As one Anti-Monument Facebook user reasoned, “What’s wrong with the way things are now? The grazers manage their lands well. They take care of things. Since they are the users of the land they are the best to take care of it. It impacts their bottom line.” Another Anti-Monument user stated, “People who are attached to the land are the one who can take care of this land the best. Local residents have been taken care of from their use of this land and so why would they destroy what takes care of them?” A monument, it is reasoned, would only encourage greater pedestrian traffic and subsequent adverse effects, thus creating problems that were previously non-existent or nominal. An Anti-Monument user explained,

“Unfortunately, those of us that live right next to the monument are already seeing the negative effects of increased tourism. Garbage, toilet paper and tracks left behind by people who care very little about this area. You talk about looting. What do you think a lot of those tourists take home for souvenirs?”

These comments have an interesting corollary to cost-benefit analysis, an explicit evaluation tool in public administration and business to assess alternatives in decision-making. The basic assumption of cost-benefit analysis is that things are worth doing if the benefits outweigh the costs.⁴⁵ Localism statements simply assert that a ‘no action’ alternative is the most pragmatic, fair option, and the optimal means to protect the land. However, statements of localism see only two alternatives within the wider context they evaluate: land of prior use and status or land of increased use caused by a change in status. Some Pro-Monument users retort that large-scale extractive industries have their eyes on the region, so a monument designation is a pre-emptive move against such land disturbing activities. Localism statements rectify their position through a representation of fact that again relies on prior personal and collective observation. There is, so it is argued, no known interest among industries to extract resources from the area, or else they would have already done so. As one Anti-Monument user states, “Very little of San Juan County can be and is mined for

⁴⁵ Amartya Kumar Sen, ‘The discipline of cost- benefit analysis’ (2000) 29 *Journal of Legal Studies* 2.

anything. Especially the land inside the proposed Bears Ears monument. Been there, traveled it and know what I say is true.”

Statements of localism are further styled through messages that characterise the object of a national monument. Localism relies on statements of “locking up” the land. Localism is not associated with an ontological view of localness, ‘who we are’, but with local use and practices on the land, ‘what we do’. The presumption of reversion relates to the benefits of rescinding the monument, whereas locking up the land statements explain the ungirding costs. These statements rely on a view that the National Monument is similar in legal category to a National Park. These styling statements concern why, broadly speaking, national monument designations pose risks and “take away rights and freedoms.”

The association between national monuments and National Parks asserts that locals will no longer be able to engage in customary practices, such as collecting firewood, grazing, hunting, harvesting wild plants, or visiting places that require an off-road vehicle. The Monument accordingly creates a land use boundary that prohibits these practices in absolute terms. Local perspectives conflate the National Monument, a legal designation that may, depending on the managing agency involved, be compatible with the conservation or sustainable use principle (a land use principle developed by Gifford Pinchot), with a National Park,⁴⁶ a designation based on the philosophy of preservation (a land use principle developed by John Muir) that disallows uses such as hunting, collecting forest products, etc. The Monument is managed jointly by the Bureau of Land Management⁴⁷ and U.S. Forest Service,⁴⁸ federal agencies that followed Pinchot’s conservation principle, which promote multiple use policies.⁴⁹ Localism asserts that experience on the land demonstrates a cultural ethic of conservation, and, therefore, local land use practices are superior in nature to the National Monument’s presumed preservation policies.

Pro-Monument users style their messages according to notions of American identity in order to justify their positions and challenge localism and the drawn conclusions about the costs and benefits of monument designation. American identity statements are often framed as the land “belongs to all of us,” whereas comments on localism emphasise the land should be “given back” to its rightful owners. American identity claims are based on the ideologies of American identity, U.S. federalism and their corollary in established federal policy on public lands. Federal policy currently stipulates that the federal government should retain its federal holdings and that

⁴⁶ The mission statement of NPS states, “To conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

⁴⁷ The mission statement of the BLM states, “To sustain the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations.”

⁴⁸ The mission statement of the USFS states, “To sustain the health, diversity, and productivity of the Nation’s forests and grasslands to meet the needs of present and future generations.”

⁴⁹ The Bears Ears National Monument’s management plan allowed for hunting, fishing, collection of forest products, off-road vehicle use, etc. under an existing permitting system (e.g., a firewood permit cost about \$15.00 USD/quart of firewood).

lands are held in trust for the benefit of all American people.⁵⁰ One Pro-Monument Facebook user commented, “Why is there such surprise? Don’t people believe in the USA?” The negative effects on local practices are dismissed outright, not according to the specifics of the management plan, but under the ideology of American-ness, for the land belongs to ‘us,’ too.

VI. Conclusion

Legal language use among different interpretive communities involved in Western public land debates demonstrates how people with competing interests invoke law and talk past one another in asserting their claims, goals and values. The law becomes a proxy for and is mediated through political ideology and identity as it is reimagined, asserted and debated. Legal concepts and forms of reasoning are thereby disseminated at a vernacular level, which may in turn be further adopted in legislative reform and political rhetoric.

The ‘law,’ what Bourdieu calls a universalising attitude, is not solely a function of institutional control and influence, but also social relationships and day-to-day interactions. Legal culture is, therefore, broader than the institutional settings of law, as it reaches and disseminates into general, vernacular social relations and practices – the sociolinguistics of legal implementation, or the ways in which law becomes a part of quotidian social practice.

The study of law as a matter of general social practice may help to further explore how law becomes implemented into society and help to explain why in some cases there are ‘implementation gaps’ between legal principles and daily realities, for law at a grassroots level becomes encoded with power and ideologies. Perhaps as movements such as these expand and gain momentum, law not only works from the institutions down, but from a general, vernacular level up to the institutional level. Certainly, the legal interpretations of these groups have no or little institutional effect within the courts; however, the Utah congressional delegates have recently proposed legislation to reduce the federal estate in the State of Utah by 5% in order to provide funds for public education. This article suggests that law may be a much more dynamic social process than has been previously explored in the literature.

⁵⁰ Under U.S. Common Law, the federal government holds public lands in trust for the American people. See, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). It is also the established federal policy that federal lands should be retained by the federal government since the passage of the Federal Land Policy and Management Act (FLPMA) of 1976[43 U.S.C. 1701]. Sec. 102 (a)(1) of the Act states, “The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership.”

The Federal Judiciary Revolts...not Quite and not Enough: Trump's Travel Bans and Judicial Review †

Nino Guruli ¹

Round 3 of the travel ban litigation in US courts has begun.² The administration has issued Travel Ban 3.0 and the district courts have, once more, ordered preliminary injunctions. As we watch the judicial response to this third iteration of President Trump's travel ban order develop, it is worth considering the judiciary's approach so far and what the emphasis on 'the *especially troubling* Presidency of Donald Trump' motif surrounding the litigation may obscure about the stakes.

