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#Vulnerability – Expectations of Justice through Accounts of Terror on Twitter

Cassandra Sharp [1]

The world we live in isn't as safe as it should be,
people shouldn't have to fear for their everyday lives[2]

Thereis little doubt that new digital technologies have performed a dynamic function in transforming culture, both positively and negatively. In an increasingly networked world, social media platforms have not just transformed the way individuals communicate, but they have also amplified and intensified the way they interpret, critique and legitimise the achievement of law and justice within communities. Law now finds expression, facilitation and transformation in emerging digital media platforms and it is important to reflect on and explore the performance of social media in its role of challenging and transforming expectations of law and justice.

This article focuses on the ways in which terror events are responded to in the iterative narratives of social media, and how these narratives contribute to an emotional jurisprudence that impacts the public legal consciousness. It continues work begun in 2015, when I analysed the twitter responses to the Sydney siege.[3] As a hostage crisis event, I argued that it provoked a storied critique of legality and justice through the emotional experience and expression of fear.[4] In particular, the analysis demonstrated that, as individuals responded emotively to the Sydney Siege, the emerging narrative corroborated a 'just' worldview whereby (i) the protection of *innocence* was favoured as one key goal of justice;[5] and (ii) the legitimacy of the law and its ability to cope with threatening crisis events was questioned. This was especially apposite given the information that came to light during the siege that the perpetrator

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[1] Associate Professor, Law School, University of Wollongong (UOW) and member of the Legal Intersections Research Centre (LIRC). The author thanks the editors and the anonymous reviewers whose suggestions have enriched my arguments.
[2] Comment posted on Twitter in response to the Brussels event. In order to maintain some level of anonymity (see further explanation in Part IC of this article), extracted posts will be hereafter referenced by a code corresponding to the dataset on file with the author. That is, each tweet is allocated a number and will be paired with either a B or P for Brussels or Paris related tweets respectively. The one quoted above is thus coded: Tweet B1.
[3] See Cassandra Sharp, '#fear&loathing in Sydney: Law, Justice and the Experience of Fear in a Hashtag World' (2018) 30(1) *Law & Literature* 29.
[4] Sharp (n3), 30.
[5] This was evident in tweets where individuals deploy the good versus evil narrative to emotively assign *innocence* to the victims in contradistinction to the *guilt* of the perpetrator, see Sharp (n3), 41.

(Monis) had been granted 'bail for serious violent offences at the time of the siege'.[6] Unsurprisingly, this research demonstrated that such information contributed to the conflation of law and justice in public comments surrounding the concepts of legitimacy, responsibility and accountability.[7]

This article builds on the Sydney Siege Twitter study by applying the same methodology to two new case studies. The first is the Paris terrorist attacks occurring on November 13, 2015 where 130 people were killed and 368 people were injured. The Parisian co-ordinated attacks were reportedly the deadliest in France since WWII, and of course France had been on high alert since the January 2015 attacks on the Charlie Hebdo offices. The second case study is the co-ordinated suicide bombings that occurred on 22 March 2016 in Brussels, Belgium, where 32 civilians were killed and more than 300 people were injured. Again, this was reported as the deadliest act of terrorism in Belgium's history, with the government declaring three national days of mourning.

By specifically analysing the twitter narratives related to these two events, the article will explore the affective impact of social media interaction on everyday meaning-making about law and justice, and further demonstrate that the emotional responses to these events contribute to the construction and perpetuation of expectations of law and justice. Along these lines, the first section of the article will provide some context for the theoretical and methodological approach to this research; and the second section will use the key narrative of vulnerability to highlight some of the analysis from the European terrorist events

I.   Emotional Jurisprudence through Social Media Stories

The widespread use of social media in everyday interactions means that it is now one of many cultural resources that individuals use to make sense of the world, and importantly, express their expectations of that world. Twitter, as a social media platform that celebrated its 10th anniversary in March 2016, has over 335 million monthly active users, with 500 million tweets sent per day.[8] It 'is a medium of immediacy, information, and interactivity',[9] that opens up another method by which publics can 'engage with the cultural, social and political realities with which they are confronted.'[10]

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[6] Michael Thawley and Blair Comley, *Commonwealth of Australia 2015, Martin Place Siege: Joint Commonwealth – New South Wales review* (Canberra, Australia: NSW Government and Commonwealth Government, 2015) vi.

[7] See further Sharp (n3), 40ff.

[8] Salman Aslam, 'Twitter by the Numbers: Stats, Demographics & Fun Facts' (*OmniCare Agency online*, 18 September 2018) <https://www.omnicoreagency.com/twitter-statistics/>accessed 2 October 2018.

[9] Jane Johnston, 'Courts' New Visibility 2.0' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds) *The Courts and the Media: Challenges in the era of Digital and Social Media* (Halstead Press, 2012) 57.

[10] Theresa Sauter and Axel Bruns, 'Tweeting the Tv Event, Creating "Public Sphericules": Ad Hoc Engagement With SBS's *Go Back To Where You Came From* – Season 2' (2014) 15 *Media International Australia* 13.

Twitter is primarily a public medium[11] – users can follow anyone with a public Twitter account without the reciprocal requirement being fulfilled. Of course, this then easily facilitates 'the broad dissemination of emerging information within very short timeframes,'[12] and as Zappavigna argues, it fulfils 'a social need among users to engage with other voices in public and private feeds'.[13]As a microblogging service, Twitter allows users to post character-constrained messages (280 characters) across multiple devices, and because of this Twitter has 'changed the concept of how people …respond'[14] to major societal events.

It is the very nature of Twitter, with its categorisation of Tweets using the hashtag symbol (#) combined with a keyword, that facilitates the creation of narratives surrounding current events and public issues. Clicking on a hashtag word in any message enables the identification of all the other Tweets marked with that keyword, and this means it is possible to observe the development over time of various narratives that are collectively formed by the contributions of users as they create and then deploy hashtags in their responses to key events.

Hashtagging is on the one hand, a 'typographic convention used to mark the topic of a tweet', but on the other hand, it is also an 'emergent activity' that 'creates the possibility of ambient affiliation…where [individuals] affiliate with a co-present, impermanent, community by bonding around evolving topics of interest'.[15] This medium of expressing personal evaluation to 'a large body of listeners with which one can affiliate ambiently' has a dynamic perspective – 'these communities shift as hashtags shift',[16] and, importantly, a narrative of communal response can be identified in real time response to key events. This utilisation of hashtags within tweets reflects our communal innate drive to narrativise the experiences of our world,[17] which is unsurprising given that narratives are essential to the experience of being human[18] – to the ways we communicate, learn and reflectively make sense of the world. It is the aggregate of individual comments on social media that helps to shape legal narrative and impact upon 'legal consciousness.'

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[11] Twitter does have facilities for private communication via direct messages between users.

[12] Axel Bruns and Katrin Weller "Twitter as a first draft of the present – and the challenges of preserving it for the future," in Wolfgang Nejdl, Wendy Hall, Paolo Parigi, and Steffen Staab (eds) (2016) *Proceedings of the 8th ACM Conference on Web Science,* ACM, Hannover, Germany, 183, 184.

[13] Michele Zappavigna, "Ambient affiliation: A linguistic perspective on Twitter", (2013) 13 *New Media & Society*, 788, 790.

[14] Johnston (n9).

[15] Zappavigna (n13), at 800. She argues that: 'Interpersonally-charged tweets invite with their hashtags an ambient audience to align with their bonds' at 801.

[16] Zappavigna (n15), 803.

[17] See further Sharp (n3).

[18] Bret Rappaport, 'Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) are as Important as IRAC' (2008) 25 *T M Cooley L Rev* 267, 268.

A. Social Media Narratives and Legal Consciousness

As many scholars have argued, law is constituted by those narratives which give it meaning, [19] and it is through everyday stories that normative expectations of law and justice are formed, contextualised and maintained.[20] Indeed this is one aspect of what Cover conceptualised in his idea of the 'nomos', a cultural world of law that includes what people believe law is and the stories they tell about it.[21] Sherwin, Feigenson and Spiesel argue in relation to the 'nomos' that:

> *"[o]nce understood in the context of the narratives that give it meaning, law becomes not merely a system of rules. Law is a world in which we live."[22]*

Law is viewed as 'inseparable from the interests, goals, and understandings that deeply shape or comprise social life,'[23] and it is therefore appropriate to appreciate how individuals produce, interpret, transform and exchange meanings about law through reflections on life events. This article adopts this constitutive perspective that 'firmly situates the law at the heart of everyday life.'[24] The literature describes this as 'legal consciousness', and the concept encompasses the entirety of 'legal meaning making practices throughout society'[25]. In this sense then, 'legal meaning' refers to the understandings and perceptions about law that are constructed and transformed within legal consciousness. This is key to recognising the interpretive nature of popular cultural texts and activities, and individual responses to them. For this reason, the article argues that individuals are active producers of *legal* meaning from within a specific cultural context and advocates the interpretive fluidity of making meaning within public *legal* consciousness.

B. Legal Consciousness and 'Ethnographic Tradition of Law'[26]

In demonstrating aspects of a public legal consciousness, the analysis shows that when individuals tweet about an event, they narrativise their primary emotional reactions and they inscribe themselves into the story, thereby petitioning other users towards a sense of communal understanding about a particular issue. This then has the

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[19] Richard Sherwin, Neal Feigenson and Christina Spiesel 'Law in the Digital Age: How visual Communication Technologies are Transforming the Practice, Theory and Teaching of Law' (2006) 12 *BUJ Sci & Tech L* 227, 258.

[20] Lieve Gies, 'The Media and Public Understanding of the Law,' in Steve Greenfield and Guy Osborn (eds) *Readings in Law and Popular Culture* (Oxon: Routledge-Cavendish 2008) 74. I have also argued this in relation to law student identity: Cassandra Sharp '"Represent a Murderer…I'd Never do That!" How Students use Stories to Link Ethical Development and Identity Construction,' in Michael Robertson and others (eds), *The Ethics Project in Legal Education* (Routledge, 2011) 33; Cassandra Sharp 'The "Extreme Makeover" Effect of Law School: Students being Transformed by Stories' (2005) 12(1) *Texas Wesleyan Law Review* 233.

[21] Robert M. Cover, "Nomos and Narrative" (1983) 97 *Harvard Law Review* 4.

[22] Sherwin, Feigenson and Spiesel (n19), 258.

[23] Austin Sarat and Thomas Kearns, *Law in the Domains of Culture*, (Ann Arbor: University of Michigan Press, 1998) 6.

[24] Gies (n20), 74.

[25] Sherwin, Feigenson and Spiesel (n19), 259.

[26] Gies (n20), 75.

cumulative impact of facilitating a shared cultural consciousness through which a collective narrative is formed. Importantly, scholars have recognised that in the (re)telling of events and stories, individuals cannot help but to verbalise and render apparent the often unacknowledged emotions, desires and conflicting impulses 'that circulate within the law'.[27] Emotion is carried, amplified and harnessed to connect communities or publics, and 'every little tweet or comment ... accrues a tiny affective nugget'[28] that helps to make legal meaning visible and contestable.

Thus, while traditional law and media research has been often dominated by concerns with the 'effects' and 'influence' of various media on individuals, this article focuses on the emotional 'use' individuals have made of social media narratives. Individuals are no longer regarded as passively or blindly 'affected' by media, but rather they are seen as active producers of meaning who themselves use media to construct that meaning, and also participate in the ever-mutating construction of legal consciousness. For this reason in my research, I have adapted aspects of ethnography, an empirical and theoretical inheritance from anthropology, in combination with critical content analysis, to create a useful methodology for accessing individual and collective legal consciousness.[29]

While in the context of media oriented cultural studies, 'ethnography has become a code-word for a range of qualitative methods, including participant observation, in-depth interviews and focus groups',[30] it is the qualitative understanding of cultural activity in context that is the key 'spirit' of ethnography,[31] and that which is of value to an exploration of active, emotional and embodied expressions of legal consciousness and meaning. The qualitative concern of ethnography is details of life, while connecting them to wider cultural processes and existence, and this makes it well suited to be adapted to an analysis of the ambiguities, uncertainties and contradictions inherent within a study of social media narratives. In the burgeoning research space of social media, scholars now have 'an unprecedented opportunity to observe behavior in a naturalistic setting',[32] and researchers have deployed aspects of ethnography[33] as a mechanism through which to appreciate the nature and practices of that setting.

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[27] Richard Sherwin, 'Symposium: Introduction: Picturing Justice: Images of Law and Lawyers in the Visual Media' (1996) 30 *University of San Francisco Law Review* 891.

[28] Jodi Dean, *Blog Theory* (Cambridge: Polity Press 2010) 95.

[29] In utilising this methodology in projects over the last decade or so, I have been able to explore the ways in which different groups of individuals actively interpret, construct and embody legal meaning. See for example: Cassandra Sharp 'Changing the Channel: What to Do with the Critical Abilities of Law Students as Viewers?' (2004) 13(2) *Griffith Law Review* 185; Sharp (2011) (n20); Cassandra Sharp, "Let's See How Far We've Come: The Role of Empirical Methodology in Exploring Television Audiences" in Peter Robson and Jessica Silbey (eds) *Law and Justice on the Small Screen* (Hart Publishing, 2012).

[30] Chris Barker, *Cultural Studies: Theory and Practice* (2000) 28.

[31] Barker (n30), 28.

[32] Robert E Wilson, Samuel D Gosling and Lindsay T Graham, 'A review of Facebook research in the social sciences' (2012) 7(3) *Perspectives on Psychological Science* 203.

[33] For use of 'virtual ethnography' see: Sanja Milivojevic and Alyce McGovern 'The Death of Jill Meagher: Crime and Punishment on Social Media' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 25.

Because the 'ethnographic tradition of law in everyday life, which clearly adopts a constitutive approach, regards law as something that is deeply embedded in people's consciousness',[34] it is consciousness (rather than knowledge *per se*) that is the focus of this methodology. The aim is to do so much more than simply summarising a person's attitudes and opinions about law and the legal system. Rather, it can help to reveal the deeply imbricated account of legality deployed by individuals and groups within these meaning-making practices. It is therefore an interdisciplinary methodology that is focused 'less on an expedition for "the facts"'[35] and more on accessing personal, social and cultural conversations about the law, that are informal, active and spontaneously emotive.

C. Coding Emotions – Hashtag Methodology

In order to analyse the meaning that is circulated within public legal consciousness, the methodology of this project stands in contrast to the established quantitative media analysis tradition that is popular among social scientists for analysing user-generated content. It does so by eschewing quantitative sentiment analysis that measures emotional responses in social media on a statistical scale, in favour of in-depth qualitative methodologies that interrogate the expression and use of emotions in the digital sphere. As such, this project sits alongside an 'emerging body of literature on the use of social media during crisis events' and in particular, a small subset of social science research that 'explores communal sense-making processes and the social space of crisis communication'.[36] Scholars such as Jean Burgess, Axel Bruns and Larissa Hjorth have undertaken some instructive research concerning emerging methods within the digital media sphere and particularly the impact of public 'collective response' to events on Twitter.[37] Following their lead, but with specific application to *law*, this research seeks to provide a qualitative account of the role of public comment and conversation in perpetuating a narrative of vulnerability through fear on social media. The methodological process for this account includes: data collection using keyword searches; an in-depth exploration of content involving a mix of Aristotelian rhetorical analysis; and critical discourse analysis. Each of these will be discussed in turn.

Data collection. In response to both the Paris and Brussels terrorist events, individuals provided a constant emotional narrativisation of the events on Twitter and it was easy to recognise the powerful work of fear as it moved its way into a collective consciousness. The co-ordinated terror events in Paris had a massive impact on social media, with well over 4 million tweets generated within the first 24 hours of the attacks to several key hashtags: #prayforparis was the most used hashtag globally, reaching

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[34] Gies (n20), 75.

[35] Chris Barker and Dariusz Galasinski, *Cultural Studies and Discourse Analysis: A Dialogue on Language and Identity*, (Sage, 2001), 29.

