

# ASLCH PROGRAM, March 10-11<sup>th</sup> 2014, UVA LAW SCHOOL

## **2014 Conference theme: The Politics of Law and the Humanities: Crisis, Austerity, Instrumentalism**

How will law and the humanities scholarship fare against the pressure of the science and technology paradigm that has now permeated the institutional frameworks of academia? Will it mime the general humanities and, as suggested by the defeatist pomp of many national “crisis reports”, merely retreat to its traditional position as the well-mannered guardian of liberal values? Will law and the humanities scholarship be subsumed under the science paradigm’s instrumental ethos by either taking on aims and objectives sanctioned by government policies or by domesticating its own political potential to address those very same policies? Or can we imagine more salutary alternatives to defeatism and instrumental subsumption?

The terrain is well known. The ongoing economic crisis has engendered a worldwide decline in funding for research in the humanities showing sharp decreases between 2009 and 2012 with funds almost cut in half each year. The global trend is also detectable at national levels, with growing gaps between public investment into STEM subjects and the humanities. But the changes do not merely concern the fiscal prioritization of diminishing resources. The social sciences, including law, are under constant political pressure as lawmakers question the value of curiosity-driven basic research. This pressure is then mirrored at the institutional level of individual law schools emphasizing their vocational remits at the expense of research and scholarship. And this research and scholarship is itself increasingly cast in reformist, practical, and “policy relevant” terms, and directed to issues of perceived topical and regulatory concern.

The implied allegation is simple enough: basic research in the humanities and social sciences is, if not obsolete, then at least a luxury we can’t afford in these times; because it cannot satisfy the more immediate needs of market-driven societies in the current economic climate, it is politically irrelevant.

But can we imagine new ways to claim – or, perhaps, to reclaim – our political relevance? Are we relevant in other, perhaps more radical ways? And if we are, how? Is there a politics that is specific to law and the humanities? Or can we articulate the limits to the conversation about “relevance” in a way accessible to minds focused on instrumentality? How might we respond to our critics, or do we ignore them?

**This conference was made possible by the generous support of the University of Virginia School of Law. Special thanks to Dean Paul Mahoney and Vice Dean George Geis.**

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**PLENARY**

**PANELS, SESSIONS AND ROUNDTABLES**

**March 10**

**8:30-10:15**

**1.1. Session: Histories and Stories 1**

**Room: WB102**

Chair & Discussant: Kathryn Temple  
Georgetown University

Panelists: Alexandra Havrylyshyn  
UC Berkeley  
*Slaves to our Sovereign?*

In sixteenth-century France, how was a subject's servitude to a king conceived to be any different from slavery? Possible answers to this question are provided by Jean Bodin's reflections on slavery and citizenship in *Les six Livres de la République* (1583). For Bodin and his contemporaries, such as François Hotman (1573) and Etienne de la Boëtie (1570), what did it mean to be free under an absolute monarch? What spectrum did these theorists draw between the condition of freedom and the status of slave? How did Bodin channel a markedly anti-slavery sentiment (seemingly ahead of its heyday), in order to defend his overarching theory that sovereignty should be unified, perpetual and absolute? A sharper understanding of pre-revolutionary conceptions of personal liberty can illuminate modern declarations of rights and the

persistence of national sovereignty even in a world that seeks to put human rights above all else.

Kathryn Heard  
UC Berkeley

*John Locke's Reason: Or, Parsing the Power of Secular Conduct*

The purpose of this paper is twofold: first, to assess how Locke constructs an expansive system of secular liberalism in early modernity by appealing to 'the genuine reason of mankind,' and second, to examine if – and how – this appeal imparts a particular subjectivity to the religious constituents in such a system. It begins by engaging with Locke's determination that reason derives from the Protestant practice of Christianity, a religion that encourages its practitioners to strengthen their spiritual connections with God by forgoing outwardly displays of piety. Devout individuals can only be considered properly rational and thus properly governable, he argues, once the privatization of religious belief is achieved. This paper suggests that Locke's reliance on a Protestant understanding of reason imbues his vision of secular liberal governance with a proto-Foucaultian mien – a mien that ultimately holds full legal and political representation hostage to the reduction of tangible, non-Protestant religious pluralism.