Soon after several district courts around the United States struck down the second travel ban executive order issued by the Trump administration, a piece on *Lawfare* blog (one of the top national security blogs in the US) raised a question: "why are so many judges being so aggressive here?"³ After all, when it is the immigration policy (especially matters of entry) mixed with claims of national security, the judiciary traditionally sings a very different tune: deference, avoidance, and faith in political judgement. The question came up in a lengthier discussion on reasons why different political, civil, and judicial actors have reacted to the Trump presidency with less deference and trust than is typically enjoyed by the holder of that office. The main argument advanced by the authors is that the Oath Clause of the Constitution has significant legal and political purchase, which accounts for institutional and doctrinal respect for presidential decision-making; the courts defer, the media extends the benefit of the doubt, executive officers fall in line because we all trust that the president is acting in 'good faith' and with constitutional principles in mind.⁴ The problem is, the authors argue, "[t]he idea that Trump's swearing this or any other oath 'solemnly' is, not to put too fine a point on it, laughable."⁵ The courts are willing to

† Previewed on 7th December 2017, <https://joxcsls.com/new-articles/>.

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² *IRAP v Trump*, Civ No TDC-17-0361 (D Md 17 Oct 2017)

<https://assets.documentcloud.org/documents/4112212/Md-Memo-Opinion.pdf>; *Hawaii v Trump*, Civ No 17-00050 DK1-KSC (D Haw 17 Oct 2017)

<https://assets.documentcloud.org/documents/4111837/Hawaii-v-Trump-TRO.pdf>. See also Vivian Yee, 'Judge Temporarily Halts New Version of Trump's Travel Ban' (*NYTimes*, 17 Oct 2017) <<https://www.nytimes.com/2017/10/17/us/trump-travel-ban-blocked.html>> accessed 30 Oct 2017.

³ Benjamin Wittes & Quinta Jurecic, 'The Revolt of the Judges' (*Lawfare*, 16 March 2017) <<https://lawfareblog.com/revolt-judges-what-happens-when-judiciary-doesnt-trust-presidents-oath>> accessed 25 May 2017.

⁴ Benjamin Wittes & Quinta Jurecic, 'What Happens When We Don't Believe the President's Oath?' (*Lawfare*, 3 Mar 2017) <<https://lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath>> accessed May 25, 2017.

⁵ *ibid.*

step up and be aggressive, the line of thinking goes, because this president cannot be thought to be acting in 'good faith'. This line of argument is troubling, as is how the federal judiciary has approached the travel ban litigation more generally.

Personal shortcomings of President Trump may be cause for serious concern, but any legal doctrine developed and limited to these unique circumstances will fail to confront the core legal problem these cases present. The real problem is that our regular assumptions of 'good faith' have produced doctrines that grant almost absolute deference to the executive, to the point that it is accurate to characterize the law as allowing the president to use discriminatory, arbitrary, and irrational reasons for action. Two circuit courts ruled President Trump's Executive Orders unconstitutional, but neither court's approach confronts the issue of the breadth of discretion granted to the Executive and the need to develop principled standards for placing constitutional limits on that discretion.⁶

The 9th Circuit Court of Appeals' decision against the first travel order and the 4th Circuit Court of Appeals' *en banc* decision against the second travel ban order highlight two different judicial approaches. Each approach shows the judiciary failing to confront the substantive constitutional issues involved, finding refuge instead in lines of reasoning that fail to grapple with the challenge of unbounded discretion. The 9th Circuit's focus on the separation of powers and procedural due process arguments avoids the question of 'bad faith' by following a more familiar national security/immigration context line of reasoning, one that has already proved incapable of examining the justification for and legitimacy of executive practice. Meanwhile, the 4th Circuit's reliance on 'bad faith' sidesteps challenging doctrinal questions by developing a rule focused on *this* president and *these* circumstances. As the federal courts take up these issues again, it is worth considering what the circuit courts' constitutional lines of reasoning so far tell us about judicial review of executive discretion.

I. The First Travel Ban

On 9th February 2017, 9th Circuit Court of Appeals issued a decision refusing to stay the temporary restraining order against the first executive order.⁷ Soon after the decision was handed down, President Trump announced he would not appeal; as a result the courts never conducted a full merits review. However, the 9th Circuit's emphasis on separation of powers and procedural due process principles when justifying the exercise of judicial review signals that the substantive rights of the

⁶ There was a third circuit court decision, the 9th Circuit's opinion on the second travel ban order, but that case was decided on statutory and not constitutional grounds. Though there are some interesting constitutional implications for how the 9th Circuit conducted statutory interpretation in the case, that decision will not be analyzed in this article. *Hawaii v Trump*, 859 F3d 741 (9th Cir 2017).

⁷ *Washington v Trump*, 847 F3d 1151 (9th Cir 2017).

people affected by this order (or an examination of the justifications offered for it) may never have been a significant part of the eventual merits analysis.⁸

President Trump's first executive order implicated important individual interests: whether it stranded legal permanent residents abroad; or trapped residents and aliens domestically by restricting their right to travel; or refused to grant entry to someone because of their religion. Judicial review of the legality and constitutionality of such an order should give proper weight to those interests.

There are two main kinds of separation of powers arguments in the court's analysis, both of which are familiar. One focuses on the executive's institutional powers in immigration and national security matters and the second on the judiciary's role as the institutional check against illegal and unconstitutional exercises of executive power. I want to focus on the checks and balances arguments for the exercise of judicial review. Given how much the circuit court references the Supreme Court decision in *Boumediene v. Bush*, a case in which the separation of powers arguments for exercising judicial review were effectively severed from the underlying individual interests mandating judicial review, there is reason to be concerned.⁹ Federal courts have, in the past, relied on structural arguments to assert the need for judicial review.¹⁰ Grand rhetoric about the need for checks and balances has proved to be just that, institutional grandstanding without much substantive doctrinal safeguarding of the principles and interests at stake. In other words, an institutional powers-based justification for the exercise of review is likely to get mired in duelling arguments for institutional domains of authority, conducted at a highly abstracted level at which executive national security and immigration powers are likely to win over any claims of judicial guardianship of constitutional structure.¹¹

An institutional powers-based approach that merely pays lip service to checks and balances will not provide any meaningful review. The reasoning needs to be able to link the exercise of judicial power with a substantive principle/interest at stake in the litigation. The courts need to clearly explain that the judiciary is empowered to ensure the executive does not exercise discretionary authority in a discriminatory or unreasonable manner (perhaps finding arbitrariness from the fact that there is no evidence that the means chosen are related to the purported aims of the order).

Instead of identifying the applicable substantive standard, the court focused on the procedural due process claim as the main individual interest in the litigation. Given the Supreme Court's use of procedural due process in national security and immigration,¹² the emphasis on process is another means of avoiding articulating the substantive principles or rights at issue.