[36] Frances Shaw and others 'Sharing News, making sense, saying thanks: Patterns of talk on Twitter during the Queensland Floods' (2013) 40(1) *Australian Journal of Communication* 23.

[37] Jean Burgess, Axel Bruns, and Larissa Hjorth 'Emerging Methods for Digital Media Research: An Introduction' (2013) 57(1) *Journal of Broadcasting & Electronic Media* 1.

over 600,000 tweets in the first two hours; #porteouverte[38] (used to promote solidarity and advertise options for those who needed a safe place) and #parisattacks (used to provide real time factual information) were also frequently utilised.[39] Following the Brussels attack, the hashtag #prayforbrussels trended in the wake of the Paris example, and along with #JeSuisBruxelles and #Brussels, it was one of the top trending Twitter hashtags worldwide.

To access the data, the research team[40] utilised Twitter's publicly available Search User Interface (UI) which enables the tailoring of advanced search functions to specific date ranges and hashtags. By tracking topical hashtagged tweets, it is possible to identify and collate a 'data set of the most visible tweets relating to the event in question, since it is the purpose of topical hashtags to aid the visibility and discoverability of Twitter messages.'[41] Identifying the most used hashtags from these two events as a starting point (#prayforparis, #porteouverte, #prayforbrussels and #Brussels), and constraining the time stamp to within the first 48 hours of each event, the data set was established by applying search criteria that focused on the keywords: 'law' or 'justice' or 'fear'. By further eliminating tweets that merely contained links, or other superfluous aspects, the data set was reduced to 854 tweets. It is important to acknowledge that 'no retrieval methods guarantee a comprehensive capture of Twitter data'[42] yet, as Highfield, Harrington and Bruns argue 'such research, nonetheless, remains valid and important … especially where research focuses on identifying broad patterns in Twitter activity from a large data set.'[43]

In the hyper-developing world of technology and social media research, debates also loom large concerning the ethics of privacy, consent and risk of harm for twitter users.[44] The most recent research indicates that 'while it is not possible to take a fixed position in relation to research on Twitter as different projects will have different aims and study different phenomena', ethical frameworks have been developed and suggested for researchers engaged in social media analysis.[45] This project adopted two particular positions concerning social media research ethics proffered by Townsend and Wallace. The first was that informed consent from twitter

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[38] French translation: 'Open Door'.

[39] Jonathan Trajkovic '#ParisAttacks: How Twitter Tells the Story' (*Tableau*, 19 November 2015) <https://www.tableau.com/about/blog/2015/11/parisattacks-how-twitter-tells-story-45940> accessed 15 November 2018.

[40] The research team was comprised of myself and a Research Assistant who was funded by a small seed grant from the Faculty of Law, Humanities and the Arts. Absent significant funding for substantial data scraping, this was a modest research project in the style of a pilot study.

[41] Tim Highfield, Stephen Harrington and Axel Bruns 'Twitter as a Technology for Audiencing and Fandom' (2013) 16(3) *Information, Communication & Society* 315, 321.

[42] Highfield, Harrington and Bruns (n41), 322.

[43] Highfield, Harrington and Bruns (n41), 322.

[44] For an overview of this debate and associated concerns see: Matthew L Williams, Pete Burnap and Luke Sloan 'Towards an Ethical Framework for Publishing Twitter Data in Social Research: Taking into Account Users' Views, Online Context and Algorithmic Estimation' (2017) 51(6) *Sociology* 1149.

[45] Wasim Ahmed, Peter A. Bath, Gianluca Demartini 'Using Twitter as a Data Source: An Overview of Ethical, Legal, and Methodological Challenges' in Kandy Woodfield (ed) *The Ethics of Online Research* (*Advances in Research Ethics and Integrity, Volume 2*)(Emerald Publishing Limited, 2017) 96.

users is not necessary where specific hashtags have been utilised in order for their tweets to be publicly visible to a broader audience,[46] and the second was to take the ethical position of not publishing individual usernames with the quoted tweets.[47]

Content & Aristotelian Analysis. This data set was then independently coded by the research team according to categories established from a mixture of critical content analysis and Aristotelian rhetorical analysis.[48] With tweets now being recognised as the 'new sound bites' of media that have significant rhetorical impact,[49] it was useful to track the deployment of Aristotle's pathos as an expression of the experience of fear and vulnerability.[50] Recognising that there is a complex relationship between emotion and legal judgment, pathos was used as an interpretive category to acknowledge the distinct persuasive appeal often used to communicate everyday meaning. Pathos petitions the audience's sense of communal identity through the deployment of emotion in language, and so coding categories were applied that exposed the variances in the use of pathos contained in the 854 tweets. This involved: coding against statements that expressed an appraisal of threat, danger or vulnerability; coding those statements that belied uncertainty around coping; and coding those expressions that attributed blame through anger.[51]

Critical Discourse Analysis. Critical discourse analysis is a tool that demonstrates the role of language within the constitution and governance of cultures.[52] This methodological step involves identifying how social media actively contributes to the formation of critical legal discourses and how these shift around particular moments in time. In this research the process involved identifying a number of aspects of language that could be recognised in the data (e.g., rhetorical devices/linguistic elements) to isolate socially shared understandings and explore the ways different groups of individuals actively interpret, challenge, construct and embody legal meaning.

This combination of methodological tools was designed to facilitate immersion in the social setting of a trending Twitter hashtag occurring during occasions of

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[46] Leanne Townsend and Clare Wallace, *Social media research: A guide to ethics*. The University of Aberdeen, 2016 <http://www.dotrural.ac.uk/socialmediaresearchethics.pdf>accessed 5 October 2018.

[47] This was further guided by the scaffolded ethical framework of Townsend and Wallace (n46), 8.

[48] The Aristotelian method has been used by several scholars to understand the nature and impact of online network discourse during election campaigns: See Tal Samuel-Azran, Moran Yarchi and Gadi Wolfsfeld, 'Aristotelian rhetoric and Facebook success in Israel's 2013 election campaign' (2015) 39(2) *Online Information Review,* 149; J Bronstein, 'Like me! Analyzing the 2012 presidential candidates' Facebook pages' (2013) 37(2) *Online Information Review* 173; and Kristin English, Kaye D Sweetser, and Monica Ancu, 'Youtube-ification of political talk: an examination of persuasion appeals in viral video' (2011) 55(6) *American Behavioral Scientist* 733.

[49] Johnston (n9), 55.

[50] The Aristotelian discourse analysis method thus acknowledges that speakers can use three distinct and powerful appeals of persuasion: logos, ethos and pathos. Logos utilises logic-based appeals. Ethos, emphasizes the speaker's credibility and trustworthiness, and pathos appeals to the audience's emotions. See further Samuel-Azran, Yarchi and Wolfsfeld (n48).

[51] Some tweets contained more than one appraisal element, but the tweet was coded by primary element.

[52] Barker and Galasinski (n33).

heightened threat and fear; and to interrogate and challenge law as expressed in comments made in response to these occasions. The analysis shines the spotlight on the perceptions of law and justice that are emotionally expressed on social media in response to two terrorist attacks (Paris and Brussels). The analysis in Section II will show that individuals implicitly respond to terror events by reinforcing a 'just worldview', while simultaneously using the emotional responses as a stimulus for, and vehicle of, the maintenance of retributive desire. In addition, the analysis demonstrates that by articulating their emotional response to the events as they happened, a collective westernised narrative of vulnerability was produced.

II.   Twitter Analysis

A. Just Worldview

Theories of human motivations and behaviour in social psychology have for some time recognised that 'human beings have a functionally autonomous need for justice that emerges as part of normal cognitive development'.[53] The work of Melvin Lerner, which has been highly influential in this regard, is founded on the basic premise that 'the justice motive is a foundational component of everyone's psychology',[54] and that people have a strong desire to live in a fair world where people get what they deserve. His work explores the 'belief in a just world'[55] and the implications of such an intuitive worldview 'for how people construe daily experience in a manner that sustains the implicit assumption that the world is just.'[56]

This 'just worldview' is integrated within the shared legal consciousness which provokes normative expectations of the law as the key institution that possesses the power and authority to keep the world safe and secure.[57] This is evident in the Twitter narrative produced through the narrative of vulnerability in response to terrorist attacks. Take for example these tweets which indicate a strong expectation and desire that our legal systems maintain justice goals:

> *"Appalled by #Brussels attacks. Our reaction can only be more democracy and rule of law!"[58]*

> *"Hey Paris, just stay strong. Don't let those bastards take your light away. Justice will hunt them down."[59]*

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[53] John H. Ellard, Annelie Harvey, and Mitchell J. Callan 'The Justice Motive: History, Theory, and Research' in Clara Sabbagh and Manfred Schmitt (eds) *Handbook of Social Justice Theory and Research* (Springer New York, 2016) 127.
[54] Ellard, Harvey and Callan (n53), 128.
[55] Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum, 1980).
[56] Ellard, Harvey and Callan (n53), 128.
[57] Sharp (n3).
[58] Tweet B2.
[59] Tweet P1.

"May protection and justice reign in the midst of terrorism."[60]

When possessed of a belief that the world is primarily a place of justice, individuals will become vulnerable in the face of experiencing or witnessing injustice. In the context of this research, it is argued that when terrorism is feared, the imagined world is now made fragile and it becomes harder to believe that the world can be adequately protected from injustice, and the belief in a just world becomes threatened.

Interestingly, the language used in tweets surrounding the Paris and Brussels terrorist attacks strongly affirm this expectation and demand for a just world. By using the modal verb *should* in relation to issues of safety and security, individuals reflect the impact of an assumed threat to the just worldview (emphasis added):

"We shouldn't *have to be panicking like this all the time and living in fear. So upsetting."*[61]

"This is just not the world we should *live in. Terror and fear around every turn. All of which is unnecessary."*[62]

"We are living in a dark world, people should *be able to live in peace not fear."*[63]

The repetition of both *should* and its negative form *shouldn't* indicates an expectation for the world to function in a way that protects citizens from harm, and it operationalises the just worldview. The deployment of language in this way proliferates the twitter narrative and is often combined in sentences that utilise first person narrative. For example, in the tweets above the use of the pronoun *we* represents the personal and plural nature of requiring and expecting protection in this world. It allows individuals to remove any feelings of isolation and emotionally associate with other twitter users by expressing a shared understanding about collective safety in the world. This is also illustrative of what Kamenka contends about the ideology of justice, which he argues 'rests on the tension or contradiction between what is and what at least some men think ought to be.'[64] In this sense, tweets such as those extracted in this section, serve as a presupposition of criticism regarding the impact of injustice (this case through terrorism) on the existing reality, 'allegedly in light of …an ideal end state'.[65]

The expression of a definite and absolute expectation of a just world through the use of the verb *should*, is in the following tweets also connected to a vulnerability

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[60] Tweet B3.
[61] Tweet B4.
[62] Tweet P2.
[63] Tweet P3.
[64] Eugene Kamenka 'What is Justice?' in Eugene Kamenka and Alice Erh-Soon Tay (eds) *Justice: Ideas and Ideologies* (Edward Arnold London, 1979), 1.
[65] Kamenka (n64).

that is manifested in the absence of security and safety via words such as *no-one* (emphasis added):

> "No ones *[sic] life should be lived in fear. This is awful"*[66]

> "No-one *should ever have to suffer such tragedy and fear at the hands of reckless, remorseless extremism"*[67]

> "No *place is safe anymore and that's so upsetting and messed up,* no one *should have to fear living"*[68]

The use of the indefinite pronoun *no* in relation to people and places in these tweets (particularly when paired with the condemnatory *should*) is an example of the manner in which the desire and need for the just world to be maintained is sustained through emotional responses to threatening events.

From this perspective, it is unsurprising that crisis events can so easily provoke fear, doubt and critique in the face of uncertainty about our level of safety in the world. The need to believe that the world operates on principles of fairness therefore influences the way law's efficacy in the provision of justice goals are evaluated, and in moments of threat, fears become expressed as complaint or critique not only about those who might be responsible, but also about those whom may have had the power to prevent it from happening in the first place. For example:

> "These attacks of terrorism make me frightened to grow up into this world of fear and devastation. Something needs to change"[69]

> "'In times of war, the law falls silent.' Cicero @ Palais de Justice #Brussels Perhaps it's time to enforce the law."[70]

> "How many more innocent people must die or be in fear before this is taken seriously?"[71]

In the moments of injustice, suffering and grief, the typical and repetitive catch cry is that justice is missing and/or absent. Take for example these questioning tweets: 'My heart is now falling into pieces …Justice where are you?[72], and 'struggling to grasp the concept of this whole situation. where is the justice?'.[73] This existential call for justice on behalf of other people (and in particular of distant victims) 'emphasizes the extent to which justice is a central organizing theme in people's lives.'[74] Indeed, this 'commonplace sensitivity people everywhere have to injustice experienced by others is

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[66] Tweet P4.
[67] Tweet P5.
[68] Tweet P6.
[69] Tweet P7.
[70] Tweet B5.
[71] Tweet P8.
[72] Tweet P9.
[73] Tweet P10.
[74] Ellard, Harvey and Callan (n53), 127.

a hallmark of justice motive theory,'[75] and feeds into what Lerner argues is the instinctive need to engage in coping strategies when injustice seems possible or probable.[76]

B. Coping Strategies when the Just World is Threatened

Given the importance of a just world desire within individual psychology, Lerner argued that 'people engage in various cognitive and behavioral "strategies" or "tactics" to maintain a perception of justice in the face of threat.'[77] These protective strategies are deployed by individuals in order to make sense of injustice in their lives, and include: taking action to assist the victim (either before or after injustice); adopting psychological frameworks that relate injustice to 'ultimate justice'; and desiring that the 'perpetrator(s) of injustice get their "just deserts". It is the latter two tactics that are most evident in the twitter narratives analysed for this research, and are discussed in turn below.

Ultimate Justice Reasoning – Justice Will be Done. The adoption of 'ultimate justice framing' enables individuals to cope psychologically with present injustice because it is an anticipatory and ongoing means of orienting one's experience towards the belief that at some point justice will be achieved. As evident in the following tweets after the Brussels attacks, this particular protective strategy adopts a temporal framework which contains the 'tendency to believe that forthcoming events will settle any injustice that occurs'[78] (emphasis added):

> *"The world mourns for you #Brussels. Peace and justice* will prevail*"[79]*

> *"Heartbreak in #Brussels today, please pray for the families and victims of these senseless tragedies. Freedom and justice* will prevail.*"[80]*

> *"We must increase security but not change our way of life. Freedom + tolerance underpin a modern, dynamic society and* will prevail.*"[81]*

> *"Do not be discouraged. The power of Good* will ultimately prevail *over the Evil of our time.*"[82]*

Notice that each tweet above uses the declarative and present-tense phrase *will prevail* to indicate expectations of future successful action. It would seem that '[e]ncounters with injustice are less problematic and threatening if one is committed to

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[75] Ellard, Harvey and Callan (n53).
[76] Ellard, Harvey and Callan (n53), 131.
[77] Ellard, Harvey and Callan (n53), 131
[78] Jurgen Maes 'Immanent Justice and Ultimate Justice: Two Ways of Believing in Justice' in Leo Montada and Mervin J Lerner (eds) *Responses to Victimizations and Belief in a Just World* (Plenum New York 1998) 12.
[79] Tweet B6.
[80] Tweet B7.
[81] Tweet B8.
[82] Tweet B9.

the view that justice is being done or will be done.'[83] An important aspect of Lerner's theory of justice motivation, this framework therefore powerfully allows for present injustice to be contextualised and endured by maintaining the belief that 'the world is basically a just place'.[84] Yet, this is also connected to the rational strategy that the 'justice' to be done will be retributive in nature.

Retributive Desire – Focus on Just Deserts. The innate desire to hold individuals responsible for their actions is also arguably a rational strategy associated with the justice motivation. That is, Ellard, Harvey and Callan have suggested that it is a protective tactic in the face of injustice to seek 'retributive action focused on bringing offenders in line with expectations for how the law should respond in a just world.'[85] Retributive theory argues that the state has a right and duty to punish the offender by virtue of their culpability for the offence, and links justice with desert. It is retribution's underlying *lex talionis* philosophy of an "eye for an eye" that is prominent within legal consciousness when instances of injustice are recounted and therefore become threatening. This is reflected for example in the following tweets where the populist notion of retribution invoked following the Paris attacks is equated with justice.