Zach Reyna  
Johns Hopkins University

*Law's Materiality: Aquinas, Natural Law, and the New Materialisms*

Modern legal theory and law practices tend to relegate material things—e.g. trees, desks, guns, stones, DNA, clouds, etc.—to the status of \*resources\* to be used, controlled, and molded, but not considered as potential \*sources\* of law or active co-participants in law's pursuit of justice. This tendency makes it difficult for modern Western state law to grapple with an array of jurisprudential situations from environmental law and indigenous land ownership, to property law more generally and criminal law questions of liability and responsibility in an age when human intentionality and exceptionalism have repeatedly been tried and found wanting amidst a host of non-human actors and processes. In this paper, I turn to natural law theory—which I suggest is one of the oldest sustained meditations on the imbrications between nature and law; physis and nomos; matter and language; determinate, inert nature and moral freedom—as a source implicit, if sometimes overlooked, in Western jurisprudential traditions for challenging this assumption that law is the exclusive product of willing or positing: a linguistic activity reserved for gods and humans, in contrast to dull, passive, and mute materiality. With help from recent work done in the new materialisms and critical legal studies of law, space and aesthetics, I reappropriate Aquinas, arguing that John Finnis, Robert George, and others of the new natural law camp remain too wedded to the assumption of materiality's passivity (what Finnis praises as fidelity to Hume's 'true and significant' is-ought distinction), thus obscuring Aquinas's radical potential for thinking a 'law of things' sourced in lively materiality. Drawing on Mikhail Bakhtin, William James, and contemporary Thomistic scholarship amongst others, I suggest that Aquinas's dialogic method, fourfold definition of law, and radical empiricism make him a fit place to think about materiality's relationship to law as both source and active co-participant, and to work through some sticky spots in

contemporary environmental jurisprudence that still wonders if trees should have standing.

## 1.2 Session: The Stage and the Screen 1

Room: WB103

Chair & Discussant: Annette Houlihan  
St Thomas University

Panelists: Susan Heinzelman  
University of Texas, Austin

### *Interpellation and Equivocation in King Lear*

With its relentless insistence on public articulations of love and loyalty, *King Lear* offers audiences a dramatic rendition of contemporary concerns around state security, political authority and individual conscience. Specifically, the opening scene of the play, where Lear demands his daughters confess their love, models how the state both brings identity into being and also forces the subject to acknowledge that identity publicly as if it were an act of individual will (interpellation). I employ the concept of 'equivocation' to capture both the specific quality of Cordelia's resistance to Lear's demands and the multiple forms of strategic resistance to political authority manifest in the play. Invoking equivocation as a form of resistance situates the play historically—that is, the Gunpowder Plot of 1605 and European religious extremism—as well as in the post-9/11 world, political and moral orders have become irredeemably blurred by the rhetoric of the war on terror.

Sarah Higinbotham  
Georgia State University

### *Stocking Kent: Legal Violence in King Lear*

When Albany and Regan stock Kent in Shakespeare's tragedy *King Lear*, they publicly and visually demonstrate their capacity to immobilize and shame, a distinct political 'theatricality' that the early modern legal historian Sarah Covington argues 'functioned as a projection of the state's unified power,' a 'street performance,' both 'comic and pathetic' (Covington 95, 98-99). What Nietzsche taught Foucault -- that power is not handed down as ordained, transcendentally-based genealogical descent, but by war -- Lear sees in a single moment on the stage, as his political heirs project their power against his servant. It is 'performed' for him. Does Lear overstate the case when he weighs Kent's punishment against the offense, and declares the scales of justice are imbalanced, the punishment is 'worse than murder'? While Lear seems to grow increasingly irrational beginning with the stocking scene, the king's insight into 'justice,' a justice dependent upon legal violence, actually grows more lucid and coherent. At the ASLCH 2014 conference, I propose to present 17th century visual images of stocking in order to read Kent's stocking scene as a significant moment of legal violence not just in the play, but within the early modern culture of legal violence.

Donn Scheidt  
High Point University

### *Shakespeare's Macbeth in Judicial Decisionmaking: A Politics of Humanities in Law*

Colorado v. Connelly (479 U.S. 157 (1986)) holds that police coercion is a necessary element of an involuntary confession. In his partial concurrence, Justice Stevens compares the involuntary nature of the psychotic defendant's confessions to those produced by Lady Macbeth's nightmares, quoting relevant passages from Shakespeare's Macbeth. Implicitly, he draws on the principle as well as the scene from Macbeth – that the use of the defendant's confessions as evidence (as with Lady Macbeth's) is fair and not a denial of due process, using Macbeth as a kind of precedent, albeit literary rather than legal. What passages from Macbeth do federal-level judicial opinions turn to and how are these references used within the opinions? What are the politics of this particular practice of incorporating the humanities in law? Does quoting Macbeth make for good law or not? To what extent is this a practice that makes the humanities relevant to law?