⁸ See *Kerry v Din*, 135 S Ct 2128 (2015).

⁹ *Boumediene v Bush*, 553 US 723 (2008). See also Stephen Vladeck, 'Boumediene's Quiet Theory: Access to Courts and the Separation of Powers' (2009) 84 Notre Dame L Rev 2107.

¹⁰ *ibid.*

¹¹ *United States v Curtiss-Wright*, 299 US 304 (1936); *Korematsu v United States*, 323 US 214 (1944); *Boumediene v Bush*, 553 US 723 (2008).

¹² *Kerry v Din*, 135 S Ct 2128 (2015).

There were important individual interests at stake in the litigation over the first travel ban. The rule of law concerns dominated the political and public discussion of the executive order. While judicial analysis necessarily proceeds differently, any judicial analysis that severs the institutional and procedural standards from the substantive values at stake will fail to protect those values, thereby rendering judicial review a hollow guarantor of constitutionality.

II. The Second Travel Ban

Following the 9th Circuit's decision, President Trump withdrew the first order and on 6th March 2017 signed Executive Order 13780 (EO-2), which was to go into effect on 16th March 2017. EO-2 made some relevant changes to the first order. It removed Iraq from the list of covered countries and excluded from its coverage certain groups of individuals with relevant ties to the US.

On 16th March 2017, a district court in Maryland issued an injunction.¹³ It was that decision that the *en banc* 4th Circuit affirmed (in part), 10-3. The 4th Circuit's majority opinion focused considerably on President Trump's statements, during his presidential run and after taking the Oath of office, to find 'bad faith' on the part of the administration in issuing the second order.¹⁴ In looking at those statements and investigating the question of purpose of or justification for the executive order, the majority opinion had to confront a key precedent set by the Supreme Court in *Kleindienst v Mandel*. The Court in *Mandel* made the following rule for reviewing executive exercises of immigration power, when that exercise violates the First Amendment rights of citizens or residents:

*"We hold that when the Executive exercises [the power to grant entry] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests [of the plaintiffs]."*¹⁵

The 4th Circuit's majority opinion, through the examination of President Trump's public statements about the purpose of the executive order, found that there was ample reason to suspect that the purported national security purpose was in fact not 'bona fide' and therefore to find a likelihood of a Establishment Clause violation.¹⁶ This is a bit of a misreading of *Mandel*.

In the case of *Mandel*, evidence was presented by the plaintiffs to raise doubts about the 'bona fide' nature of the decision, but the Supreme Court refused to consider them—a fact one of the dissents points out.¹⁷ As Judge Niemeyer states, according to *Mandel* "a lack of good faith must appear on the face of the government's action [in the text of the executive order], not from looking behind it."¹⁸ Given the stated reasons

¹³ *IRAP v Trump*, __FSupp 3d__, 2017 WL 1018235 (D Md Mar 16, 2017).

¹⁴ *IRAP v Trump*, __F3d__, 2017 WL 2273306 (4th Cir May 25, 2017) 50-53.

¹⁵ *Kleindienst v Mandel*, 408 US 753, 770 (1972).

¹⁶ *IRAP*, 2017 WL 2273306 (4th Cir May 25, 2017) 53.

¹⁷ *ibid* 160-62.

¹⁸ *ibid* 163 (Niemeyer dissenting).

for targeting the nationals of the named six nations,¹⁹ the dissent argued, on its face, the government's reasons are legitimate and bona fide. The dissent is right about the state of the law, the precedent cited does dictate almost total judicial abdication, but that fact is a cause for concern about the state of our constitutional law and its compliance with the rule of law.

By focusing so much on the unique terribleness of *this* president, and devising a rule to get around *Mandel* so fitted to these circumstances, this case and the scholarly dialogue preoccupied with President Trump's lack of 'good faith' runs the risk of closing its eyes to deeper problems with the state of the law. The issue, at the core, is not that we had set legal doctrine just right and President Trump is now unsettling the arrangements we have made. The problem is that constitutional doctrine in the area of immigration (and national security) is so deferential that it is not at all clear that President Trump's policies (discrimination and all) are unconstitutional. We cannot say, examining cases like *Chae Chan Ping*,²⁰ *Korematsu*,²¹ *Mandel*,²² and *Kerry v Din*,²³ that using discriminatory, arbitrary, and unjustified reasons to deny, expel, and detain individuals is clearly unconstitutional. This fact may not trouble some people, but it should worry anyone in favour of imposing some limits on executive power. By focusing on the 'bad faith', or the personality and actions of this president, the legal analysis seeks to sidestep confronting the problem of unbounded deference and unreviewable power, which is the reality of this subject matter and these travel orders; its consequence.

III. The Supreme Court and the Second Travel Ban Order

On 26th June 2017 the Supreme Court granted cert in a pair of cases challenging EO-2 (appeals from the 9th and the 4th Circuit Courts of Appeal) and granted, in part, the government's motion to stay the lower courts' injunctions.²⁴ The Court ultimately dismissed the case (or rather the pair of appeals) due to mootness, given the temporal scope of the Order, and vacated the two circuit court opinions.²⁵ Nevertheless, the *per curium* opinion gives us a glimpse into the Court's thinking. The focus, in that opinion, on the 'relationship' between the individuals impacted by the Executive Order and the United States suggests the Court was leaning away from the Establishment Clause argument and was more likely to rely on the procedural due process protections to

¹⁹ Executive Order 13780 'Protecting the Nation from Foreign Terrorist Entry into the United States', 82 (45) Fed Reg 13209, 13210 (Mar 6, 2017) ("Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.").

²⁰ 130 US 581 (1889).

²¹ *Korematsu v United States*, 323 US 214 (1944).

²² *Kleindienst v Mandel*, 408 US 753 (1972).

²³ *Kerry v Din*, 135 S Ct 2128 (2015).

²⁴ *Trump v International Refugee Assistance Project*, 582 US__ (2017) (per curium).

²⁵ *Trump v Hawaii*, Cert Summary Disposition 16-1540 (24 Oct 2017)

https://www.supremecourt.gov/orders/courtorders/102417zr_e29f.pdf; *Trump v IRAP*, Cert Summary Disposition 16-1436 (10 Oct 2017) <http://www.scotusblog.com/wp-content/uploads/2017/10/16-1436.pdf>.

guide its reasoning.²⁶ As this essay has already argued, the Supreme Court's continued reliance on procedural due process and separation of powers arguments presents a real barrier to substantive scrutiny of executive policy. Where the emphasis remains on institutional competencies divorced from substantive principles of due process, reasonableness, and non-discrimination, the habitual (and superficially defended) assumption of 'good faith' will, most likely, translate into unchecked executive power.