> *"Thinking of those affected in Paris tonight. Hoping the full weight of justice is brought against the terrorist scum."[86]*

> *"The news is talking about justice for these terrorists. The only proper justice for these sick people is death"[87]*

> *"Whoever these bastard terrorists are, they deserve justice for what was done"[88]*

> *"Capital punishment wouldn't be enough justice for those victims in Paris!"[89]*

It would seem that individuals consistently deal with the tragedy of terrorism by resorting to expressing retributive desires that the guilty must be punished. As one twitter user articulated: 'Sometimes eye for an eye seems logical!'[90] The collective narrative that is therefore perpetuated in response to these events is that retribution is a necessary reaction to such heinous injustice on undeserving or blameless victims.[91] Moreover, as Lacey has argued, punishment represents 'a collective need to underpin, recognise and maintain the internalised commitments of many members of society' to

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[83] Ellard, Harvey and Callan (n53), 135.

[84] Zick Rubin, & Letitia Anne Peplau, (1975) 'Who believes in a just world?' 31(3) *Journal of Social Issues* 65, 69.

[85] Ellard, Harvey and Callan (n53), 132.

[86] Tweet P11.

[87] Tweet P12.

[88] Tweet P13.

[89] Tweet P14.

[90] Tweet P15.

[91] One user commented: 'Innocent people should never have to fear for their lives because of some senseless war': Tweet B10.

the rule of law. [92] Punishment then can be conceived as a social practice that pursues (among others) retributive measures as a mechanism for satisfying the need to see, or at the least anticipate, justice being achieved. Notice in the following tweets how the use of another modal verb *may* belies hopefulness in the achievement of justice through retribution:

> *"God help the people of Paris the world has spun out of control* may *justice be struck hard on the bastards who've done this"*[93]

> *"*May *these monsters be found and confronted, and may they face swift justice."*[94]

> *"*May *the savages responsible for these attacks be brought to justice."*[95]

In these last two sets of tweets, it is also important to note the emotive descriptors assigned to the perpetrators of violence and terror. Evocative words such as *scum, sick, savages,* and *monsters* were often used when describing the attackers, with the derogatory *bastard* being the term most consistently used. Further examples included: 'time for a show of justice, need to hang the *bastards* responsible'[96] and 'Bring these *bastards* to justice'[97]. These emotive responses embody the combination of Lerner's two protective strategies at once: the adoption of a temporal ultimate justice framework; and the emotional expression of retributive desire. This embodiment is arguably 'an inevitable cultural expression of the universal need for affirmation that the world is ultimately just'[98] and an important aspect of legal consciousness.

C. Referential Vulnerability

> *"We've all grown to fear that at any moment, a neighbourhood can go from silent to violent. What has this world come to?"*[99]

Recognising an inherent vulnerability in all social existence, Butler considers human life precarious because 'one's life is always in some sense in the hands of the other. It implies exposure both to those we know and to those we do not know; a dependency on people we know, or barely know, or know not at all.'[100] For Butler, precariousness is an 'ineradicable part of human nature emerging from the fact that all lives are vulnerable', susceptible or open to attack.[101]

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[92] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge London: 1988) 182-3.
[93] Tweet P16.
[94] Tweet P17.
[95] Tweet P18.
[96] Tweet P19. Emphasis added.
[97] Tweet P20. Emphasis added.
[98] Ellard, Harvey and Callan (n53), 129.
[99] Tweet P21.
[100] Judith Butler *Frames of War: When Is Life Grievable?* (London: Verso 2009) 25.
[101] Kathryn McNeilly, 'Livability: Notes on the Thought of Judith Butler' (*Critical Legal Thinking,* 26 May 2016) <http://criticallegalthinking.com/2016/05/26/livability-judith-butler/>accessed 15 November 2018.

Because 'human beings are especially interested in events that might affect them personally…[or] has implications for them', the research combined Butler's concept of precariousness with Ahmed's argument that vulnerability involves a 'particular kind of bodily relation to the world, in which openness itself is read as a site of potential danger',[102] to create the coding category of referential vulnerability.

The code of referential vulnerability was used to denote a particular performative evaluation where the individual expresses a disruption to their familiar worldview and subsequently relates it to their personal bodily experience. These emotive tweets are performative in the sense that they then create anxiety and discomfort in the safety with which law provides for the everyday. One set of examples demonstrates statements that suggested that in their everyday lives, users might be unable to protect themselves.[103]

> *"The world is just…awful. It scares me to death, honestly, that we can't go anywhere without fear of dying b/c of an attack"[104]*

> *"Its crazy that people can't go anywhere anymore without the fear of never seeing their families again….Messed up world."[105]*

> *"Nobody should have to go through the instantaneous fear of death while living their daily lives"[106]*

The ability to maintain a belief in a just world is crucial for meaning-making processes in the lives of individuals and communities. The literature in social psychology suggests however, that 'finding meaning this way is not limited to how we react to injustice, but is also apparent in our ongoing construal of daily experience'.[107] This means for instance, that individuals will 'construe causality, remember the past, and think about the future'[108] through the prism of a just worldview in relation to the everyday. This is evident in the analysis which shows a strong narrative that scripts individuals as 'vulnerable and in dire need of protection' in their everyday lives.[109] For example:

> *"No place is safe anymore and that's so upsetting and messed up, no one should have to fear living."[110]*

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[102] Sara Ahmed, *The Cultural Politics of Emotion*, (Edinburgh: Edinburgh University Press, 2004) 69.
[103] Krista De Castella and Craig McGarty, 'Two Leaders, Two Wars: A Psychological Analysis of Fear and Anger Content in Political Rhetoric about Terrorism' (2011) 11(1) *Analyses of Social Issues and Policy* 186.
[104] Tweet P22.
[105] Tweet P23.
[106] Tweet B11.
[107] Ellard, Harvey and Callan (n53), 135.
[108] Ellard, Harvey and Callan (n53), 135.
[109] Julie Matthews, 'Visual Culture and Critical Pedagogy in "Terrorist Times"' (2005) 26(2) *Discourse: Studies in the Cultural Politics of Education* 204.
[110] Tweet P24.

"I genuinely fear for the world! Is anywhere safe anymore?"[111]

The prism of fear through which the public viewed these events sharpened the focus on an increasingly common perception of our everyday world as scary, unpredictable and chaotic, and the tweets within these particular hashtags demonstrated a heavy reliance on emotion as an effective method for referentially communicating the seemingly common global significance that the western world was coming under threat.

At this point, it is important to note that the data from this research appeared to represent a particularly westernised shared public vulnerability that plays on the precariousness of a western world that is supposedly no longer fully protected. Notice the repeated use of the adverb *anymore* connected with the word *safe* in the tweets above. This was a common collocation to represent that safety was no longer a guarantee within a western world that once provided security for many. Of course, actual precarity, in the Butler sense,[112] is prevalent in many other parts of the world and has been present there for a long time, but for westerners it seemed as though these events provoked enormous susceptibility to individual and communal freedoms and liberty. In part, this is due to the reality that western and European countries don't experience 'nearly as much terrorism as countries with comparable recent attacks, such as Lebanon or Kenya',[113] and so western citizens start to imagine the worst:

"And every soul in Europe can't help but fear 'is my country next?' So close to home. So terrifying."[114]

To fail to fully recognize the impact of this vulnerability on the western world, is what Butler has argued was a missed opportunity following 9/11. She argues that the 'exposure of America's fragility [should have been used] productively' to temporarily dislocate First World privilege and 'acknowledge a mutual corporeal vulnerability as a basis for a new interdependent global political community'.[115] This threatened privileged western everydayness is precisely the reason why emotive appeals detailing our precariousness are so effectively circulated and repeated.

Similar to the articulated vulnerability in everyday life that I have previously argued was evident in tweets surrounding the hostage situation of the Sydney siege (where the banality of getting a morning coffee was now being corrupted by the

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[111] Tweet B12.

[112] Her thesis differentiating between 'precariousness' – a general condition shared by all forms of life, and 'precarity' – a politically induced condition referring to specific populations exposed to state violence or neglect: Judith Butler (2009) *Frames of War: When Is Life Grievable?* (London: Verso) 25.

[113] Brian J Philips, 'This is why the Paris attacks have gotten more news coverage than other terrorist attacks' *The Washington Post*, November 16, 2015.

[114] Tweet P24.

[115] Judith Butler, 'Mourning becomes the law. Judith Butler from Paris.' (*Verso*, 14 November 2015) archived at <https://instituto25m.info/mourning-becomes-the-law-judith-butler-from-paris/>accessed 15 November 2018. Quoted in Holly Brown, 'Judith Butler in Belgium: Reflections on Public Grief and Precarity in the Wake of the Paris Attacks' (2016) 3(1) *DIGEST* 8.

experience of fear),[116] everyday activities in Paris, such as sport, going to the theatre and eating out, were tainted with vulnerability through fear:

> *"A restaurant, a concert, a stadium…entertainment & free time: terrorism is touching everyone."[117]*

> *"Scary scary world we live in. Can't even go out for a meal in Paris without fear of being ambushed by cowards with guns"[118]*

> *"Its frightening to consider how you can't even attend a good music concert without fear. This is horrifying."[119]*

> *"Things have gotten to the point where people can't even go to the restaurant or theatre. We're all going to live in fear soon."[120]*

The cumulative impact of this reinforced narrative of society's vulnerability, is that possibilities of restrictions on liberty become realised, or at the very least, imagined. Again the use of language belies this awareness of westernised vulnerability – the repetitious use of the words *can't even* reflects a perceived endangerment of the normal western practices of protected social existence are now being perceived as constrained. It's the mundanity of life that is threatened – the very essence of living in a western world that is imagined as coming under threat – and this is something Judith Butler considered in her personal response to the Paris attacks. In 'Mourning Becomes the Law', Butler reflects on her own experience of being in Paris at the time of the attacks and asks why 'the café as target pulls at my heart in ways that other targets cannot'.[121] As Furedi argues, 'the more powerless we feel the more we are likely to find it difficult to resist the siren call of fear.'[122] Similarly, the more these emotional reactions are repeated, the easier it is to imagine how everyday lives could be so impacted by terrorism, and the very concept of westernised personhood becomes recast as the vulnerable subject.[123]

III. Conclusion

Terror, whether real or imagined, is an evocative phenomenon that has the potential to fracture the just worldview to which global citizens hold so tightly, and the communal experience of fear and vulnerability as reflected in twitter narratives is one demonstration of emotional coping strategies in the face of such uncertainty. The response to the two terrorist events analysed in this article contributed to the production of a narrative on twitter that served as a practical illustration of emotional

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[116] Sharp (n3).
[117] Tweet P25.
[118] Tweet P26.
[119] Tweet P27.
[120] Tweet P28.
[121] Brown (n115).
[122] Frank Furedi, *The Politics of Fear* (London: Continuum Books, 2005) 141.
[123] Furedi (n122), 141.

jurisprudence at work. In demonstrating aspects of legal consciousness, the analysis showed that on Twitter, it is through narrativised *emotional* responses to crisis events that legal meaning can be constituted, transformed and propagated. Through the articulation of fear and vulnerability, users contributed to a collective message that terrorist events are such horrific examples of injustice that they threaten individual and collective beliefs in a westernised 'just world'. Yet, the narratives also indicated that the expression of emotion through tweets at these times facilitate rational coping strategies which are underpinned by retributive desire and ultimate justice reasoning.

Socio-Legal Studies, Law Schools, and Legal and Social Theory

Roger Cotterrell[1]

I.   Preface (2018)

The paper reproduced here argues that socio-legal studies are important for legal education and juristic inquiry, and it outlines problems facing social studies of law in law schools. It claims that legal theory is necessary for practical legal studies but that legal philosophy's purportedly timeless theories about the nature of law have largely failed to meet this need. They have been relatively unconcerned with social variation and historical change and so have not adequately reflected the varieties of possible legal experience. Juristic theory must be sociologically informed. But, equally, socio-legal studies must examine the nature of law as ideas as well as focusing on behaviour in legal contexts. Legal ideas need sociological interpretation. Social theory must inform legal inquiries, and the long tradition of social theories of law is important. Alongside recent theories, the classics of socio-legal theory give deep perspective for studies of present-day law in society.

The text for this article was originally prepared for a one-day conference held at Wolfson College, Oxford, on 22nd June 2012 to celebrate the fortieth anniversary of the founding of the Oxford Centre for Socio-Legal Studies.[2] I revised it in minor ways and expanded it shortly after the conference but it has not been altered since. It was written for a particular audience on a particular occasion. In its original form it has achieved quite wide circulation. It appears virtually unchanged below. However, a new postscript has now been added to indicate some ways in which these ideas have since been developed. The text keeps the relatively informal style of the paper as it was orally presented.

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[1] Anniversary Professor of Legal Theory, Queen Mary University of London.

[2] About 60 people registered to attend and there were papers and discussions on such themes as the past and future of the Centre, the relation of empirical legal research to legal theory, whether socio-legal studies constitute a distinct discipline, and the future directions of socio-legal studies. David Nelken and I were asked to present papers that would provide the concluding session for the conference, the brief being to reflect from our personal experience on the nature and situation of the socio-legal enterprise.

II.   Introduction

David Nelken and I have each been asked to speak about our personal views of socio-legal studies to provide the final session for today's proceedings. We often find ourselves working side by side in academic projects because our research interests are closely linked in many respects even though our intellectual backgrounds and experiences in academic life contrast sharply in some ways. So, I thought it might be useful here to say something about the way my particular background and experience has shaped my view of the field of socio-legal studies (hereafter "SLS"), its promise and its present challenges, and to link that with some themes that have been addressed earlier today in this conference. After all, there are many different ways of approaching SLS. Perhaps to some extent each of us conceptualises SLS differently, because of the variety of personal motivations that have led us to a concern with this kind of research.

III.   A View From The Law School

The Oxford Centre for Socio-Legal Studies has become justly well-known internationally, especially for its rich empirical research. My relationship with the Centre has been somewhat oblique since I am a legal theorist and not an empirical socio-legal researcher. I am a 'consumer' rather than a producer of the kind of empirical research which the Centre has developed very effectively, in what I think of as the mainstream of its activities over its four decades of existence. In part, the outlook I have adopted has been shaped by the fact that I have always worked in university law schools. I came to sociology of law (which I will not here distinguish from SLS) because I quickly became dissatisfied with the kind of theory which legal philosophy offered in the law school environment. I was convinced, even as an undergraduate law student, that law, if it was to be an interesting focus of scholarship, needed to be a theoretically sophisticated subject. But I thought it was struggling towards that like a poor swimmer who had not learned efficient strokes and so made little headway, just treading water despite apparently making huge efforts to move forward.

Legal philosophy offered theoretical resources. But I decided eventually that, because law exists only in *specific times and places*, the concerns of philosophers seeking seemingly timeless and absolute answers to such questions as 'What is law?', 'What is the relation of law to morals?' or 'What is the foundation of legal authority?' were inadequate to make legal scholarship realistic and in touch with law's changing socio-political conditions. Most of the important theoretical questions about law are not at all timeless but very timely – they are issues about the way law is shaped, works and develops in specific historical contexts. They are about what law means to those who are concerned with it or confronted by it, and this meaning cannot be abstracted as though it were unrelated to time and place. Indeed, the claim of legal philosophers that there are genuinely timeless or universal characteristics of law[3] might ultimately be no

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[3] See e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 104, describing what he sees as "the difference between the philosophy of law and the sociology of law. The latter is concerned with the contingent and the particular, the former with the necessary and the universal." As used by legal philosophers, however, this way of characterising

more than arbitrary stipulation, in the absence of a full examination of conditions of 'the legal' in all possible times and places – an impossible task. A designation of the concept of law and its related concepts can usefully be made only for the purposes of empirical study of ideas in practice in *specific* social and historical settings.