**1.3 Roundtable: What's Going Right: Practices We Like in a Changing Environment Room:116**

Chair & Discussant: Susan Sterett  
University of Denver

Challenges for higher education can make us think either we support the sciences or we support the humanities. However, rapid change and stress also open possibilities for collaboration and innovative conceptualization of one's research, teaching, and presentation of both. Improving our work is likely to mean improving our practices of inclusion. Many students don't see sharp divisions as useful in developing their love of learning. Universities face pressure to address problems that impede the success of students and faculty. Many law schools are rethinking what they do and how best to work within the university. Students and faculty crowdsource ideas, problems, and successes. In that spirit, this panel will present good ideas and invite the audience to do the same. What does a good job look like to you?

Panelists: Renee Cramer  
Drake University

Anna Maria Marshall  
University of Illinois

**1.4 Session: The Lawyer**

**Room: WB104**

Chair & Discussant: Matthew Anderson  
University of New England

Panelists: Shelby Bell  
University of Minnesota

*Thinking Like a Lawyer: Hermeneutics of 'Legal Community'*  
How could Justice Holmes' speech, entitled 'The Path of the Law,' delivered in 1897 influence law today? This paper analyzes Justice Holmes speech, and its uptake in later legal thinking, to answer this question. Holmes' speech is a key text in U.S. jurisprudence. Thus, it is the starting point for this paper's analysis of the history of legal hermeneutics. This paper analyzes Holmes' speech for its role in the development of U.S. legal thought. Michael Leff's theory of

hermeneutical rhetoric asserted that the reading strategies of communities are key to the development of political rhetoric. This paper traces the rhetorical history of Justice Holmes speech through the writings of later U.S. legal thinkers as an example of Leff's theory. This paper contributes to scholarship articulating rhetoric and law, to studies on the history of jurisprudence, and explains how a culture of 'legal thinking' can be maintained across time and space.

John Bliss  
UC Berkeley

*Public Interest Drift in Law Schools: A Qualitative Study*

Sociologists and legal scholars who have examined American law schools describe a pervasive 'public interest drift,' which refers to the process by which law students drift away from public interest career goals and toward corporate law and other private sector career goals. Research suggests that, contrary to conventional wisdom, drift has only a minor correlation to income potential and no significant correlation to student debt. Thus, a more nuanced, disaggregated, and qualitative account of drift is required. This paper draws on interviews and a novel identity mapping technique to examine the constitutive effects of legal education and legal epistemology on law students as they navigate the job-search process. Drawing on Elizabeth Mertz's observation that legal discourse frames conflict stories in ways that are acontextual, amoral, and unemotional, I argue that legal education facilitates drift by encouraging students to view their professional roles as distant and instrumental.

Kirsten Davis  
Stetson University

*The Lawyer, Speaking: Rhetorical Constructions of Lawyer Identity in First Amendment Cases*

The 'Lawyer' is historically an identity-contestation site. The Lawyer has close ties to democracy and justice and also to free markets and business. She is simultaneously expected to be a truthful officer of the court and a loyal confidant for her client. In both popular and legal imaginations, he embodies conflicting character traits—shrewdness and compassion, self-interest and self-sacrifice, trustworthiness and deception, commitment to public service and motivated by profit. This conflict is textually played out in United States Supreme Court cases considering the degree to which the Lawyer's freedom of expression can be regulated under the First Amendment. In these cases, the Court provides a terministic screen for the Lawyer's identity by naming and describing his characteristics, habits, and skills. The purpose of this paper is to explore how the United States Supreme Court rhetorically constructs the Lawyer in its First Amendment cases.

Robert Raper  
Northern Kentucky University

*Herman Melville – Literary Lawyer: Incorporating Moby-Dick Into The Legal Writing Classroom*

Herman Melville has been called an accidental legal historian and his works have been among the canon for Law and Literature studies since scholarship

began in that interdisciplinary field. However, the use of Herman Melville's literary texts, in particular Moby-Dick, to illustrate elements of legal writing has never been discussed. This paper fills that void. This study will argue that certain chapters in Moby-Dick engage in principles of legal writing and that using literature to study elements of legal writing will assist students in learning its intricacies. In the chapters, The Advocate and The Affidavit, Melville engages in legal argument and perfectly utilizes persuasive authority, other proofs, and counter-argument in defense of the whaling industry. In the chapter, Fast-Fish, Loose-Fish, Melville effectively illustrates the use of precedent and employs the elements of statutory interpretation. From the negotiations in whaling pay in the chapter, The Ship, Melville provides advice for contract drafting. As a classic American novel, Herman Melville's Moby-Dick is well known and familiar to students who are entering the unfamiliar terrain of a legal writing course. The novel can provide students another source for studying the elements of legal writing and compliment the typical sources utilized in legal writing courses.