IV. Afterword

On 4th December 2017 the Supreme Court granted the government's request to allow the third iteration of the travel ban order to go into force as the litigation works its way through the federal circuit courts. Travel ban 3.0 limits the entry into the United States of nationals from Iran, Libya, Yemen, Somalia, and Syria, all of which were included in earlier orders, and adds North Korea, Venezuela, and Chad to the list.

²⁶ *Trump v International Refugee Assistance Project*, 582 US at 9.

Unpacking the Black Box: Addressing the ‘Social’ to Make Construction of AI-Powered Legal Technologies More Transparent and Unbiased

Siddharth Peter de Souza¹

I. Introduction

Over the past few years, there has been much debate about the impact of Artificial Intelligence (AI) on the legal profession. Much has been imputed to how changes in technology will impact the way legal research is conducted, how judges decide cases, how firms strategise for big value deals, and clients engage with legal information.

AI is defined as the capacity of machines to perform functions that are normally attributed to humans, such as the ability to find reason, make connections, generalise and adapt from experience.² Due to factors such as an increase in access to capital for companies to invest in research and development,³ the increase in incisive and effective algorithms,⁴ the availability of large data sets wherein product development can be tested and scaled,⁵ and the increase in computing power,⁶ there has recently been an increased impact of AI in law despite the conversation beginning over thirty years ago.⁷

While much of the conversation around AI and law has been about the technological advancements that such products bring, the economies of scale that they deliver and the challenges that automation will cause for jobs in the profession, this essay will focus on one particular aspect of AI technologies, the darker side, that of the ‘black box’ of these technologies – wherein there is much less understanding of how the systems work, and what constitutes their functioning.

The second section of this essay will describe the kind of products that are influencing and transforming the functioning of the legal profession to provide a

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² ‘Artificial Intelligence |Encyclopedia Britannica’ <<https://www.britannica.com/technology/artificial-intelligence>> accessed 5 November 2017.

³ ‘Artificial Intelligence Explodes: New Deal Activity Record For AI’ <<https://www.cbinsights.com/research/artificial-intelligence-funding-trends/>> accessed 5 November 2017.

⁴ Ibid.

⁵ ‘What’s Driving the Machine Learning Explosion?’ <<https://hbr.org/2017/07/whats-driving-the-machine-learning-explosion>> accessed 5 November 2017.

⁶ Mark Purdy and Paul Daugherty, ‘Accenture: Why AI Is the Future of Growth’ <https://www.accenture.com/lv-en/_acnmedia/PDF-33/Accenture-Why-AI-is-the-Future-of-Growth.pdf>.

⁷ Siddharth de Souza, ‘Transforming the Legal Profession: The Impact and Challenges of Artificial Intelligence’ (*Digital Policy Portal*, 16 November 2017) <<http://www.digitalpolicy.org/transforming-legal-profession-impact-challenges-artificial-intelligence/>> accessed 16 January 2018.

context for the emerging changes. The third section will introduce an ethical challenge, using the more ambiguous construct of the 'black box' to highlight the implications that the opaqueness of the internal functioning of these technologies can have for the profession. The fourth section will propose how the use of social science techniques can offer a framework to provide more transparency in an otherwise cloudy framework.

II. AI and the legal profession: trends and possibilities

The field of AI is distinguished by different technologies, many of which have found application in the law. These include machine learning systems which are designed to mine large data sets and produce patterns without definite instructions;⁸ natural language processing systems which are able to evaluate texts to generate content and answer specific questions from the user;⁹ expert systems which provide solutions through decision-making as if they were human experts;¹⁰ speech recognition which helps to convert audio to text and vice versa; and vision systems which analyse images.¹¹

Doing a scan of the different AI-driven legal products provides an insight into the domains of the legal profession that are facing disruption. These include the areas of legal research, document review, e-discovery and predictive analysis. In terms of legal research, ROSS intelligence, which has been marketed as the first robot lawyer, enables lawyers to ask questions on particular legal issues, after which it analyses its database and provides concise answers and hypotheses through identifying patterns in the text.¹² In addition to legal research, Open Text, another AI driven platform, uses machine learning to uncover relationships and patterns in documents and facts of particular cases.¹³ Other platforms such as Kira perform contract review through analysing different clauses and concepts in contracts with the purpose of improving the capacity of lawyers to conduct due diligence accurately.¹⁴ In the field of predictive analysis, platforms such as "Lex Machina" have been developed with the purpose of providing lawyers with data driven insights into the behavior of lawyers, judges, and parties based on scans of litigation databases.¹⁵ These platforms are marketed as

⁸ 'Demystifying Artificial Intelligence' (*DU Press*) <<https://dupress.deloitte.com/dup-us-en/focus/cognitive-technologies/what-is-cognitive-technology.html>> accessed 5 November 2017.

⁹ *Ibid*

¹⁰ Michael Mills, 'Artificial Intelligence: The State of Play 2016' <<https://www.neotalogic.com/wp-content/uploads/2016/04/Artificial-Intelligence-in-Law-The-State-of-Play-2016.pdf>>.

¹¹ *Ibid*.

¹² 'ROSS Intelligence' <<http://rossintelligence.com/>> accessed 5 November 2017.

¹³ 'Accelerate EDiscovery & Investigations Solutions - Recommend' <<https://www.recommend.com/accelerate-ediscovery-product-page/>> accessed 5 November 2017.

¹⁴ 'Kira Systems | Machine Learning Contract Search, Review and Analysis' <<https://kirasystems.com/>> accessed 5 November 2017.

¹⁵ 'Lex Machina™ | LexisNexis' <<http://intl.lexisnexisip.com/products-services/intellectual-property-solutions/lexisnexis-lexmachina>> accessed 5 November 2017.

being tools to augment the capacity of lawyers to forecast the manner in which litigation plays out. Each of these platforms are designed to improve accuracy in legal research, reduce uncertainty and risks in terms of strategic decisions and save time and costs by enabling lawyers to spend more time on strategic tasks.¹⁶

The development of these different products has led to much anxiety in the legal profession as to whether it will result in a loss of jobs due to the automation of the profession. McKinsey has reported that over 22 percent of a lawyer's job and over 35 percent of a law clerk's job is at risk of being redundant due to such technologies.¹⁷ This suggests that there are going to be changes in terms of how the legal profession is structured, how legal education is delivered and how lawyers continue to make themselves relevant by using technology to augment their performance.¹⁸

While technology is shaking up the daily business of being a lawyer, and introducing new standards of economy and efficiency, it also opens up complexities and regulatory challenges that arise in the construction and development of these legal products.