So, I sought theory that could help and I looked for it in social science. I thought that philosophical legal theory merely went round and round in circles in trying to address 'timeless' questions about the nature of law – going over the same issues endlessly, never resolving them – like, to use another writer's metaphor, a continually replayed game of football.[4] Social theory suggested the possibility of breaking out of that philosophical circularity[5] and linking big issues about law to observation of the varied, changing social and political contexts in which legal ideas have to find meaning and significance.

I am optimistic that socio-legal theory can do what legal philosophy has failed to do; that it can be relevant in the law school world in ways that perhaps some legal philosophy is not. But I am also aware of obstacles. Legal theory – theory aimed as explaining the nature of law – depends on empirical socio-legal research to keep it grounded in experience and sensitive to social variation. Most academic lawyers in Britain still have relatively limited awareness of or exposure to empirical socio-legal research, except perhaps where it relates directly to their legal specialism and where they have the sort of favourable conditions for wide-ranging scholarship that the best law schools allow.

American legal scholars have sometimes claimed that 'We are all legal realists now'[6] and it might be tempting to say 'We are all socio-legal scholars now.' It seems true that legal scholars in the English-speaking world are often reluctant today to label themselves as 'black letter lawyers'. What once was a label of pride to denote single-minded, rigorous and precise analysis and systematisation of legal doctrine, now more often gets treated as an admission of myopia, which no one wants to make. But socio-legal research cannot be said to have invaded the law school. In this country, unlike some continental countries, it is surely generally viewed sympathetically by academic lawyers of most persuasions. But socio-legal research has not modified the most basic patterns of legal thinking. It has not much disturbed the jurists.

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the distinction tends to imply misleadingly that sociology of law (unlike legal philosophy) is not concerned with or does not provide general legal theory. In fact, the key issue is: what is the object to be theorised? Is it law as experienced in particular kinds of society or civilization, or law as some kind of pure form detached from social context?

[4] Cf. AM Honoré, 'Groups, Laws and Obedience', in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (2nd ser, Oxford University Press 1973) 1-2.

[5] For a different – and brilliant – way of portraying the strangeness of timeless speculation about time-bound law see William Twining, 'The Great Juristic Bazaar' (1978) 14(3) *J Soc'y Pub Tchrs L* ns 185, though the author rightly insists that his vivid and exotic "dream", including its hilarious vision of the "Legal Philosophers' Circle", is, like all dreams, open to many interpretations.

[6] Joseph W Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465, 467; John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press 1995) 2.

Its value certainly does not depend of whether it has influence in the lawyers' world of doctrinal argument, dispute processing and practical regulatory design, but its long-term security probably does, to some considerable extent. In recent years, in Britain, posts in socio-legal research have been created in law schools, and part of the motivation for this – apart from any intellectual arguments – may have been that SLS is seen in some university environments as a promising focus for attracting external grants to support research. Funding from sources other than the usual state higher education support (for example, from charities, industry or European institutions) is increasingly valued in British universities for its own sake, quite apart from its financial value, as a mark of external recognition and esteem. In such a climate, support for socio-legal research in research-active law schools may make good practical sense. Yet this is a fragile foundation for the development of SLS in law schools, because external funding opportunities can disappear and fashions in academic planning can change. SLS remains vulnerable unless it becomes more clearly integrated with doctrinal law teaching and research. That means that it must engage with the idea of law as doctrine directly.

Insofar as SLS focuses on law it has to compete with juristic studies of law and in some way impose itself upon them. Hans Kelsen's famous claim to relegate sociology of law to the periphery of legal concern as a dependent study should have outlived its relevance, yet it still haunts us.[7] As Kelsen saw, if sociology of law does not find space to address the meaning of law in *something like* a 'juristic sense' – that is, as ideas and doctrine – it has no central concept of law except insofar as it borrows this from lawyers. No one can really believe that a concept such as – to use Donald Black's term[8] – 'governmental social control' captures the full meaning many people attach to the idea of law. So the intellectual situation seems parallel to that in criminology. 'Crime' seems to be what law says it is; and 'law' seems to be what the state and the lawyers say it is.

So where do the social scientists stand in relation to concepts of crime and law? Are they just bystanders waiting for the lawyers to clarify founding concepts of their intellectual field? The way out of this problem is surely to admit that SLS has to engage seriously with theoretical ideas about the nature of law, it has to take *its own stand* theoretically on the nature of law as ideas, practices and experiences; and that theory must take careful account of (but certainly not be limited by) juristic legal theory. Juristic theory provides part of the 'raw' material (indicators of legal experience and legal practice) available for empirical socio-legal theory to work with.

Part of the object of social study of law should be to show how juristic ideas find their meaning in relation to their time and place. It is for social science to study law's time and place and to clarify the nature of law through such study. So, legal ideas (as well as behaviour in legal contexts) must be interpreted sociologically; that is, systematically and empirically as social phenomena. By this means one can ask why legal ideas take the form they do, what social forces drive their development, why some

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[7] Hans Kelsen, *General Theory of Law and State* (A Wedberg tr, Russell & Russell 1961) 175-7.
[8] Donald Black, *The Behavior of Law* (Academic Press 1976).

kinds of legal arguments typically prevail over others in hard cases. It is necessary to show that legal analysis that lacks any sensitivity to what social science can offer is likely to be inadequate and blinkered, because it cannot gain an informed understanding of the currents of socio-political change in which legal problems arise and legal aspirations are formulated.

Socio-legal scholarship (theory and empirical research) has to *invade the law school*. But this is certainly not to turn law schools into social science departments, and not to make legal analysis into sociological jurisprudence (that is, social science on tap to help the lawyers when they feel they need it). It is to make the study of law a great *conversation* that draws on the whole range of types of knowledge necessary to make that conversation an informed one.

This approach could be illustrated in many contexts but two illustrations will have to suffice here. Many lawyers are actively concerned with the numerous kinds of *transnational extension of law* beyond the boundaries of the nation state that are now taking place.[9] The old forms of juristic legal theory often seem inadequate to inform these developments, because so much traditional juristic thought and legal philosophy presupposes the state as the source and guarantee of all law (including international law).[10] But many kinds of social theory are now exploring the various forms of 'the social', 'the political' and 'the economic' that are no longer contained within state boundaries. So too is socio-legal research. We need the mainstream intellectual communities in the law school to recognise just how profound the changes underway now are and to convince these communities that such massive changes in legal regulation and its environment cannot be understood through the 'internal' resources of traditional legal thinking.

The other matter that can conveniently be mentioned here is *multiculturalism* with all its trials and tribulations. Lawyers have begun to rediscover legal pluralism – the phenomenon that legal anthropologists studying faraway lands always lived with but which is increasingly 'coming home' to the old established metropolitan centres of law[11] – that is, especially to the legal systems of western Europe. Legal aspirations are now revealed clearly as rooted in 'culture', however culture is to be defined. What was once taken for granted as law's uniform cultural foundation, and so did not need generally to be mentioned in legal analysis, has now become explicit and problematic.[12] Which cultures provide the home for which legal aspirations and ideas? How can the interplay of cultures through law now be managed?

It seems obvious to most academic and practising lawyers working on questions of law and religion and legal problems of minority groups that these issues

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[9] Roger Cotterrell, 'What is Transnational Law?' (2012) 37 *Law & Social Inquiry* 500.

[10] For especially interesting recent attempts to reshape some of these traditional forms to confront new realities see Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate 2010), and Keith C Culver and Michael Giudici, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010). For a critique of Von Daniels' approach see Cotterrell (n9), 504-8.

[11] Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in La*w (Glasshouse 2005).

[12] Roger Cotterrell, 'The Struggle for Law: Some Dilemmas of Cultural Legality' (2009) 4 *International Journal of Law in Context* 373.

are never 'purely' legal in some positivist sense, but thoroughly socio-legal, so that legal matters can be addressed only by seeing them as deeply immersed in cultural understandings and concerns.[13] As these topics become more pressing interests for lawyers of all kinds, it should be expected that socio-legal research will gain further openings to invade the law school environment.

So, my thinking is much influenced by the intellectual problems of the law school world and also by a sense that the brightest future for SLS may depend at least to a significant extent on forging strong links with this world. In Britain it has long seemed clear that university social science departments, in general, are not very interested in law. Perhaps they are somewhat frightened of it – with its endless technicality and its confident claims to organise and govern the social. Or perhaps they still see it as largely socially insignificant – they think that life goes on without law intruding (as litigation) into most (middle class) people's lives. And where law *does* intrude *forcefully*, especially into the lives of marginalised populations, a special field – criminology – is left to handle that. Or perhaps law is seen by many social scientists as an intellectual no-go area, best avoided. They may think it obvious that in the intellectual division of labour of the modern university and the organisation of modern professions, law has its own disciplinary structures, its own demarcated field – perhaps beyond the social, somewhere in the humanities; so, to study law one goes to law school – a different part of the academy where people grub around with regulations rather than study social life.

Surely these are caricatures of attitudes and intellectual and practical divisions – but they have some residual substance. They imply a range of problems for socio-legal research, which sits uneasily on the institutional borders between the knowledge fields of social science and law. Perhaps there is a degree of insecurity among some lawyers, who sense a social world out there which they really ought to understand better, and also among some social scientists, who might even admit to a little resentment at the great accumulation of professional and political power supporting law financially and giving it prestige as a focus of study and practice.

Socio-legal scholarship can, of course, study these tensions alongside its other agendas. Its insights might help reshape aspects both of law and social science. Sociology of law has been called an intellectual stepchild,[14] on the edge of established disciplines. But the view from the periphery of orthodoxy is often clearer, sharper and wider than from its centre.[15] And government support for socio-legal research has to some extent displaced issues about disciplinary boundaries or competition between law and social sciences, perceived practical usefulness being the sole criterion of the worth of research in most governmental perspectives.

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[13] E.g. Ralph Grillo and others (eds), *Legal Practice and Cultural Diversity* (Ashgate 2009).
[14] Reza Banakar, 'The Identity Crisis of a "Stepchild": Reflections on the Paradigmatic Deficiencies of Sociology of Law' (1998) 81 *Retfaerd* 3.
[15] Cf. Roger Cotterrell, 'Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies', in M Hertogh (ed) *Living Law: Reconsidering Eugen Ehrlich* (Hart 2009) 75.

IV.   The Wide View: Socio-Legal Studies and Social Theory

Now I want to move outside the law school world in the rest of these remarks. When, as an academic lawyer, I first became seriously interested in sociology of law I had had no formal education in sociology. I found that – with sufficient curiosity and motivation – it seemed possible just to begin reading and learning anyway, and not to be afraid of unfamiliar concepts and methods of inquiry. But, when I had the chance, I enrolled for formal study in sociology and was guided in depth by good teachers through key ideas and research traditions and the great classics of social theory – Marx, Weber, Durkheim and others.

Having the opportunity to devote much time as a student to mastering key writings in social theory without any need to orient that study immediately to the needs of legal inquiry (although I continued to teach law full-time while I was a sociology student) was an important confidence-booster. It provided a theoretical and conceptual language to set alongside juristic legal theory. But many socio-legal scholars do not follow that route. They start from a particular knowledge-field – perhaps law or one of the social sciences – and then read themselves beyond it as seems necessary for their particular research projects. Most people do not consciously straddle two or more intellectual disciplines equally. They see their roots as being primarily in one such discipline and, from that base, they explore outwards. So, how important is some kind of systematic exposure to fundamental unifying theory in law and social science? Is there is any ideal recipe for a well-grounded socio-legal awareness in research?

I am sure, at least, that it is not necessary to become a social theorist to engage in SLS. But nor is it enough to stay firmly rooted in lawyers' thought or even perhaps to adopt in practice empirical social science research methods. I do think there is a need for a *strong sensitivity* to empirically-oriented social theory to gain a broad perspective on the nature of social change (and legal change within this) and to have access to frameworks for thinking *in general terms* about the nature of social relations, institutions and structures – that is, about 'the social', the environment law inhabits. Perhaps because of my background I have found myself returning endlessly to the sociological classics: especially to Durkheim for his efforts to build a sociology of morality and the challenges he poses to rethink what meaning might be given to social solidarity today, and how this solidarity might be fostered; and to Weber for his coldly anguished portrayal of capitalism, and of the modern state with its formidable bureaucratic apparatuses and dense layers of technical, instrumental law.

Why go back to this kind of theory? A century has passed since these scholars of genius left us their intellectual legacy. But this temporal distance does not make them irrelevant now; it reveals them as master map-makers of the whole vast social terrain of modernity (in which all modern ideas of law have been formed). They wrote in the youth of social science and so had no professional constraints to inhibit their ambition to explain all the key features of social life as they understood them, seeking the widest sociological perspectives. Classical social theory brings into sharp focus the key features of a modern Western social world that, since this theory was proposed, has undergone the most radical transformations but in relation to which legal and

social change can still usefully be measured. Using this theory as a base marker is a way of gaining deep perspective on the present; a set of frameworks for analysis that (properly supplemented, adapted and critiqued) can still inform contemporary empirical and theoretical research in productive ways.

By contrast, contemporary social theory is in some respects *too close to us* to give this deep perspective. For all its essential insights, it gives competing accounts whose enduring value often cannot be properly judged at present: it includes theoretical approaches that, perhaps dominant for a time in debate, rapidly succeed each other or gain cohorts of combative adherents to defend them against other contenders. Some are destined to be powerful maps of the unfolding future, but some are fated to be, to use a striking term, 'provincial in time'.[16] None of this is to deny in any way the importance of many kinds of recent social theory insofar as, like the classics, these are richly informed through empirical study of social variation. It is only to suggest that the kind of theory necessary to give perspective to SLS is not necessarily always the latest products.[17] Just as law as a field of doctrinal scholarship can appeal to a tradition of juristic theory that stretches back through several centuries and shows a powerful continuity of concerns (and a frequent reinventing of the wheel), so SLS should appeal to a long theoretical tradition that stretches back at least to the founding classics of social theory that established some still fundamental parameters of inquiry.

You may wonder why I have emphasised this so much. Here I offer only a very personal view. I think it is becoming necessary to retrace some steps in social theory and to link that retracing to the contemporary challenges that SLS faces, so as to make its directions most relevant to address current social issues about law. There are many such issues, and the work of the Oxford Centre reflects many of them. But I think that there are now some questions for the agenda that are dauntingly large – somewhat comparable with the vast issues that classic social theory addressed. These are issues about the conditions of social solidarity; the social character, effects and future of capitalism; the possibilities of giving meaning to ideas of community in modern society; the consequences of unchecked economic inequality; the links and contrasts between legal and economic rationality. All of these are major themes in the writings of one or other of the classic theorists Durkheim, Weber and Marx, and are prefigured, developed or reinterpreted in much other social theory. But in the modern development of sociology of law these big themes have often been largely discarded.

The reasons for putting them aside have usually been sound enough. We quite properly recognise that few if any writers today can hope to embrace the full ambitions

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[16] 'What is lastingly important [in intellectual life] can easily be unfashionable in its day…. [I]t is possible to be provincial in time as well as in place': Bryan Magee (1998), *Confessions of a Philosopher: A Journey through Western Philosophy* (Orion 1998) 30, 31. To see this 'provincialism' as a possible defect is not to contradict the claim made earlier that theory should avoid efforts to portray law in some timeless way. There is a 'middle position' – an optimal 'broad view' which good social theory can provide; one that is neither too focused on recent experience nor so generalised as to ignore variation between societies and across history.

[17] The ongoing relevance of classical social theory is signalled by the fact that a major scholarly journal, the *Journal of Classical Sociology*, is devoted to exploring its contemporary interest and significance.

of the classic theorists and it might be foolish to try to emulate the range of their intellectual concerns. We live in an age of necessary specialisation and of precisely defined professionalism; and the age of 'grand narratives' has famously been declared to be over.[18] Yet in fact, remarkably, each of the big issues I have just listed as part of the agenda of classic social theory is now quite rapidly and forcefully pushing itself back on to the contemporary agendas of debate. When, as now, the word 'crisis' is regularly linked to such big themes as the future of capitalism, 'Europe', financial regulation, social cohesion and the nature of democratic politics, it might be suggested that there is a need, if not to invent new grand narratives of social theory, at least to focus existing research methods and conceptual resources on large-scale issues again. In other words, perhaps to develop '*middle-range*' socio-legal theory[19] to shape analyses with *long-range* significance, and to apply and refine that theory in empirical research.