### 1.5 Session: Culture

Room: WB105

Chair & Discussant: Yael Machtinger  
York University

#### Panelists:

Ariel Bendor  
Bar-Ilan University, Israel

*Law Meets Painting: On the Universal Ambivalence Towards Prostitution*

The paper - which was jointly coauthored by Shulamit Almog and me - argues that both art and law reflect ambivalence and ethical incoherence with regard to prostitution. The choice of Picasso's Les Femmes d'Alger (O. J. R. M.) as representative of cultural incoherence with regard to prostitution stems from the sui-generis status of this work in the history of modern art. Of the various views evoked by the painting, four are especially prominent, moralizing, normalizing, victimizing and patheticizing. Prostitution is governed by many legal systems, which differ significantly from each other. The examination of various legal systems shows that none of them is fully coherent in its attitude toward prostitution. Each of the legal systems expresses a simultaneous existence of different perceptions and ideologies, which are similar to those evoked by the painting. It appears that law is unable to avoid the deeply rooted cultural incongruity linked to prostitution, that stays apparent even in countries that allegedly declare unambiguous standing towards it.

Nomi Dave  
University of Virginia

*Regimes of Discipline, Regimes of Pleasure: Music and Self-Censorship in Guinea*

This paper examines the role of self-regulation and discipline in authoritarian regimes, through a case-study of musical and political voice in Guinea. Voice is arguably the most powerful metaphor in contemporary human rights discourse, which frames speaking out as an expression of individual agency. From courtroom testimony to public and private speech to music, voice is often seen



as the most direct representation of individual subjectivity, and the most important vehicle to ensure justice. Yet, given this discourse, how can we understand those who choose not to speak out? In postcolonial Guinea, musicians have long practiced self-censorship as they mute their public critiques in deference to the state. As I argue, this stance results not from state coercion but rather from the collective, sensorial pleasures of praise-singing. This paper thus emphasizes aesthetics, pleasure and the senses in understanding authoritarian rule, and local understandings of power and rights, in Guinea.

Lucero Ibarra Rojas  
Universita degli Studi di Milano, Italy

*Managing Rights, Breaking Up Culture: Cultural Rights in Mexican Public Administration*

The notion of cultural rights can only make sense if we understand that the state and its law have a significant role in the way cultures are experienced in the public sphere. Indeed cultural rights sustain the basic assertion that it is not correct (or right) that, in a multicultural context, a state should favor some cultural trades in detriment of others. This assertion comes to states like México with a change in political paradigms regarding indigenous peoples; a turn from the integrationist paradigm, which aimed to disappearance, and towards the pluralist paradigm, which in turn expresses a desire to protect and develop indigenous cultures. But this is easier said than done, firstly, because rather than being an abstract entity, the state is composed by very real persons with specific backgrounds. While this fact gives a tendency to the state that can hardly be avoided and is often denounced, it is the habitus of public administration which poses a most invisible but effective barrier to the practice of cultural rights. By looking at the way the province of Michoacán, México, has dealt with a particular project of promotion of intellectual property (collective trademarks) for indigenous communities, through three different administrations, I intend to show the way cultural rights fall fast from the hierarchies' ladder of public administrators, in order to make room for other concerns. These concerns express the ways people understand that power can be looked for and kept; and although much less noble and therefore less talked of, are fundamental to the public administration field, and guide the actions of the persons in it. In this context, what can be the significance of cultural rights for indigenous peoples against the habitus of the state?

Jeffrey Kahn  
Southern Methodist University

*The Law is a Causeway: Metaphor and the Rule of Law in Russia*

The value of law is often expressed with a metaphor, as a sword for the strong or a shield for the weak. But when law is conceived so instrumentally, it has little but instrumental value, especially in societies with a poor history of respect for the rule of law. There is much in Russian law that rule-of-law scholars would recognize and approve. But very few would consider Russia to be a rule-of-law state. Law there remains an instrument, a problem that traditional definitions of the rule of law obscure, hindering efforts by domestic and foreign sources to strengthen its role in Russian governance and civil society. In this essay, I use a different, non-instrumental metaphor from Robert Bolt's famous play, *A Man From All Seasons*, to examine a haunting case of reprisals against scholars

whom the state itself asked to examine a particularly controversial Russian case: the second conviction of oil baron Mikhail Khodorkovsky. When the scholars (among whom I was the only American) reached the ‘wrong’ conclusions, law as weapon – the very failure of Russian law at the heart of their criticisms – was turned against them.