III. The ethical challenge of the black box: questions of transparency and bias

In a study by Pro Publica of an algorithm called COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) used by judges in the USA to determine the recidivism of a criminal defendant,¹⁹ it was found that black defendants were incorrectly judged to be at a higher risk of recidivism than they actually were, whereas white defendants were found to be less at risk of recidivism than they actually were.²⁰ It was also found that that black defendants were twice as likely to be misclassified as white defendants.²¹ This challenge of bias in AI systems is seen as a threat to justice, because there is a potential that without a clear understanding of the methods that have been used to construct these systems or the data used, it is likely that there will be human prejudices that are hidden in the system, both in terms of the data used to train it and in the construction of the product itself.²² The fact that technologies reflect the biases of their developers is

¹⁶ de Souza (n. 7).

¹⁷ Erin Winick, 'Lawyer-Bots Are Shaking up Jobs' (*MIT Technology Review*) <<https://www.technologyreview.com/s/609556/lawyer-bots-are-shaking-up-jobs/>> accessed 16 February 2018.

¹⁸ de Souza (n. 7).

¹⁹ Jeff Larson Julia Angwin, 'Machine Bias' (*ProPublica*, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 16 February 2018.

²⁰ Julia Angwin Jeff Larson, 'How We Analyzed the COMPAS Recidivism Algorithm' (*ProPublica*, 23 May 2016) <<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>> accessed 16 February 2018.

²¹ *ibid.*

²² Will Knight, 'Google's AI Chief Says Forget Elon Musk's Killer Robots, and Worry about Bias in AI Systems Instead' (*MIT Technology Review*)

also seen in the fact that many virtual assistants like Apple's Siri or Amazon's Alexa, which are usually used for domestic work, are presented as women, whereas lawyer bots are represented as men — reinforcing gender stereotypes.²³ Only after being called out on the ways in which these virtual assistants were reinforcing sexism and in addition were not fighting back after being called derogatory things such as “bitch” and “slut” by its users, did Amazon partially resolve the problem, and program Alexa to disengage and shut down if the user used demeaning language.²⁴

In addition to the challenge of bias, there is also the question of transparency. Many of the products that use AI technologies like machine learning or natural language processing end up generating layers of complexity and patterns that often become difficult even for their creators to understand.²⁵ These systems take the information and process it through commands and webs of networks akin to the neural network in the human brain, which allows machines to solve problems on their own — a process called deep learning.²⁶ As these programs assume an independent internal development, they cannot be easily unmasked, and thus assume the form of a ‘black box’. Such opaqueness in technology, when applied to fields such as law, as demonstrated in the COMPAS case, becomes problematic. It is therefore imperative that a method is developed that requires these systems to explain how they arrive at particular conclusions, such that using them does not require ‘a leap of faith’ for both the creator and the user to whom they should be accountable.²⁷

IV. Unpacking the black box

The technical aspects of the development of algorithms and technologies are typically shrouded in secrecy. However, in order to unmask how these systems function, it is useful to examine the social relationships and processes that result in the construction of these products.²⁸ Introducing sociological insights can help to reveal the character of AI-driven legal products as well as provide a context for the

<<https://www.technologyreview.com/s/608986/forget-killer-robotsbias-is-the-real-ai-danger/>> accessed 16 February 2018.

²³ Natasha Mitchell for Science Friction, ‘Alexa, Siri, Cortana: Our Virtual Assistants Say a Lot about Sexism’ (*ABC News*, 11 August 2017) <<http://www.abc.net.au/news/2017-08-11/why-are-all-virtual-assistants-female-and-are-they-discriminatory/8784588>> accessed 16 February 2018.

²⁴ Ian Bogost, ‘Sorry, Alexa Is Not a Feminist’ [2018] *The Atlantic* <<https://www.theatlantic.com/technology/archive/2018/01/sorry-alexa-is-not-a-feminist/551291/>> accessed 16 February 2018.

²⁵ Will Knight, ‘The Dark Secret at the Heart of AI - MIT Technology Review’ <<https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/>> accessed 5 November 2017.

²⁶ Ariel Bleicher and Ariel Bleicher, ‘Demystifying the Black Box That Is AI’ (*Scientific American*) <<https://www.scientificamerican.com/article/demystifying-the-black-box-that-is-ai/>> accessed 14 February 2018.

²⁷ Knight (n. 25).

²⁸ Reza Banakar and Max Travers, ‘Introduction to Theory and Method in Socio-Legal Research’ (Social Science Research Network 2005) SSRN Scholarly Paper ID 1511112 <<https://papers.ssrn.com/abstract=1511112>> accessed 18 February 2018.

political, economic or cultural influences and decisions that determine the development of these technologies.²⁹ Exploring the 'social' in the evolution of these technologies can also offer an insight into the network of power structures of people, finances, processes and technologies that influence these products.

In many ways, technologies reflect the worldview of the people who develop them.³⁰ These typically tend to be scientists or engineers who introduce a technocratic approach to the development of the product.³¹ An argument can be made that by diversifying the pool of developers to include other disciplines, such as sociologists, designers, historians, and psychologists, a multiplicity of views will be brought to the table.³² While this may at first seem obvious, it is also critical because many of these legal products are actively being used to offer solutions for how judges decide cases or how offender risk is assessed — attributes which go beyond just textual interpretations of the law to instead study the context in which particular cases have emerged. Introducing a plurality of views would ensure a more balanced outlook on the use, development and management of data and methods that are being used to build the AI-driven legal products.

A Thomson Reuters report found that in 2016, 579 patents were filed in legal services technologies, compared to 99 in 2012, which amounted to a rise of over 484 percent in the four-year period.³³ This trend is being driven due to businesses looking at new avenues for legal advice and alternative legal providers entering into the market due to changes in regulatory practices, particularly in the UK, USA and Australia.³⁴ The rising demand from business as well as the increase in equity funding of over 1.5 billion dollars in 2016, with major investors in AI (broadly) including Google, Intel and Khosla Ventures, has spurred an increase in development.³⁵ An analysis of the scale, purpose and the diversity of investments in AI will provide an insight into the strategies of funding across different industries and how they relate to particular kind of products being developed for the legal profession. With firms, and traditional legal providers being compelled to respond to demands from clients and alternative legal providers, an analysis of drivers such as regulatory changes could allow for explanations as to why particular aspects of the profession are being automated as opposed to others.

²⁹ Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171.

³⁰ Kriti Sharma, 'Can We Keep Our Biases from Creeping into AI?' (*Harvard Business Review*, 9 February 2018) <<https://hbr.org/2018/02/can-we-keep-our-biases-from-creeping-into-ai>> accessed 16 February 2018.

³¹ 'Why AI Needs the Humanities' <<http://blog.nextit.com/popular/why-ai-needs-the-humanities/>> accessed 23 May 2018.

³² Sharma (n. 30).

³³ 'Thomson Reuters Analysis Reveals 484% Increase in New Legal Services Patents Globally' (*Thomson Reuters*, 16 August 2017) <<https://www.thomsonreuters.com/content/thomsonreuters/en/press-releases/2017/august/thomson-reuters-analysis-reveals-484-percent-increase-in-new-legal-services-patents-globally.html>> accessed 5 November 2017.