I think that this reorientation is happening increasingly in SLS. For example, the field of regulation and governance which has always been an important focus is becoming very much more so, with a wealth of important research activity and journals devoted specifically to this field. Surely this will continue as pressing questions are addressed, for example about the prospects for effective regulation of national and international economic and financial systems; systems that have been brought to the edge of disaster by regulatory inadequacies, 'white-collar' and corporate criminal activity, obfuscation of transactions through complexity, and intricate forms of corruption. Exciting developments are now underway to rediscover old ambitions for an economic sociology of law[20] to fill the sense of a void left by orthodox economists' thinking about the legal regulation of economic life. Accounts of the imminent 'death of the social' a few years ago[21] will surely be seen as much exaggerated, as it becomes clearer that our most prominent public anxieties relate precisely to the nature of the social and the need to rebuild and strengthen many of its foundations – partly through a wise use of law. Under these conditions the responsibilities and opportunities for SLS in assessing the conditions, limits and consequences of legal intervention can only continue to grow.

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[18] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (G. Bennington and B. Massumi trs, Manchester University Press 1984).

[19] Amanda Perry-Kessaris, 'What Does it Mean to Take a Socio-Legal Approach to International Economic Law?', in A. Perry-Kessaris (ed) *Socio-legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2012) 3; Roger Cotterrell, 'Spectres of Transnationalism: Changing Terrains of Sociology of Law' (2009) 36 *Journal of Law and Society* 481, 494, 499-500.

[20] E.g. Richard Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 *Theory & Society* 1; Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy', in NJ Smelser and R Swedberg (eds) *The Handbook of Economic Sociology* (Princeton University Press 2005) 527; Sabine Frerichs, 'Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law', in C Joerges and J Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart 2011) 65.

[21] Cf. Nikolas Rose, 'The Death of the Social? Re-figuring the Territory of Government' (1996) 25 *Economy and Society* 327.

V.   Postscript (2018)

Six years on, I hold to all of the views expressed in the previous paragraphs. But two things, in particular, should be given more emphasis: one of them because it remains largely implicit in the text; the other because it can be clarified by referring to ideas developed since the paper was written.

The implicit theme is the important distinction between a sociological jurisprudence and a scientific sociology of legal ideas. The paper strongly advocates a sociological study of legal ideas – not in place of but alongside the mainstream of sociology of law which has been centrally (and properly) concerned with the empirical study of behaviour in legal contexts. Sociological study of legal ideas is not just valuable for, but essential to, doctrinal legal scholarship and juristic concerns with law. But this claim has sometimes been wrongly seen as a suggestion that social scientific research on law should be *subordinated* to mainstream doctrinal legal scholarship. In other words, it has been seen as a resurrection of the old intellectually conservative and professionally parochial idea that social scientists can be 'on tap' but not 'on top' within the world of legal scholarship as a whole.[22]

Nothing is further from my view. Sociology of law must be a scientific inquiry in its own right, not dependent on its usefulness for jurists. Within this scientific enterprise should be included the sociological (social scientific) study of legal ideas – that is, the theoretical-empirical study of social sources and effects of these ideas, and of the forces in society that shape them and give them meaning in specific contexts. Social conditions, which sociology can study, make some legal ideas, aspirations and arguments seem meaningful and pertinent, or impractical or irrelevant, in particular times and places but not in others. Equally, some doctrinal legal solutions can seem viable, acceptable or necessary, or else impossible, unwise or 'off the wall', depending on sociologically explicable context. So, social science can illuminate the nature and development of legal ideas and reasoning.

Sociological perspectives can, on this view, do much to clarify juristic debates by revealing their socio-historical contexts; treating law as an aspect or field of social experience, not as something analytically apart from it. They can do this even though social science cannot *become* jurisprudence. It certainly cannot *resolve* normative questions. It remains an enterprise of studying what 'is' (and 'has been', and perhaps 'will be'), not one of prescribing what 'ought' to be. So the sociology of legal ideas is (and must remain) social *science*; committed to disinterested explanation of the social (including legal) world.

But sociological jurisprudence – that is, jurisprudence in general informed by sociological insight – is necessarily a value-focused enterprise. It is not a neutral scientific inquiry about law. It is an enterprise of safeguarding, promoting and

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[22] Cf. the editorial on the first page of the inaugural issue of the *Journal of Law and Society*: 'We wish to refute certain notions regarding the nature of what is commonly called "socio-legal studies". We do not subscribe to the view that the social scientist is to be cast in the role of handmaiden to the lawyer, the lawyer being in the dominant position' (1974) 1 *British Journal of Law and Society* 1.

interpreting a practical *idea* of law as infused with values. In a recent book *Sociological Jurisprudence*[23] I have tried to emphasise the sharp distinction between, on the one hand, a scientific sociology of ideas and, on the other, a value-oriented project of jurisprudence that should draw on the social sciences. This sociologically-oriented jurisprudence should – to use the paper's terms – 'invade the law school'. *Via* such an outlook in jurisprudence, socio-legal studies can be aided in colouring and informing all law school studies. In *Sociological Jurisprudence* I have argued that all jurisprudence must be sociologically informed, in part because of fundamental ongoing contemporary changes in law and its social environment. But this is certainly not to say that all the issues of jurisprudence are sociological, or that jurists should become social scientists, or even that all law teachers should think of themselves as jurists.

When the paper was written in 2012 I saw legal philosophy and socio-legal studies as parallel enterprises in competition; vying to give theoretical guidance for legal studies. I argued that legal philosophy – in the forms developed since the 1960s in the Anglophone world which came to dominate legal theory until relatively recently – is unsuited to this role. This is because of its general lack of serious and substantial concern with the diversity of lawyers' practical engagements with law and the changing nature of legal experience and its contexts.

Indeed, it seems now that most legal professionals (practising and academic) and socio-legal scholars usually attach very little significance to legal philosophy. Surely the reason is that much of it tends to treat 'the empirical' in general, and the specific varying and changing problems of legal practice in particular, as simply uninteresting. So, the paper treated dominant Anglophone legal philosophy as largely irrelevant to the theoretical needs of legal practice and scholarship, and saw socio-legal studies as potentially able to fill this theoretical vacuum. But I have taught jurisprudence throughout my teaching career; I did not want to give up on juristic theory.

What is missing from the paper, and what I have recently sought to make explicit, is the idea of a different kind of theory, distinct from dominant kinds of legal philosophy and also from scientifically committed sociological theory. The missing element is a specifically *juristic* body of theory having different aims from (yet necessarily drawing extensively from) both legal philosophy and legal sociology. When the paper was written, jurisprudence was widely assumed to be merely a synonym for legal philosophy. If jurisprudence was treated as anything else (for example, as jurists' practical speculations rather than philosophers' debates) it was thought to lack intellectual credibility.

But I now think – and the argument is made out in my *Sociological Jurisprudence* book – that jurisprudence, critically committed to certain values that combine to indicate a flexible but demanding *working idea* of law, can be an important conduit between law as juristic practice (an entirely normative enterprise) and socio-legal studies and sociology of law (as scientifically-oriented enterprises of explaining the

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[23] Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2018).

socio-legal world). I have borrowed from Gustav Radbruch's immensely subtle, yet modest and undogmatic juristic theory to sketch a value-oriented working idea of law that, avoiding essentialism, gives a realistic, adaptable template for organising the ever-changing diversity of juristic experience and concerns.[24] A renewal of jurisprudence as deeply receptive to social scientific insight and not confined by the disciplinary protocols and intellectual bounds of philosophy is needed. It offers a rediscovered means for normatively-oriented doctrinal legal analysis (the law school's primary focus) to link theoretically with the rich resources of empirical socio-legal scholarship.

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[24] Gustav Radbruch, 'Legal Philosophy', in J Hall and others (eds) *The Legal Philosophies of Lask, Radbruch and Dabin* (K Wilk tr, Harvard University Press 1950) 43.

Review Article

Who is afraid of jurisprudence?

Alice Schneider[1]

Sociological Jurisprudence: Juristic Thought and Social Inquiry by Roger Cotterrell (Abingdon, Oxon: Routledge, 2018), 256 pages.

The signifier 'jurisprudence' has multiple uses. It can refer to the case law of a particular court (as in, 'the jurisprudence of the European Court of Human Rights'), it can be used as a synonym for legal theory (or a branch thereof, such as in the case of 'General Jurisprudence') and, in its broadest sense, 'jurisprudence' simply means 'legal knowledge and scholarship'. In the context of legal education at Oxford, we use the term both in reference to the tutorial course in legal theory – the one about Hart, Dworkin and others – and as the official name of the undergraduate degree in law, the *BA in Jurisprudence.*

In *Sociological Jurisprudence*, Roger Cotterrell cares about nomenclature. He wishes to reverse what he sees as a 'decline' of jurisprudence (p.5) by motivating an understanding of it as a sociologically informed body of legal knowledge that aims to "serve social needs and social values" (p.45). Such *sociological jurisprudence*, he argues, is a necessary resource for *jurists* – certain kinds of legal scholars who are *committed* to an ideal of law that is informed by values like justice, security, order and solidarity (pp.32, 33, emphasis as in original).

In part one (the book is divided into three parts), Cotterrell sets out an ideal type of the virtuous jurist that he contrasts with the greedy, manipulative image that lawyers tend to have in popular culture. It is the responsibility of jurists, Cotterrell explains, to "guard" (pp.32, 43), "promote" (pp.30, 53, 220), "preserve" (p.43) and "nurture" (p.6) "the well-being of the idea of law" (p.53). A critical reader may be inclined to pause here and wonder whether more normatively committed jurists are truly necessary. After all, law is already a deeply entrenched institution in modern societies and sociologists have long been proclaiming the juridification of modern life.[2] If anything, the ideological power of legal concepts and institutions seems to be

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[2] See, for example, Jürgen Habermas, *The Theory of Communicative Action Volume One: Reason and the Rationalisation of Society* (Beacon Press 1984) 242, 270; Günther Teuber, 'Juridification– Concepts, Aspects, Limits, Solutions' in Günther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (de Gruyter 1987); Jürgen Habermas, 'Law as Medium and Law as Institution', *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1985) 207.

proliferating; Samuel Moyn famously dubs human rights "the last utopia".[3] Viewed in this way, law seems hardly in need of patrons and advocates.

On the matter of why jurists are necessary, Cotterrell offers that "if no one speaks forcefully and influentially for law in this sense but people generally seek only to make use of it for their political or personal ends, history shows a range of risks, ultimately including that of constitutional collapse, as in the Weimar republic"(p.42). That the Weimar republic collapsed because of an absence of committed legal idealists reads like an ambitious claim.[4] But it seems true enough that to be socially valuable, law – like other human artefacts – requires the efforts of those who work to continually update and to improve it. So I am on board with Cotterrell's claim that normatively committed jurists are needed (though, of course, they may already be abundant).

Part one of the book explains in more detail why the jurist's enterprise of working towards said 'idea' of law should be systematised into the multidisciplinary bricolage (p.45) that is "sociological jurisprudence". A central consideration here is that General Jurisprudence, or "contemporary Anglo-American legal philosophy", as Cotterrell refers to it (p.47), is not up to the task. This, we are told, is the case for two reasons: firstly, philosophical concepts of law are too abstract and thin to be practically relevant (p.49), and secondly, they are too normatively inert to promote "an ideal juristic understanding of law" (p.45).

The first point is a familiar socio-legal critique of legal philosophy.[5] Cotterrell laments that contemporary legal theory has developed into a professionalised branch of analytical philosophy that focuses on generalised concepts and universal truths. Thus, in working towards a conceptualisation of law, this discipline is often blind to social and cultural variation in legal phenomena (p.54).

But the claim that legal philosophers do not sufficiently engage with empirical social realities is controversial. As Cotterrell rightly notes, analytical legal philosophers are typically concerned with discovering what is *necessarily*, or, as he prefers to phrase it, *universally* (p.52) true of law; the kinds of features, one might say, that make it so that some phenomenon counts as a 'law' or as a 'legal system' in the first place. The flipside of building a theory on the basis of general features is that one predictably

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[3] Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010).

[4] Normative legal thought seemed to be alive and well in Weimar; for a discussion of the notable Weimar dispute on legal method and legal positivism, see Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre - ein abgeschlosssenes Kapitel der Wissenschaftsgeschichte?* (Franz Steiner Verlag 2001).

[5] That jurisprudence ought to concern itself more with empirical socio-legal insights has been proposed in the works of various scholars. See, for example, Fernanda Pirie, *The Anthropology of Law* (Oxford University Press 2013) 19,20; Nicola Lacey, 'Philosophical Foundations of the Common Law: Social Not Metaphysical' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: 4th Series* (Oxford University Press 2000); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, vol 1 (Cambridge University Press 2009) 22; Denis J Galligan, 'Legal Theory and Empirical Research', *The Oxford Handbook of Empirical Legal Research* (2010); Brian Z Tamanaha, 'The Third Pillar of Jurisprudence: Social Legal Theory' (2015) 56 *William and Mary Law Review* 2236.

skims over variations and idiosyncrasies. For a different field – like socio-legal studies, or the sociological jurisprudence that Cotterrell advocates – it may well be that detailed differences are of particular interest.

What, then, is the relationship between analytical and 'sociological' jurisprudence? Can those academic projects not exist alongside each other? The answer Cotterrell gives in the book is not entirely clear. At one point, he states that it is not his concern "to debate whether a philosophical search for truth […] is appropriate as a philosophical project" (p.53). Indeed, the introductory chapter explicitly recognises that legal theory can have various different disciplinary orientations (p.7). At the same time, significant portions of the book call into question the purpose and utility of formulating 'essentialist' conceptions of law (pp.50 f, 90, 222).

The brunt of this criticism is directed at one branch of legal theory: contemporary legal positivism. Here, the second consideration that supposedly justifies the need for sociological jurisprudence becomes important: positivism, we are told, is not sufficiently evaluative. The book is strongly committed to the view that a concept of law should have an evaluative dimension: the first few chapters tell us that *sociological jurisprudence* is concerned with developing an *idea* of law, but halfway through part one, Cotterrell begins to add, in parenthesis; '*ideal'* to this agenda. But are idea and ideal the same thing? When it comes to law, Cotterrell evidently proposes they are. Or at least that they ought to be, since a non-evaluative conception of law is, in itself, an allegedly purposeless endeavour (p.50).

In advancing an idea (or rather, *ideal*) of law infused with values like justice, security and solidarity, Cotterrell draws inspiration from the works of some of the biggest non-positivist names in Anglophone legal philosophy debates. In this way, *Sociological Jurispudence* presents a surprising allegiance between socio-legal thought and natural law theorists like Radbruch, Dworkin and Fuller.

The word 'surprising' seems apt here because there is an obvious kinship between empirical social sciences and legal positivism. Cotterrell himself points out that socio-legal scholars "usually treat as law what is accepted by lawyers and officials […]" (p.204). This is strikingly reminiscent of H.L.A. Hart's approach to identifying legal rules in reference to the rules of recognition that are accepted by legal officials.[6] My guess is that most socio-legal scholars are casual legal positivists – possibly without being aware of it. Social scientists typically view law as a social construct: it is human societies who came up with the idea of law. Human societies determine what counts as law, and they are the ones who make and change legal rules. 'Legal positivism' nothing but reflects those very same presumptions: it is a handle used to refer to the position that legal validity is ultimately determined entirely by *social sources* and not by

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[6] HLA Hart, *The Concept of Law* (2nd Edition, Clarendon Press 1994) 94, 100.

considerations of merit.[7] This, of course, means that positivists insist on a strict demarcation between an *idea* of law and an *ideal* of law.