³⁴ *ibid.*

³⁵ 'Artificial Intelligence Explodes: New Deal Activity Record For AI' (n. 3).

Linked to the criticism of the opacity of the processes and technologies through which AI products arrive at decisions, there have been arguments for introducing an 'ethical black box', which would establish a process for discovering how and why a robot acted in a particular way, similar to the way in which a flight data recorder tracks and transmits internal data.³⁶ The purpose of this intervention is that robots will be making decisions that often require a moral compass, and introducing such a framework would allow for accountability and transparency in their functioning, in addition to public trust in their processes.³⁷ This is especially relevant in the legal field where, as the example of the case of machine bias in recidivism technologies demonstrates, the development of these legal products cannot just be carried out in a technocratic manner, but should instead be conducted cognisant of the social and cultural implications of AI-assisted decisions. As technologies increasingly adopt processes that supplant evaluation done by humans, they should also be held to criteria of predictability, inspection and accountability as would any human official in a similar position.³⁸ Each of these aspects require that the framework and algorithms that go into designing the processes and technologies of AI products adopt elements of social, ethical and moral reasoning, because the implications of the decisions of many of these products are entering into spheres that consist of assessment, appraisal and judgement, with profound implications for humans.

V. Conclusion

This essay has sought to explore the advancement of AI in the legal profession by considering some of the innovations that are disrupting the profession. It has focused particularly on some of the ethical implications in the legal sphere – those of transparency and bias in terms of how these products are constructed. The essay has suggested that addressing the social will allow for a more holistic consideration of the increasingly critical functions performed by technologies in the legal domain. By scrutinising the circumstances and actors involved in the construction and deployment of these technologies (particularly three stakeholders – people, finance and processes), they can be opened up to scrutiny and review. Unpacking the “black box” of these technologies can make them more trustworthy, understandable, and accountable.

³⁶ AF Winfield and others, 'The Case for an Ethical Black Box' in Yang Gao and Yang Gao (eds), *Towards Autonomous Robot Systems* (Springer 2017) <<http://eprints.uwe.ac.uk/31760/>> accessed 18 February 2018.

³⁷ *ibid.*

³⁸ Jim Torresen, 'A Review of Future and Ethical Perspectives of Robotics and AI' (2018) 4 *Frontiers in Robotics and AI* <<https://www.frontiersin.org/articles/10.3389/frobt.2017.00075/full#B13>> accessed 18 February 2018.

In the Name of Tradition: Reflections on Bride Wealth Negotiation in Southern Nigeria

Jane Diala¹

It was a sunny Friday afternoon in Eziama, a sleepy town in Southern Nigeria. The entire compound had received thorough cleaning to welcome the expected guests. A group of women bustled in a corner of the compound, cooking different, mouth-watering dishes. A smaller group of men occupied the other side of the compound, chatting, laughing, and setting up chairs and canopies. Children ran around, helping where they could. Music played softly in the background. There was a distinct feeling of joy in the atmosphere – the joy only a big traditional wedding ceremony could generate. Cynthia,² the bride to be, was all dressed up, beautifully adorned, and grinning from ear to ear as she anxiously waited to be declared Mrs Johnson. However, this could only happen after payment of her bride wealth.

Johnson duly arrived with his family and friends, all dressed lavishly. Unlike Cynthia, his smile was restrained, for he was nervous over the outcome of the bride wealth negotiation. His expression encapsulated the mood of grooms in Southern Nigeria, a region that witnesses the highest rates of bride wealth payment in Nigeria.

Bride wealth is the legitimating symbol of a customary law marriage.³ In the past, it often manifested as labour or service from the groom to the family of the wife for an agreed period.⁴ Often, this labour or service was accompanied by a small cash payment and drinks. However, this form of payment has been eroded by urbanisation, labour migration, economic stratification, and other socio-economic changes. Today, bride wealth payment takes the form of cash and other materials of very expensive value, which are listed on a marriage list and handed to the groom on or before the wedding day. In places such as Mbaise in Southern Nigeria, the marriage list is sometimes so long that it rivals an Aramaic papyrus. Johnson's fears were confirmed soon after his arrival, when his kinsmen and potential in-laws began haggling over the items in the marriage list and how much was to be paid as bride wealth.

I looked for Cynthia. She was nowhere to be seen, for tradition forbids her from partaking in her bride wealth negotiation. Johnson was present, but merely a passive participant. His voice in the negotiations was represented by his eldest brother who, as an elder put it, "*has his best interest at heart.*" As the subject of the negotiations, Cynthia was represented by her father, with her younger brother

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² All names used here are pseudonyms.

³ Uche Isiugo-Abanihe, 'Bridewealth, marriage and fertility in the East-Central states of Nigeria' (1995) 51 (3/4) *Genus* 151, 152.

⁴ Gary Ferraro and Susan Andreatta, *Cultural Anthropology: An Applied Perspective* (9th edn, Wadsworth Publishing, 2011) 224.

passively participating. It had not been easy for me to obtain permission to monitor the ceremony.

Cynthia's family insisted that all the items enumerated in the marriage list be provided before their daughter would be handed over to Johnson in marriage.

Johnson's brother, Mike, obviously a man with a short fuse, stood up and shouted. *"These items are too much! You cannot expect us to provide all of them! If you wanted to open a provision shop, you should have said so directly. Are you selling your daughter or what?"*

Sensing danger, one of Mike's kinsmen tugged him back to his seat.

Undeterred, Mike continued. *"Johnson, please come back home and marry from our village! Is it a crime to marry?"*

Cynthia's father was unfazed. He had participated in numerous bride wealth negotiations and knew how to defuse tension. *"Training a daughter is expensive,"* he said genially. *"We are not selling Cynthia; if you truly love her, you should be happy to pay up."*

I asked Johnson why he was not contributing to the increasingly heated haggling. He stared blankly at me.

"I mean you provided the money for this occasion," I explained, *"yet you have no right to explain why, for example, you bought only five fabrics out of the ten demanded in the marriage list, or question what happens to ten yams out of the 50 you bought."*

"Ah," Johnson exclaimed. *"Culturally I am not allowed to participate, so even though I am allowed to be here, I am not allowed to talk."*

Johnson went on to explain that he trusted his family to do right by him. I left him to look for Cynthia.

I found her at the back of the house, called her aside and asked her why she was hiding at the back of the house rather than partaking in her bride wealth negotiation. She shrugged. *"Culturally, I am not supposed to be there; my father and brother are there and will represent me."* She went on to explain that she did not mind the loud haggling going on in the other side of the compound.

* * *

Bride wealth negotiation raises the question of women's agency and, of course, gender equality. Ironically, my findings reveal that men are more opposed to the practice of bride wealth payment than women. On the one hand, Johnson and his family had complained that the amount requested from them was too much. On the other hand, Cynthia and her family believed that the items did not compare to the cost of raising her. Women's passivity in challenging cultural barriers of patriarchy, evident in their absence from bride wealth negotiation, is obviously significant for the persistence of gender inequality. Although Johnson was a passive participant, Cynthia dared not

show up. Although her absence suggests that bride wealth negotiation is an exclusive affair of men, field evidence shows that in the past, the groom was also excluded.⁵ The fact that Johnson could observe proceedings is arguably the result of changing perceptions of men's ability to exercise agency and influence tradition to be more accommodating of their interests in bride wealth negotiation.

In the agrarian past when the custom of bride wealth emerged, parents were responsible for choosing spousal partners for their children. This is no longer the case, as young men and women now largely choose their partners. Arguably, their ability to choose is due to socio-economic changes such as education, migration, Christianity, and urbanisation. The freedom of women to choose their spousal partner plays an important role in determining the span of their sexual, reproductive, and economic freedom after marriage. In the past also, the groom's exclusion was justified on the ground of the group-based nature of wealth production.⁶ Today, individual income generation is the norm, and prospective spouses could arguably use wealth as a bargaining tool for increased influence in bride wealth negotiation. Likewise, extending freedom for women to express opinions during bride wealth negotiation could go a long way in establishing their cultural identity.

It appears that women are oblivious of how their absence from bride wealth negotiation reproduces and perpetuates gender inequality, women's subordination, and arguably, intimate partner violence.⁷ Cynthia appeared startled when I informed her how her presence in bride wealth negotiation could establish her independence and decision-making powers in as vitally important an issue as marriage. While women's increasing freedom to choose marriage partners is largely a product of the exercise of their agency, this agency appears to be missing in bride wealth negotiation. Notably, Cynthia is a practicing advocate. Despite her reasonable awareness of human rights, she is still hindered by tradition. It therefore appears that education alone does not enable women to challenge certain traditional norms like bride wealth negotiation due to their entrenched nature.

It is precisely the persistence of certain traditions in the face of agentic tools such as education, wealth, and religion that prompted me to embark on an investigation of structure-agency interplay in South-East Nigeria. Obviously, desktop research was inadequate for uncovering the socio-cultural power dynamics that shape bride wealth payment. I needed to understand how women use agency to navigate the cultural institution of bride wealth payment by 'blending' into the spaces in which women would traditionally not be allowed to enter. As a non-participant

⁵ Uchendu Egodi 'Girls' Lives in Anioma' (2004) 19 *Asian Women* 175-195 at 176-184; JE Olawoye, FO Omololu, Y Aderinto, I Adeyefa, D Adeyemo, & B Osotimehin, 'Social construction of manhood in Nigeria: implications for male responsibility in reproductive health' (2004) 19 (2) *African population studies* 1-20 at 2-3.

⁶ Nwakamma Okoro, *The Customary Laws of Succession in Eastern Nigeria and the Statutory and Judicial Rules Governing their Application* (Sweet and Maxwell, 1966) 4.

⁷ Clifford Odimegwu, and Christian Okemgbo, 'Gender role ideologies and prevalence of violence against women in Imo State, Nigeria' (2003) 5 (4) *Anthropologist* 225-236 at, 225.

observer, I wanted to use the opportunity of access to bride wealth negotiation parties to understand the implications of women's exclusion on gender relations.

* * *

I asked Cynthia's father why he insisted on a huge amount of money for his daughter's bride wealth. He explained that she is the first daughter to marry in their family and that significant expenses had been incurred on her education. However, Cynthia had told me that from the age of ten, she had lived with one of her aunts, who took charge of her educational expenses until she met Johnson. Her father's excuse was therefore not the real reason for his family's high bride wealth demand. His real motivation was obviously poverty.

When I asked Cynthia's mother for her opinion, she replied that she only wanted her daughter to get married. She could only appeal to the women's group to take whatever items on the marriage list Johnson could afford. She too was not present during the bride wealth negotiation.

It is significant that legislation which seeks to reduce the quantum of bride wealth is treated disdainfully because informants believe that government should not regulate bride wealth. While I agree that bride wealth should not be legislatively regulated, I question the institutional structures which inform and reinforce the exorbitant items on marriage lists. In any case, law is not a panacea for high bride wealth payment.

My field experience enabled me to identify negotiating tools and strategies which women could use to improve their agency in bride wealth negotiation. I observed that women sometimes undermine their agency by being complicit in their invisibility in bride wealth negotiation. For women to have increased voice in bride wealth negotiation, they must negotiate greater access to bridewealth negotiation. To do this, they could use dialogue and, for women with financial muscle, economic coercion.

Finally, my observations revealed significant complementarity in the interplay of structure and agency. This complementarity is evident in the interdependent relationship between actors involved in bride wealth negotiation. For example, acting directly or through their husbands, brides' mothers influence their kin to accept lower bride wealth items. Also, brides could pressure their families by threatening to elope with prospective grooms. Brides may also help grooms with raising the funds for bride wealth. These examples illustrate how women's exercise of agency could reshape understandings of the structure versus agency debate. Ultimately, more research is needed on the economic, legal, and socio-cultural motivations that inform women's exercise of agency in issues related to marriage in Nigeria.⁸

⁸ Mercifully, this area is receiving attention thanks to increased awareness of gender based violence and gender equality.

Book Review

***Searching for Truth in the Transitional Justice Movement: A Grounded Theory of Transitional Justice's Instrumentalisation* by Jamie Rowen
(Cambridge: Cambridge University Press, 2017),
192 pages.**

Diana Dajer¹

Commissions to produce a historical account of the causes and consequences of armed conflicts abound; they have been implemented in contexts as diverse as South Africa, Canada, Chile, Guatemala, East Timor, and Sierra Leone, just to provide a few examples. Even though the impact and benefit of the recommendations produced through these instruments are often not clear, it is not unusual for truth commissions to be promoted as a transitional justice standard, a benchmark beneficial to a broad range of contexts to foster reconciliation in the aftermath of armed conflicts. In *Searching for Truth in the Transitional Justice Movement*, Jamie Rowen takes the reader on a journey through different countries and their quest for truth, to question why truth commissions are being promoted around the world. Rowen uses grounded theory to examine transitional justice's malleability, while arguing that this characteristic is both an asset and a liability for actors that mobilise around it.

The book is structured in six chapters. In the first chapter, the author introduces the thesis, methodology, main concepts, and theoretical perspectives of the book. Using a constructivist approach, Rowen defines transitional justice as an evolving idea about how to redress mass violence and ensure democratic social and political change. This idea, Rowen claims, is constantly instrumentalised: adapted, used by, and of use for different actors and political realities and interests in different contexts, employing judicial, quasi-judicial and non-judicial mechanisms that often include special tribunals, truth commissions or reparation programmes. In this context, truth commissions usually focus on producing a record of what happened during the conflict, enabling survivors to share their stories and providing recommendations for social and political change.