Cotterrell happily accepts that social scientists typically aim to scientifically describe and explain legal phenomena, rather than to morally evaluate them (pp.172, 173). Why does he not make the same disciplinary allowances for branches of legal philosophy? Notably, insisting on a distinction between theorising what law *is* and what law *ought to be like* does not imply the claim that the latter question lacks importance. The opposite is the case; separate from their stance on law's nature, many legal positivists pursue evaluative projects that fall into the category of normative jurisprudence.[8]

The treatment of philosophy in general and the harsh critique of legal positivism in particular are perhaps the least convincing parts of the book. In particular, it remains unclear why the usefulness of Cotterrell's sociological jurisprudence should hinge on the merits and caveats of analytical legal philosophy. Is it not possible to view one as seeking thorough engagement with issues outside the other's ken? In one passage, Cotterrell claims that "the intensity, intricacy and assumed cultural importance of arguments around contemporary legal positivists divert attention from other philosophical issues about law" (p. 49). It seems counterintuitive to view ways of theorising law as a zero-sum-game in academic scholarship.

Perhaps Cotterrell's concern is more plausible when it comes to legal education. It is true that analytical jurisprudence continues to have a more established place on the law student's curriculum than other approaches to law. In his lecture *Socio-Legal Studies, Law Schools, and Legal and Social Theory*, published in the present issue of this journal, it becomes apparent that it is primarily with view to a spot on the law student's tightly packed syllabus that analytical legal philosophy and 'sociological jurisprudence' are competitors; "vying to give theoretical guidance for legal studies".[9] To the extent that Cotterrell is concerned with (prospective) legal practitioners, his claims warrant our sympathies; in many instances, contextual sociological knowledge of law will be more practically useful than conceptual insights into law's general nature.

But what about those (prospective) scholars who have a predominantly theoretical or academic interest in law and legal institutions? In his lecture, Cotterrell concedes "[…] this is certainly not to say that all the issues of jurisprudence are

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[7] This way of explicating legal positivism is also referred to as 'the sources thesis'; see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 47.
[8] Consider, for example, H. L. A. Hart's evaluative writing on crime and punishment (HLA Hart and John Gardner, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) , or Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986).
[9] Roger Cotterrell, 'Socio-Legal Studies, Law Schools, and Legal and Social Theory' (2018) 2 *Journal of the Oxford Centre for Socio-Legal Studies* 19, 29.

sociological, or that jurists should become social scientists, or even that all law teachers should think of themselves as jurists".[10] Who then are those 'jurists' for whom legal philosophy and socio-legal studies really are "parallel enterprises in competition"? To justify the call for sociologically-oriented jurisprudence to "invade the law school",[11] the category of 'jurist' requires further delineation – and it may end up being much narrower than parts of *Sociological Jurisprudence* suggest.

The validity of analytical philosophical theorising aside, Cotterrell does make a convincing case for why a focus on empirical social realities may benefit philosophical approaches to law – even on their own terms. Especially the essays contained in part two of the book offer insightful explanations for how salient developments in late modern legal systems like transnationalism, legal pluralism and multiculturalism challenge the archetypal municipal legal system that has traditionally been taken for granted in legal theory and in legal scholarship more generally. One of Cotterrell's examples is 'legal authority', a topic that reappears throughout Part two. Chapters six to nine offer examples for how both descriptive and normative concepts of legal authority can be usefully rethought in sociologically informed ways. Cotterrell emphasises that in practice, the extent to which people accept authority, as well as the particular reasons for which they accept it, are variable and culturally contingent (p.124). It seems to me that sociologically informed answers to the well-posed question of "which phenomena are to be seen as involving authority?" (p.122), have the capacity to speak back to sticky debates in legal philosophy, such as whether how law motivates action is significantly different to a gunman's threat.[12]

Part three develops the jurists' ideal of law in more detail and outlines two main ways in which a sociological perspective may aid the moral evaluation of law. Firstly, sociological theory may provide normative resources for legal evaluation (p.172) and secondly empirical data may help to refine jurists' knowledge of socially held values. To illustrate the first point, chapters 12 and 13 outline how jurists can draw inspiration from Durkheim's treatment of morals, especially the view that whether something counts as morally good depends on whether it promotes "integration and cohesiveness" (p.173) in a given society. Cotterrell illuminates various facets of Durkheim's work and makes a strong case for why Durkheimian concepts like solidarity and moral individualism ought not to be missing from the legal theorist's worktable. A core merit of Durkheim's moral thought, Cotterrell claims, is that is adaptable to culturally specific circumstances.

What remains unexplained is that social theorists like Durkheim are, as Cotterrell insinuates, a more useful source of normative guidance for jurists than moral philosophers (p.172). There seems to be no *prima facie* reason for why philosophical

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[10] Cotterrell (n9), 29.
[11] Cotterrell (n9), 29.
[12] Hart famously proposed this distinction in The Concept of Law (n6), 6, 19. For a critical perspective, see Kenneth M Ehrenberg, 'The Anarchist Official: A Problem for Legal Positivism' (2011) 36 *Australian Journal of Legal Philosophy* 89, 93, 94; Frederick Schauer, 'Was Austin Right after All? On the Role of Sanctions in a Theory of Law' (2010) 23 Ratio Juris 1.

approaches like consequentialism should be less sensitive to socially varied conceptions of the good, or less successful at yielding culturally sensitive conclusions in their application. Perhaps Cotterrell prompts jurists to draw inspiration from the views of social theorists rather moral philosophers because he takes the former to be more likely to be overlooked. As mentioned above, it is a reoccurring claim throughout *Sociological Jurisprudence* that professional philosophy contributes to the marginalisation of sociological thought. If, like me, you are unconvinced that this is true, you might view social theory and moral philosophy as disciplines that both provide valuable resources to those who seek to normatively evaluate law.

Regarding the necessity of sociological insight into social norms and expectations, Cotterrell explains that the jurists' ideal of law must be amenable to culturally varied values. Words like 'justice' and 'security', we are told, are not universals but mere "receptacles" (p.224); they are to be fleshed out by particular societal or group values (p.159). This likely reads as intuitive to socio-legal scholars: it is empirically true that laws tend to be followed more reliably when they are considered legitimate and chime with socially held values[13]. Cotterrell points out that legal scholars and professionals tend to have a rather crude and homogenous image of the societies regulated by law (pp.160, 161), so empirically informed knowledge of social norms is undoubtedly useful for developing more effective regulation.

But in some cases, the claim that law ought to reflect culturally specific values may be controversial from an ethical perspective. What if the society in question happens to harbour racist, homophobic or other discriminatory values – should those be translated into the local conceptions of justice that law promotes? If Cotterrell's answer to this is 'no'– which it is, as the conclusion reveals – then he faces the charge that his own concepts of justice or solidarity have at least some degree of universal meaning – a core that remains stable across cultural and historical difference. To this 'core' extent, Cotterrell's concepts would not be all that different from the "essentialist" thought of philosophers he so heavily criticises. In the final chapter, Cotterrell himself raises the question, "Are these concepts then, despite what I have written earlier, timeless, meaningful beyond any specific references to context, valid in and of themselves?" (p.223).

I wish this consideration had been raised so explicitly before page 223 (the conclusion ends six pages later). Moral relativism is a challenging position to defend, and cavalier claims such as "everyone knows that justice and security are important" (p.224) are unhelpful. My interpretation is that the position Cotterrell occupies mixes universalism and relativism: concepts like justice and solidarity have *some* general meaning and must be *somewhat* amenable to locally held views. This view is intriguing and attractive, but it would be more practically and academically useful if Cotterrell elaborated how, in his view, the boundaries are to be drawn.

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[13] Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006).

As a research programme, 'sociological jurisprudence' draws attention to the ways in which sociological insights can inform and improve conceptions of law. The independent merit of this project is undeniable. But in calling this enterprise "jurisprudence", Cotterrell ostensibly aims to provoke comparison and disagreement with legal philosophers. To what end? Contrary to the claims in the book, I struggle to see that the ambitions of sociological jurisprudence substantively contradict with the analytical philosophical project. The signifier 'jurisprudence' has various uses. Surely, and without defiance, one additional meaning is available for the kind of sociologically informed and normatively committed legal scholarship that Roger Cotterrell advocates.

Brexit and Devolution:
New Frontiers for the UK Union

Stephen Clear[1]

I.   Introduction

As the UK prepares to leave the EU,[2] much has been said about the consequences for open borders and EU freedoms.[3] After nearly five decades of membership,[4] the complexities surrounding divorcing UK laws from those intertwined with the EU are, unsurprisingly, fraught with difficulties. However, beyond Brexit, it is often taken for granted that the UK has enjoyed a 'customs union', and border-free movement, that has endured far beyond the longevity of the EU, insofar as the UK is a nation-of-nations.[5] Whilst, post-1998, the UK's unitary constitutional model of devolution has been fragmented and incremental,[6] the transfer of powers to the regions has been *largely* based on mutual respect.

Brexit has seen these relationships enter new territory, not least over motions passed by the devolved parliaments under the Sewel Convention, otherwise known as Legislative Consent Motions ("**LCM**"s). Operating on a convention basis, such motions are based on the political principle that the UK legislature will not normally pass laws that either directly affect a devolved subject matter; or change the competence, or powers, of a devolved legislature or its ministers, without consent to do so. Although the Supreme Court has stated that the devolved legislatures have no legal right of veto over Brexit,[7] the UK Government, at least at the time, acknowledged that LCMs should be sought from the devolved bodies;[8] particularly, as Brexit would change areas traditionally of devolved competence.[9] However, following refusals by Scotland and some Welsh Assembly Members to grant LCMs, there are now greater political points of contention between the regions and Westminster. In the absence of a political solution, the UK Government has had to shift towards an arbitrary reliance

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[2] Following the referendum facilitated by the European Union Referendum Act 2015.
[3] See: Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia, 2017).
[4] Following the European Union Communities Act 1972 ss.2(1)-(4).
[5] Act of Union with Scotland 1707, and Act of Union with Ireland 1800.
[6] Robert Hazell (ed), 'Devolution and the Future of the Union' (Constitution Unit April 2015) <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/> accessed 30 October 2018; and Aled Griffiths, Stephen Clear and Huw Pritchard, 'Fragmented and Incremental Devolution in the United Kingdom' (2015) 3 JCLC 74 (India).
[7] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[8] UK Parliament, 'Territorial Extent and Application' (Parliament.uk 13 July 2017) <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en11.htm> accessed 30 October 2018.
[9] EU Withdrawal Bill clause 15, formerly 11.

on Westminster's supremacy. In doing so, socio-political evidence advanced by the regions' political parties shows that the rhetoric is changing, with greater and more frequent references to how disregard for their concerns will lead to renewed calls for independence.

Whilst it is appropriate, within a democracy that follows the tenets of the rule of law, to debate where powers should be vested following Brexit, the strain on the UK's unitary constitutional model needs to be addressed. Scholarship has focused on the UK constitution after *Miller*,[10] but recent signals from politicians suggest that the time is now opportune to also reconsider constitutional patriarchy, the model of Westminster sovereignty, and their effect on the UK Union. Given the concerns of Welsh, Scottish and Northern Irish politicians, and the societies they represent, for the UK Union to survive, asymmetrical quasi-federalism is looking increasingly likely post-Brexit.

II. New Frontiers for Devolution

The UK's constitution has been predominantly recognised as political in nature,[11] with the caveat being that what is legally possible may not be practically achievable.[12] Within the context of devolution, the legitimacy of the Scottish Parliament, and Welsh and Northern Irish Assemblies is facilitated via the respective devolution Acts passed by Westminster.[13] Nonetheless, it is through this recognition of the difference between the theoretical *legal possibilities* (i.e. that the UK Parliament *could* shut down the regions' legislatures), compared to the *political reality* of the situation (that doing so would cause turmoil), that Westminster has sought to maintain a working relationship with the devolved administrations. For example, whilst the Scottish Government wanted to pursue an independence referendum, it did not have the legal competence to do so (as matters pertaining to the UK Union are legally reserved).[14] It was through respect for the will of the Scottish people that the UK Government agreed that the Referendum Act could be an exception to the Scottish devolution scheme.[15]

This relationship of mutual political respect has been recognised via LCMs. Whilst such conventions exist politically (and have been recognised within devolution legislation),[16] the agreements are not legally binding. Nor do they limit the sovereign powers of the UK Parliament. Nevertheless, it is rare for the devolved legislatures to refuse Westminster's LCMs, with the Welsh Assembly only refusing such on seven

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[10] Mark Elliot and others (eds) *The UK Constitution after Miller* (Hart Publishing, 2018).
[11] John AG Griffith, 'The Political Constitution' [1979] 42 MLR 1.
[12] Mark Elliot and others (n10), Ch 2.
[13] Scotland Act 1998 (SA1998), Northern Ireland Act 1998, and the Government of Wales Act 1998/2006; which are all subject to parliamentary sovereignty rules.
[14] SA 1998 (n13), sch.5.
[15] Scottish Independence Referendum Act 2013.
[16] See SA1998 (n13), s.28, as amended by Scotland Act 2016 s.2; and Government of Wales Act 2006 s.108, as amended by Wales Act 2017 s.3. For commentary: TH Jones, 'Wales, Devolution and Sovereignty' (2012) 33 Stat.L.R 151.

occasions since 2011,[17] and the Scottish Parliament only doing so on one occasion other than Brexit.[18] In all previous instances, the result of a region refusing a LCM has been a political compromise between the UK Government and the devolved executives to revise either the Bill itself, or policy or practice.

However, in an unprecedented exercise of constitutional power, the paradigm of mutual respect for the regions has been destabilised in the context of Brexit. When the UK Government sought LCMs from the Scottish Parliament and Welsh Assembly for the EU Withdrawal Bill, they did so against the backdrop of Scotland officially voting remain, and the First Minister claiming that a second independence vote was highly likely. Similarly, Wales, whilst officially voting to leave, still had a 47.5% remain vote (1% more than in England).[19] The primary point of contention over granting LCMs was the 'devolution insensitive' clause 15 (formerly 11),[20] which enables Westminster to temporarily retain power over some devolved areas, which have traditionally been subject to EU oversight. The UK Government is of the opinion that temporary control is needed in order to ensure regulatory alignment across the whole of the UK, so as to not become a future barrier to international trade via divergence across the regions. Although the Welsh Assembly voted to pass their LCM, some Assembly Members have remained strongly opposed to the Bill, referring to it as a loss of leadership and a farcical weakening of the Welsh Parliament.[21] By contrast, the Scottish Parliament have refused their LCM, stating that they could not give consent to something that limits the will of the Scottish people, nor limits the powers of their Parliament.[22] Instead the Scottish Parliament has attempted to implement its own Continuity Bill, which, whilst set to be challenged in the Supreme Court, proposes that Brexit will not affect any existing, legally recognised, Scottish powers.[23]

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[17] Welsh Assembly, 'Legislative Consent Motions' (2018)<http://www.assembly.wales/en/bus-home/research/bus-assembly-publications-monitoring-services/bus-lcm_monitor/Pages/bus-lcm_monitor.aspx>accessed 30 October 2018.

[18] In relation to the Welfare Reform Act 2012, with the LCM refusal culminating in Scottish Ministers being given competency in administering universal credit and personal independence payment benefits.

[19] The Electoral Commission, 'EU Referendum Results' (2018) <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 30 October 2018.

[20] Commons Select Committee, 'Constitutionally Insensitive Clause 11' (Parliament.UK, 29 November 2017) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/news-parliament-2017/devolution-clause-11-report-published-17-19/>accessed 30 October 2018.

[21] BBC News, 'Brexit Bill Deal a Significant Achievement' (25 April 2018) <https://www.bbc.co.uk/news/uk-wales-politics-43895350> accessed 30 October 2018.

[22] BBC News, 'Holyrood Refuses Consent for Westminster Brexit Bill' (15 May 2018) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44113864> accessed 30 October 2018.

[23] Scottish Parliament, 'Legal Continuity (Scotland) Bill' (2018) <http://www.parliament.scot/parliamentarybusiness/Bills/107725.aspx> accessed 30 October 2018.

This recent sequence of events has seen the UK Government depart from its traditional approach to LCMs and, given the result of the EU referendum, the traditional approach of negotiating a political solution to Scotland's rejection appears impossible. Whilst refusal to grant a LCM will not legally prevent the passage of the EU Withdrawal Bill, nor stop Brexit, this reliance by Westminster on the legal possibility over and above the political reality of the situation represents a new frontier in devolution history.

The notion of sovereignty, including where power is held, and by whom, has been much debated in recent years.[24] However, politically speaking the EU Referendum never asked the question as to where power should be vested once returned from Brussels. One might question whether, given the strong national identities in both regions, Welsh and Scottish citizens who voted in favour of Brexit would also have voted for such powers to be concentrated in London over and above Cardiff and Edinburgh. As can be seen in the discussions below, such disunity is now being capitalised upon by the nationalist parties and devolved administrations to reflect upon the inequalities amongst the different nations within the UK.

III.   New Paradigms in the Regions' Responses

As a result of these events, the devolved administrations have raised concerns that the UK Government cannot be trusted to respect the devolution settlements, and that Brexit processes are arbitrarily 'rolling back' responsibilities that have long been devolved.[25] Such warnings have also been reflected in the House of Lords, where Lord McNally ironically stated "it is the Conservative and Unionist Party that is overseeing the greatest threat to this Union."[26] Furthermore, concerns about the mutual respect and relationships between Westminster and the regions have been exacerbated by studies suggesting, for example, that 59.9% of voters in the UK prioritise Brexit over the UK Union.[27] However, perhaps the starkest warnings are coming from the regions themselves.

Hours after the EU referendum result, the SNP were calling for a second independence referendum.[28] Similarly Scotland's First Minister claimed that

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[24] For commentary: M Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond…' (2016) 27 K.L.J. 333. For sovereignty within context of devolution: for Scotland: Lord Hope in *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, para 46, and Lord Reed, para 145. For Wales: *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3.

[25] Mark Drakeford, 'Brexit not a vote to roll back devolution' (BBC News, 11 March 2018)<https://www.bbc.co.uk/news/uk-wales-politics-43362420> accessed 30 October 2018.

[26] House of Lords Hansard, 'Scotland: European Union (Withdrawal) Bill, Volume 791' (14 June 2018)<https://hansard.parliament.uk/lords/2018-06-14/debates/8A0EE9B9-5132-4BF5-BB80-ACFD3CFB6407/ScotlandEuropeanUnion(Withdrawal)Bill> accessed 30 October 2018.

[27] Hatty Collier, 'Brexit is more important to voters than keeping the UK together' (Business Insider UK, 18 March 2017)<http://uk.businessinsider.com/poll-brexit-is-more-important-to-voters-than-keeping-the-uk-togerther-2017-3> accessed 30 October 2018.

[28] Kevin McKenna, 'Scottish Nationalists Are Already Salivating Over the Spoils of Brexit' (The Guardian, 18 February 2018)
<https://www.theguardian.com/commentisfree/2018/feb/18/scottish-nationalists-salivating-over-brexit-spoils> accessed 30 October 2018.

Westminster has consistently attempted to 'grab power back' over Brexit, which will not be forgotten in the next independence bid.[29] SNP disdain over Brexit can be reflected in the guerrilla tactics the party has recently used to disrupt proceedings within the House of Commons, such as walking out during Prime Minister's Questions.[30]

Within Westminster, similar statements have been made by Plaid Cymru setting out the Welsh position:

"It is impossible to overstate the seismic implications of Brexit for Wales…We are facing…a vortex of centralisation, a self-affirmation of self-interest in sovereignty by and for Westminster…[M]y party argued in favour of remain…because we believed…small nations like Wales are served better sitting alongside the other…small nations of Europe…as equals. We argued that the inbuilt inequality of the UK would make Wales expendable political collateral to the overriding interests of England…Brexit will be a landmark in the journey Wales takes to our own conclusion…Westminster and its parties will always treat Wales like an adjunct, an afterthought, an inconvenience….All that does is make the case for Welsh political independence."[31]

Whilst Northern Ireland does not currently have an active Parliament at Stormont (following the collapse of the power-sharing agreement),[32] Sinn Féin have similarly called for an independence referendum, claiming that the reunification of Ireland is now needed as 'Brexit exposes (the) undemocratic nature of partition.'[33]

Some may be inclined to dismiss these statements by nationalists as biased, but the cumulative traction of the calls for independence, by all regions, equates to one of the most decisive periods for the UK's future. Whilst the Prime Minister has refused to allow independence referendums during Brexit negotiations, [34] this uncharted move away from seeking political compromise will indubitably lead to future consequences for the UK Union.

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[29] Stewart Ward, 'First Minister says Scotland 'Won't Forget' Today' (The National, 12 June 2018) <http://www.thenational.scot/news/16286036.First_Minister_says_Scotland__won_t_forget__today_as_power_grab_vote_passes/> accessed 30 October 2018.

[30] Anne Perkins, 'SNP promise more guerrilla tactics over Brexit powers' (The Guardian, 14 June 2018)<https://www.theguardian.com/politics/2018/jun/14/snp-promises-more-guerrilla-tactics-over-brexit-powers> accessed 30 October 2018.

[31] Liz Saville Roberts, 'Sewel Convention Volume 643' (House of Commons Hansard 18 June 2018), <https://hansard.parliament.uk/Commons/2018-06-18/debates/1D1AC068-4583-41A9-978E-2678E2EB9901/SewelConvention#contribution-696153D2-6E75-4D8A-A6D0-ACF7B6AEF9A1> accessed 30 October 2018.

[32] BBC News, 'Power-sharing talks collapse at Stormont' (BBC, 14 February 2018)<https://www.bbc.co.uk/news/uk-northern-ireland-politics-43064009> accessed 30 October 2018.

[33] Michelle O'Neill, 'Sinn Féin urges unity referendum within five years' (Irish Times, 1 April 2018)<https://www.irishtimes.com/news/politics/sinn-f%C3%A9in-urges-unity-referendum-within-five-years-1.3447391> accessed 30 October 2018.

[34] Heather Stewart and others, 'Theresa May rejects Nicola Sturgeon's referendum demand' (The Guardian, 16 March 2017)<https://www.theguardian.com/politics/2017/mar/16/theresa-may-rejects-nicola-sturgeons-scottish-referendum-demand> accessed 30 October 2018.

Whilst those consequences are yet to be realised, perhaps a more measured view of what could happen comes from the current Welsh First Minister:

> *"There will need to be change…[T]he UK's constitution has come to the end of its ability to deal with devolution…It's…a question of putting in place a constitution where it is understood what the different levels of government do. Does that mean an end of parliamentary sovereignty? Well I'm afraid it does."*[35]

The Welsh First Minister was discussing federalism prior to the EU referendum result, but the divisiveness of Brexit, and the concerns raised by the regions over perceived 'London-centric power grabs', strengthens such proposals for revising devolution settlements within the UK.

IV.   Concluding Thoughts

Legally, independence from the UK Union cannot be sought without Westminster approval. The UK's unitary constitutional model, and the devolution Acts, make it clear that such matters are reserved for London alone. Furthermore, the Prime Minister has made it explicit that none of the devolved administrations will be granted an independence referendum until after the Brexit negotiations have concluded.

Nonetheless, Brexit has led to new strains on UK devolution relationships. Politically, if there is a will amongst the region's societies to pursue independence it would be difficult for Westminster to morally enforce its supremacy. Whilst the UK Government has now departed from its traditional paradigms over LCMs, the consequences of trying to exert legal sovereignty via constitutional patriarchy, rather than pursue political compromise with Scotland, appears to be serving the ambitions of nationalist political parties in their pursuit of independence.

For the UK Union to survive, asymmetrical quasi-federalism is looking increasingly likely.[36] The post-Brexit challenge for the UK Government will be the territorial distribution of power amongst the devolved regimes, particularly in light of the new powers that will return from Brussels. The need to consider a basic territorial duality of the Whitehall machine is now needed if the UK Union is to endure and prosper post-Brexit.[37] As a minimum, owing to the views of the regions' societies, the UK may inevitably have to move towards an even looser State of Union, particularly as demands to rework traditional London-centred conceptions of the executive grow.

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[35] Mark Elliot, 'Why Carwyn thinks we're moving towards federalism' (IWA, 23 January 2014)<http://www.iwa.wales/click/2014/01/why-carwyn-thinks-were-moving-towards-federalism/> accessed 30 October 2018.

[36] See further: Akash Paun and others, 'Governing after the Referendum' (Institute for Government, 2014)<https://www.instituteforgovernment.org.uk/sites/default/files/publications/Scenarios%20paper%20-%20final%20APJR.pdf> accessed 30 October 2018.

[37] For expanded view: Rick Rawlings, 'A Coalition Government in Westminster' in Jeffrey Jowell and others, *The Changing Constitution* (8th edn OUP 2015) Ch.7.

International Legal Sightseeing

Sofia Stolk[1] and Renske Vos[2]

The phenomenon 'international legal sightseeing' denotes what we call the eventisation of international law.[3] We have become interested in how international law presents itself to 'the public', and in turn in what that public shows up for. We are struck by the participation of international courts and institutions in cultural activities and specifically in the presentation of international law's institutional buildings as tourist attractions in their cities of residence. And we want to understand how international legal sightseeing fits with a managerial turn observed in law where justice becomes a product, citizens become consumers, and demands of transparency, accessibility and openness are translated into 'logos, slogans, tags and mission and vision statements'.[4] International legal sightseeing as a distinctive phenomenon arises out of an exchange between audience and institution. We inquire into three components of this exchange: the spectacular, the everyday and the encounter.

As a spectacle, international law is presented both visually and dramatically. This component sits within a wider trend where 'justice needs to be seen to be done' to meet an appeal for legitimacy, accountability and transparency.[5] The spectacle of international law is as much a literal *seeing* of international law[6] as a dramatic invocation of 'humanity' as international law's main constituency. International justice becomes sexy, glamorous.[7]

In juxtaposition to the spectacular, the everyday component draws attention to the mundane and trivial practices that legal sightseeing entails, both on the part of the institution and the audience. There is a growing interest in the everyday practices of

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[3] For some concrete examples, see www.legalsightseeing.org.

[4] Christopher Hutton, 'Linguistic Landscape, Law and Reflexive Modernity', in Wagner and Sherwin (eds), *Law, Culture and Visual Studies* (Springer 2014).

[5] Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017); Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (CUP 2013); Jillian Dobson, 'Mapping the Transparency Turn at the International Criminal Court', (PhD thesis, VU Amsterdam forthcoming), on file with authors.

[6] Wouter Werner, 'Justice on Screen: A Study on Four Advocacy Documentaries on the ICC' (2016), 29 Leiden Journal of International Law 1043.

[7] Immi Tallgren, 'Stardust of Justice? Celebrity in and by International Law', research paper prepared for the Law and Society Association Annual Meeting 2018, on file with authors; Payam Akhavan, 'Making Human Rights Sexy: Authenticity in Glamorous Times' (*Harvard Human Rights Journal Blog*, 9 November 2012) <http://harvardhrj.com/2012/11/making-human-rights-sexy-authenticity-in-glamorous-times/> accessed on 25 June 2018.

international law and courts.[8] Their work entails more than producing legal documents and decisions but also includes, for example, organising formal and informal network events and marketing and communication activities. Of interest to this article is the daily practice of accommodating visitors. Visitors in turn use the space of legal sightseeing to display any variation of (un)expected practices, from gathering information for study assignments to taking selfies.

As an encounter, legal sightseeing entertains a physical component, where an audience journeys to meet an institution.[9] Institutions attract a multiplicity of audiences with different motivations for visiting an international legal site. Some visitors will attend a hearing with an interest in a specific case, while others might be largely unaware of what the legal work of their destination entails. Nor will all visitors be receptive to the efforts of institutions to communicate with them. We are interested in the (mis)match between intention and perception. To study legal sightseeing is to analyse a material interface between law and culture on which a hotchpotch of legal and non-legal actors engage and where the boundary between law and non-law fades.[10]

By studying the dynamics between visitors and institutions, we aim to get a better grasp of the international legal sightseeing phenomenon. The main question we ask ourselves is how legal sightseeing practices (re)produce and contribute to 'popular' narratives about international law. How do international legal institutions present their story to the public, how do they 'brand' themselves?[11] What do they (aim to) gain from this interaction? What do they hope visitors take away from their visit? And conversely, why do tourists go to such places? How do they experience their visit? How does it affect their view on international law? In this short article, we make a start in further articulating these questions by observing and describing one specific site of international legal sightseeing: the Peace Palace grounds in The Hague.

I.   The Peace Palace: A Legal Institution as Cultural Actor

The Peace Palace is the seat of the International Court of Justice ("**ICJ**") and the Permanent Court of Arbitration. But besides its function as office and courtroom, many other things happen at this site. Recent activities include lectures, concerts,

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[8] See, for example, Ronald Niezen and Maria Sapignoli (eds) *Palaces of Hope: The Anthropology of Global Organizations* (CUP 2017); Tanja Aalberts and Thomas Gammeltoft-Hansen (eds) *The Changing Practices of International Law* (CUP 2018); Jessie Hohmann and Daniel Joyce (eds) *International Law's Objects: Emergence, Encounter and Erasure through Object and Image* (OUP 2018, forthcoming); Lianne Boer and Sofia Stolk (eds), *Backstage Practices of Transnational Law* (Routledge 2019, forthcoming); Sarah-Jane Koulen, '"Opaque Transparency": Ethnographic fieldwork and International Criminal Justice' (2018), paper on file with authors.

[9] See also Renske Vos 'A Walk Along the Rue de la Loi: EU Facades as Front- and Backstage of Transnational Legal Practice' in Boer and Stolk (eds), *Backstage Practices of Transnational Law* (Routledge 2019, forthcoming).

[10] On this (fading) boundary, see Fleur Johns, *Non-Legality in International Law: Unruly Law* (CUP 2013); Luis Eslava, *Local Space, Global Life* (CUP 2015).

[11] Christine Schwöbel-Patel, 'The Rule of Law as Marketing Tool: The International Criminal Court and the Brand of Global Justice' in May and Winchester (eds), *Research Handbook on the Rule of Law* (Edward Elgar 2018).

nightly illuminated tours of the Peace Palace[12], visits from high officials such as UN Secretary General António Guterres, and the filming of a Dutch TV programme 'College Tour', in which Guterres was interviewed by students.[13] During the annual 'Just Peace' festival, the Peace Palace is the setting for many activities celebrating international justice and its institutions, including 'Hague Talks'[14]; an open-air screening of the film 'Land of Mine' in the palace gardens; tours during the 'International Open Day'; and a daily carillon concert playing songs of peace by, among others, Händel and John Lennon. These activities are public in many ways. Events can be attended but can also be followed through live Tweets, live-streaming or recordings on YouTube and Facebook. The content of these activities are a mix between law, history and (popular) culture that is not easily disentangled.

Besides these special events, everyday life around the Peace Palace is partly public too. Tourists gather at the entrance gate to take pictures of the palace itself and to sit on the walls of the exterior garden to watch the site and eat an icecream. On the left, there is a door to the Visitor Centre, where one finds the security entrance to the garden, library, conference hall and palace (the official entrance gate only opens for authorised cars and special occasions), an information desk, a gift shop, and an exhibition space. Downstairs there are toilets, lockers and a wardrobe. Next to the entrance of the visitor centre, one can tie a personal wish for peace around a branch of a Wish Tree.