Rowen's research involved the analysis of copious empirical data collected during a period of seven years, including more than 200 interviews, participant observation, a web-based survey in the Africa Transitional Justice Research Network, and documental and archival texts. She used process tracing techniques, and engaged

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in fieldwork in Bosnia and Herzegovina, Colombia, and the United States. Overall, her empirical study helps to understand who is promoting and appropriating transitional justice, who mobilises around truth commissions, and why they do it, using three case studies to discuss the power of legal ideas and their malleability.

The second chapter asserts that transitional justice is a professionalised transnational movement, emphasising the complex shared identity and loosely structured collective action around the idea. To support her argument, Rowen tracks the origins of transitional justice and organisations that have contributed significantly to the movement's professionalisation, such as the International Center for Transitional Justice, making this chapter beneficial not only for the reader interested in truth commissions, but also in how legal ideas emerge, travel through different contexts and scholars, and are shaped and evolve with time.

Rowen's process tracing of the origins and development of transitional justice and the use of truth commissions as one of its signature interventions, provides grounded bases from which to demonstrate its malleability or capacity to be adapted to a variety of places, even by actors with opposing interests. This flexibility of transitional justice, and its combination with practices of standardisation in certain contexts, creates a complex shared identity within the movement, whereby actors "have different opinions about what transitional justice means, does, or should do."² For instance, Rowen reveals that, in certain cases, broad understandings of transitional justice are useful both for actors who prioritise prosecution to address mass violence, and those who prefer other strategies. Yet, Rowen warns that transitional justice's malleability is a double-edged sword: while some actors may use transitional justice to frame their work due to its adaptability, others with similar goals may be unsure of the idea and sceptical of its use.

In the next three chapters, Rowen develops further the idea of transitional justice's malleability. Instead of focusing on truth commissions that had already been established, the case studies in these chapters examine instances in which truth commissions were being promoted in ambiguous transitions prior to 2009. In this vein, the third chapter studies the mobilisation around the creation of a truth commission in the Balkans, including consultations with an extensive range of actors and a multimillion-dollar investment. However, under the label of *disruptive instrumentalisation*, the author claims that the intervention's flexibility was so appealing to local and international actors that they proposed an ambitious model that ended up reproducing social and political divisions, given that it attracted actors with complementary, competing, and even contradictory goals. Hence, in Rowen's words, the establishment of a "regional truth commission was easy to suggest, difficult to promote, and nearly impossible to create."³ The Balkans case study also exemplifies the twofold attribute of transitional justice's malleability. On the one hand, it was an asset since the adaptability of truth commissions to diverse contexts satisfied

² Jamie Rowen, *Searching for Truth in the Transitional Justice Movement*, (Cambridge University Press, 2017) at 56.

³ *Ibid*, at 87.

different stakeholders. On the other hand, this ductility also condemned the effort to fail, as actors with competing objectives wanted the commission to do too many things, reflecting the social and political dynamics instead of changing them, and deceiving many people's expectations.

The fourth chapter examines the idea of *transformative instrumentalisation* by studying the case of the evolving understandings of transitional justice in Colombia. Accordingly, Rowen characterises the Colombian scenario as transformative given that, even though there is not a clear political transition, for more than a decade transitional justice constructions in the country have translated into diverse political actions and shifted parameters, bringing possibilities to create peace accords with illegal armed groups as diverse as paramilitaries and guerrillas. This *transformative instrumentalisation* was feasible, Rowen argues, due to transitional justice's malleability, which made it possible for actors with opposing political agendas and interests to utilise transitional justice politically to incentivise demobilisation processes, while advancing victims' rights to truth, justice, reparation and non-recurrence. Still, as in the case of the Balkans, transitional justice's flexibility also proved to be a liability in Colombia. For instance, commenting on the opposition to the peace negotiation with the FARC guerrillas, which led a marginal majority of citizens to reject the final accord in a plebiscite, Rowen claims that "all could agree that transitional justice was necessary, but they could not agree on what the idea means for Colombia"⁴

The fifth chapter analyses a non-usual suspect in transitional justice studies: the mobilisation around a truth commission in the United States to redress abuses and state-sponsored torture during the War on Terror. Drawing on empirical evidence, Rowen illustrates that some actors in the United States viewed transitional justice as a lesser form of justice that was not necessary if a judicial system could address violence, and categorises this case as *decoupled instrumentalisation*. Hence, the author argues that, though stakeholders who mobilised for a truth commission promoted a strategy that was similar to transitional justice, they dissociated their claims from the transitional justice discourse. From this perspective, Rowen examines the limits of transitional justice's malleability, by highlighting the scepticism of some actors around transitional justice.

Finally, the sixth chapter sets out concluding remarks that discuss further crosscutting themes of the empirical findings. To name a few, all three cases show how actors mobilise law to achieve different goals, at the same time nurturing a professionalisation of the movement, and fostering legal elites at both national and international levels. Likewise, this section digs deeper into how transitional justice acts "as a placeholder for actors to articulate their hopes and desires for the future, and for actors with contradictory agendas to make claims against one another."⁵

⁴ Ibid, at 120.

⁵ Ibid, at 21.

Overall, *Searching for Truth in the Transitional Justice Movement* serves as a starting point for a broader dialogue in the transitional justice arena, around three issues that could be critical for the development of the idea in the years to come. First, the often deceived expectations around reconciliation, truth, justice, and reparation, at the core of transitional justice's malleability, which frequently leads to the repetition of the conflicts and, as Rowen points out, an echo of divisions and violence. Secondly, the resilience of ideas of transitional justice that are exported from foreign contexts and sometimes perceived as standards and benchmarks, thus transplanting language and discourse into different realities without encouraging meaningful, authentic and transparent dialogues that could create and shape new legal ideas truly reflective of the desires and hopes of a variety of actors. Lastly, the notion of transitional justice as a professionalised movement fed by national and international elites, and its effects on the efforts to bring new voices, especially those of the people directly affected by the conflicts, to dialogues about how to guarantee truth, justice, reparation and non-recurrence.

In the manner of a truth commission, Rowen examines the causes and consequences of using transitional justice as a malleable legal idea in order to provide guidance regarding issues and conflicts that could emerge in settings where truth commissions are promoted. In this vein, the study is a thorough example of socio-legal research that provides an empirical comparative examination of how legal ideas shape and are shaped by the actors and social and political contexts in which they are implemented. At the same time, the book invites a wider conversation about how to redress mass violence in the aftermath of conflict, and the role of legal ideas in doing so.