In the Visitor Centre, a free audio-tour available in ten languages[15] takes you through an exhibition of nine themed panels that display the history, present and future of the Peace Palace and the institutions that reside in its building. In the summer and winter, during recess, the Peace Palace itself as well as its gardens can be visited with a (paid) guided tour. The exhibition in the Visitor Centre and accompanying audio-tour and the dynamics of visual knowledge production at play[16] merit a separate article, but, briefly, phrases as 'impressive books', 'beautiful seals', 'prestigious project', and a 'building as majestic as the idea of world peace' stand out. One line from a video notes that the 'greatest enforcement of this court is public opinion', which is exactly what this exhibition attempts to influence. The information provided to visitors about these institutions in visual and textual forms contributes to the construction and distribution of a specific narrative about what international law is and does. Seemingly 'trivial' practices of institutions, such as providing guided tours and participating in cultural events, communicate and reproduce international law's legitimacy claims. The other side of the coin is the reception and perception by the audiences, to which we now turn.

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[12] 'Past event: Peace Palace by Night' *(Peace Palace)* <https://www.vredespaleis.nl/peace-palace-by-night/?lang=en> accessed 29 October 2018.

[13] 'College Tour with Guterres' *(Peace Palace)* <https://www.vredespaleis.nl/college-tour-with-guterres/?lang=en> accessed 29 October 2018.

[14] 'Hague Talks: Setting Peace and Justice in Motion' *(Hague Talks)* <http://www.haguetalks.com> accessed 29 October 2018.

[15] English, Dutch, French, Spanish, Chinese, Russian, Arabic, Italian, Portuguese and German.

[16] Sandra Ristovska, 'Tackling Visual Knowledge: The Story of the Yale Visual Law Project' (2017) 2 *Journal of the Oxford Centre for Socio-Legal Studies 145.*

II.   Audience

While the Peace Palace is slightly removed from the centre of The Hague, it is a well-visited site featuring on many tourist guides' 'must-see' lists.[17] The website of the municipality even describes it as 'the most photographed building in The Hague'. The Palace is promoted not only as beautiful, but also as important and informative. The Peace Palace square is almost always crowded and many guides and websites advise to book tours well in advance. In sum, the Peace Palace is a popular tourist attraction. But how do visitors evaluate their experiences? And how does the socio-legal interaction take shape?

Visitors arrive in large groups by tour bus or by themselves on foot. Most visitors take a stroll around the small square in front of the palace and walk up to the gate. Almost all visitors take photographs. Only a segment of these visitors ventures inside into the Visitor Centre. Still, the lady at the reception desk estimates about 200000 visitors visit the Visitor Centre each year. Of which she guesses almost half opt for the audio tour or take interest in the exhibition. She further shares that visitors are extremely diverse and that some are actually unaware of the function of the Peace Palace, instead taking it to be a royal palace or a church.

The people that we encounter around the site are similarly diverse: retired couples, families, tour groups, young travellers, and incidental passers-by. A mother and daughter from India are interested to see the place for real that has featured in the news about the India v. Pakistan case before the ICJ. A girl from Moscow walked by this beautiful building by coincidence and stopped to take a photo; she asks what the building is. A young man has arrived too early for his first day at his new job across the road and is killing time by reading the information signs around the square. Two guys visiting from Greece are diligently taking photos of the Wish Tree and praise the audio guide that 'covers all the basics' in a short span of time, which is just as well as they plan to visit two more cities later today. Not a few visitors lament the impossibility of entering the Peace Palace during sessions.

An easy way to gain a quick overview of visitor experiences is to check online reviews. The Peace Palace stars a 4,5 out of 5 on TripAdvisor based on 1100 reviews.[18] A preliminary analysis of the 548 reviews written in English include the words 'beautiful' (201), 'impressive' (66) or 'amazing' (35) but also words as 'important' (58) 'informative' (42) and 'interesting' (147). Another recurring theme concerns references to its 'historic value' (223). And many visitors appreciated the fact that the exhibition was 'free' (149). Only a few negative responses mention that the visit was 'boring' (5), 'not worth it' (3), or 'can be skipped' (2).

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[17] E.g. 'Top 10 must-see van Den Haag' *(Den Haag)* <https://denhaag.com/nl/must-see>; 'Top things to do' *(Lonely Planet)* <https://www.lonelyplanet.com/the-netherlands/the-hague/top-things-to-do/a/poi/360849> both accessed 29 October 2018; Ineke Mahieu and Ad van Gaalen, *The Hague Highlights* (Seapress 2015).

[18] Retrieved from 'Peace Palace' *(TripAdvisor)* <https://www.tripadvisor.nl/Attraction_Review-g188633-d319466-Reviews-Peace_Palace-The_Hague_South_Holland_Province.html> accessed 10 January 2018.

While the building is praised for its beauty, fewer references are made to its legal function. 'Law' is mentioned 77 times. The comment that the palace is interesting for those who are interested in law recurs frequently, both in positive and negative ways. Where a user from Colombo notes that '[n]ot only to the law professionals, all of us should visit this place to understand the dynamics when it comes to states and state relations', a reviewer from London mentions that '[t]his is only worth doing if you have an interest in law and want to see the rooms where the international court of justice sits.'

III.   Concluding Remarks

The interaction between international law and society has always been one that is both crucial and abstract to the project of international justice. Institutions such as the ICJ are endowed with a public function of serving a global community and they claim to foster and create internationally shared norms and values. This only makes sense if the work of these institutions is visible to this community; an ideal that is reflected by the institutions' repeated commitment to transparency, outreach activities, and justice that is 'seen to be done'. On the other hand, sites of international law are places where people work and where the visibility of institutions is produced and enacted through mundane practices and interactions. Areas of legal sightseeing provide a space for encounter between the abstract grand narrative of international law, its physical appearance and its audiences. But how much does the audience get to see, what is offered by the institution, and what is really seen? While this paper cannot provide the answers, it opens up opportunities for socio-legal research that take these interactions between international institutions and the public seriously.[19]

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[19] For similar socio-legal approaches to international institutions, see for example Mikael Madsen, 'Sociological Approaches to International Courts', in Romano et al (eds) *The Oxford Handbook of International Adjudication* (OUP 2015); Sarah Nouwen, 'As You Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2017) 27 *LJIL* 227.

Research Access and Ethics in Myanmar

Kristina Simion[1]

In early 2014, I arrived in Myanmar for a socio-legal study of rule of law intermediaries – parties who mediate, translate, broker or "go-between" – that emerged when foreign organisations flocked to Myanmar to initiate rule of law assistance in the aftermath of the reforms that followed the 2010 elections.[2]

As my research focus had developed in 2011, the prospects of conducting empirical field research in Myanmar were uncertain. Myanmar had been restricted to foreign researchers during military rule,[3] when access to information and reliable sources were difficult to obtain, and research was more commonly conducted by outside observers.[4] And even when transition was underway there was little indication of development activities that focused on the rule of law.

In late 2012, foreign rule of law actors started to conduct assessments to identify Myanmar's rule of law deficits and possible solutions.[5] Thereafter, an increasing number of foreign development actors established a field presence and initiated activities to promote the rule of law. Because of the frantic rule of law activities that were on the rise, and although I was concerned about the ethical dimensions of entering a setting that was already constrained by an abrupt foreign presence, I decided to give fieldwork a try.

While my project started out as a qualitative case study,[6] because of the access I gained, it came to be significantly informed also by ethnographic methods such as accompaniment and observation.[7] My direct interactions with individuals in the rule of law community informed my "thick descriptions" of the social groups that I studied[8], and I was able to observe the way rule of law intermediaries emerged and immersed themselves in that field in a historical moment.

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[2] Monique Skidmore and Trevor Wilson, 'Perspectives on a Transitional Situation' in Nick Cheesman, Monique Skidmore and Trevor Wilson (eds), *Ruling Myanmar: From Cyclone Nargis to National Elections* (ISEAS Publishing 2010).

[3] Andrew Selth, 'Modern Burma Studies: A Survey of the Field' (2010) *Modern Asian Studies* 44, 2.

[4] David I. Steinberg, David, *Burma: the State of Myanmar* (Georgetown University Press 2010).

[5] New Perimeter, Perseus Strategies, and The Jacob Blaustein Institute for the Advancement of Human Rights, 'Myanmar Rule of Law Assessment' (March 2013) <http://viewer.zmags.com/publication/69f423a6#/69f423a6/1>accessed May 15 2013.

[6] Robert K. Yin, *Case Study Research: Design and Methods (*SAGE Publications 2003).

[7] Barbara Kawulich 'Participant Observation as a Data Collection Method' (2005) *Forum: Qualitative Social Research* 6, 2.

[8] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973).

I.   My Role as an "International" Researcher

I approached the research site as an "international" and foreigner. Deliberately, I sought my first contacts amongst foreign practitioners. While my approach could result in an overemphasising of the "international,"[9] I wanted to understand foreign practitioners' experience of working in a new setting that was culturally and linguistically inaccessible and thus how they became reliant on intermediaries. Also, because of my own background as a rule of law practitioner it seemed the most representative point from which to navigate the setting.

My first encounter with the expat community in Yangon was through an invitation by a foreign lawyer to a boat party on Yangon River. Perplexed by such an invitation, I dressed up for what I suspected to be a cultural event or a professional mingle with lawyers. On my arrival at Yangon harbour and the sight of a rusty old boat filled with expats in flip flops and St Patrick's Day attire, I realised my misinterpretation. While attracting some stares throughout the night and feeling very new in town, surrounded by American journalists, Russian oil and gas consultants, French gas entrepreneurs, embassy staff and development practitioners, the boat party did open up access that might otherwise have taken considerable time to gain.

II.   Access to Research Participants

After that initial opening, considerations on how to how to best approach respondents and in what sequence became important. As Myanmar was a new "hot spot" for development I had to consider carefully the possibility that potential respondents would already be constrained by other meetings. Also, being reflexive in my role as a foreign researcher was central. As Denzin and Lincoln suggest, in post-colonial settings qualitative research may carry imperial connotations of power, truth, and knowledge.[10] In Myanmar such complexities are further exacerbated by decades of isolation during military rule which contributed to limited interactions with foreigners.

At the outset I had a strategy of "getting to know" people before I asked for a formal interview. With foreign practitioners this proved a bad idea because they were sometimes reluctant to meet a second time. I did understand the hectic work schedule some maintained but it appeared to me that their reluctance was less about being busy at work and more about feeling as if they had done their part in the exchange, which, certainly, is seldom on equal terms because the researcher has little means to offer something in return. The experience was similar with some local participants; however, many also expressed their gratitude that somebody was studying their country.

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[9] Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars- Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002).

[10] Norman K. Denzin and Yvonna S. Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in Norman K. Denzin and Yvonna S. Lincoln (eds) *The Landscape of Qualitative Research* (SAGE Publications 2008).

My experience of interaction with the rule of law intermediaries that became key participants in my research was slightly different. From her field work, Fujii describes how there was a certain point at which she sensed that she was accepted into the community and thus managed to collect data that would be difficult to obtain.[11] Fujii experienced her "entry" into a more informal space as she was invited for meals and gossiping with the women she was studying. I experienced something similar as I was invited to join travels, dinners, family lunches and pagoda visits.

III.   Qualitative Interviews

The qualitative interviews I conducted as part of my data collection were carried out face-to-face and in English. It could be questioned whether a foreigner without Myanmar language proficiency had the cultural skills to undertake research that involved local participants. My stance was one of behaving ethically, to learn about the field setting, and to convey the perspective of my participants. The opportunities to study Myanmar language that I undertook were limited but provided me with an understanding of how the language is structured, common expressions, and day-to-day basic conversational skills. Fujii argues that a researcher should not refrain from entering a research site because she lacks full language proficiency.[12] Indeed, I am convinced that my lack of language proficiency provided me with a better understanding of the complex situation foreign practitioners face when they enter a new setting. Also as a researcher I had to be mindful about becoming too reliant on the intermediaries, whose role I had set out to study, as they potentially acted as "gatekeepers" for me, as well.[13]

Obtaining personal accounts of intermediaries was to some extent a methodological challenge because they were potentially being asked to reveal "sensitive topics".[14] Generally, they were willing to talk about rule of law project activities and outputs, or even the lack of rule of law in Myanmar under military rule. They were happy to share stories about their childhoods and early political activities. However, as my questions turned to the theme of their current motivations and activities, interviewees were more reluctant to talk. For example, some would not reveal that they worked on several contracts or that they had wishes to be elected for political office.

Also it proved difficult to encourage interviewees to talk about other people, which was a central aspect of my research. I soon understood that it was problematic for me as an "outsider" to ask questions about "insiders." The sensitivities of an

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[11] Lee Ann Fujii, *Killing Neighbors: Webs of Violence in Rwanda* (Cornell University Press 2009).
[12] Lee Ann Fujii, 'Working with interpreters' in Lana Mosley (ed) *Interview research in Political Science* (Cornell University Press 2013).
[13] Rosalind Edwards 'Power and trust: an academic researcher's perspective on working with interpreters as gatekeepers' (2013) *International Journal of Social Research Methodology* 16, 6.
[14] Juliet Corbin and Janice M. Morse 'The unstructured interactive interview: Issues of reciprocity and risks when dealing with sensitive topics' (2003) *Qualitative Inquiry* 9, 335.

approach that included asking about others can be explained by reference to Myanmar's history of intelligence surveillance and culture of informers.[15]

In some cases interviewees revealed that "it felt good to talk" and I understood that they felt as if the interview had enabled them to relieve emotions and worries. This was the case with Hla Aung Shwe[16] who worked for a government department. Since the 2005 move of the capital from Yangon to Nay Pyi Taw, many government employees like Hla Aung Shwe have seen their personal and professional lives increasingly scrutinised. Government employees live in apartment blocks shared with their colleagues from which they travel on buses to and from work every day. The opportunity to meet and talk openly with foreigners is limited. Before Hla Aung Shwe agreed to meet with me I had to contact him several times to assure him that I would come by myself and that our conversation would be anonymous and fully on his conditions. When we met, he was more relaxed and seemed to enjoy sharing stories about work and personal life. After our meeting, he said that it felt good to "talk." Such "therapeutic interviewing" requires an ethical and sensitive listener.[17] Like Dempsey et al, I found that the emotions shared with me by the interviewees enriched my understanding of the complexities of the research setting and their experiences of living and working there.[18]

IV.   The Ethics of Myanmar Research

While field research in Myanmar is possible, researcher engagement has the potential to raise ethical problems that can appear unexpectedly.[19] Scholars have previously described how the risks involved in conducting and participating in research in Myanmar arise fundamentally from its absence during military rule.[20]

As the country initiated political change there was also an influx of foreign researchers. Because of the rapid pace of the transition it may be difficult to fully gauge the risks – the potential to face legal or political consequences – involved for research participants (local, national and international) as well as for the researcher in such a setting.[21]

The general view expressed at the time of my research, was that there was minimal risk involved in conducting research in the country and for research participants as long as the research did not involve sensitive topics, for example, that related to national security, land confiscation, or national minorities. However, despite the current perception of a more permissive political climate, there were sensitivities

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[15] Andrew Selth, 'Burma's Intelligence Apparatus' (1998) *Intelligence and National Security* 13, 4.

[16] I use pseudonyms to protect the identity of my participants.

[17] Marilys Guillemin and Lynn Gillam, 'Ethics, Reflexivity, and "Ethically Important Moments" in Research' (2004) *Qualitative Inquiry* 10, 2.

[18] Laura Dempsey and others, 'Sensitive Interviewing in Qualitative Research' (2016) *Res Nurs Health* 39, 480.

[19] Guillemin and Gillam (n16).

[20] Selth (n3), 2.

[21] Lisa Brooten and Rosalie Metro 'Thinking about Ethics in Burma Research' (2014) *Journal of Burma Studies* 18, 1.

involved for respondents speaking with foreign academics, and the potential to be reprimanded for divulging information. They, as well as I, remained aware of the possibility that the government could, for whatever reason, revert to its past behaviour.[22]

Recent events in the country confirm that transition in Myanmar is a complex matter. The escalation of foreign assisted development aid to Myanmar and its relationship with local actors and reform processes merit in-depth analyses about donor engagements. As much reflection is required for foreign researchers that are engaging in a new research setting.

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[22] Mary P. Callahan, 'Myanmar's Perpetual Junta: Solving the Riddle of the Tatmadaw's Long Reign' (2009) *New Left Review* 60.