### **1.6 Panel: The Corporation in Law and Culture**

**Room: WB119**

Chair & Discussant: Brandon Garrett  
University of Virginia

Corporations not only play powerful roles in the modern economy, but they litigate constitutional claims, and both in the courtroom and in society, they may claim not only legal but also cultural and moral status. Each of the panelists will present work examining the changing status of corporations in law and culture. Papers will explore the standing of corporations to assert constitutional rights, ranging from speech rights to criminal procedure rights; how or whether a corporation can assert rights of conscience; and the emergence of the corporation in 18th and 19th century in literature. We will discuss common themes in legal, literary, and historical treatment of arguments about the nature and status of corporations, including shifting descriptions of the public and private purposes corporations serve.

Panelists: Brandon Garrett  
University of Virginia

Are corporations “persons” with constitutional rights? The Supreme Court has famously avoided the issue, while nevertheless recognizing that corporations and organizations may litigate a range of constitutional rights. In this Article, I part company with many cogent critics who call the Court’s rulings ad hoc and unprincipled, and also with those who conversely argue that in *Citizens United*, the Court recognized corporations as a “real entity.” Instead, I argue the Court’s approach is grounded in the concept of standing, asking this question: does the organization effectively represent the interests of individuals in protecting a given constitutional right? Conceived as a question of standing, rather than whether an organization “has” a constitutional right, a judge addresses standing but then conducts constitutional analysis as with an individual litigant. Finally, I explore how standing may not be appropriate if corporate constitutional rights are in tension with individual rights.

James Nelson  
Columbia Law School

Do business corporations have free exercise rights? This question has become critically important in recent challenges to the Affordable Care Act’s so-called “contraception mandate.” A host of businesses selling ordinary goods and services claim that they cannot be compelled to provide employees with insurance that covers contraception. Courts have divided over whether corporations can assert rights of conscience, and existing theoretical accounts fail to provide guidance on this question. This paper offers a new normative framework for evaluating corporate claims of conscience. Drawing on theories of conscience and collective rights, it develops a “social theory” of conscience

that explains how individual moral identity is formed within associations and, consequently, how the social structure of those associations can support institutional claims for legal exemptions. The social theory of conscience has direct implications for free exercise doctrine. For an institution to assert a valid claim, it must be a constitutive community, such that individual members regard the collective as intimately tied to their sense of self. Some institutions, like churches and other religious organizations, fit comfortably in this category. But the legal, social, and economic norms that govern modern business practice pervasively undermine the formation of tight personal connections to for-profit corporations and thereby erode the normative basis for institutional legal exemptions. Free exercise doctrine should therefore resist corporate claims to exemptions from the law.

John O'Brien  
University of Virginia, Department of English

The famous emblem that Josiah Wedgwood's studio designed to serve as a propaganda piece for the first wave of abolitionist writing in the 1780s, the figure of a shackled black man appealing "Am I not a Man and a Brother?" was widely reproduced in Britain and the early United States, and continued to be circulated for decades thereafter. In this paper, I understand the emblem as a corporate logo, the seal for the Society for Effecting the Abolition of the Slave Trade. I relate it first to the question of corporate seals and the concept of the corporation more generally, and then specifically to the legal definition of "man"--the emblem's key-word--in the period of the first abolitionist movement.

### **1.7 Session: International and Transnational Criminal Law**

**Room: WB121**

Chair: Sara Kendall  
Leiden University, Netherlands

Panelists: Kerstin Carlson  
American University of Paris, France  
*'Reconciled' Narratives: Reading Reconciliation and Forgiveness at the ICTY*  
Reconciliation among the former warring peoples in the Balkans is one of the central stated goals of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Tribunal has recorded 20 guilty pleas thus far through the use of a form of 'plea bargaining,' a procedure borrowed from Anglo-American law that usually involves the mitigation of charges (and concordantly sentence length) against the defendant in exchange for his/her admission of guilt. Guilty pleas are argued to advance the cause of reconciliation in a variety of ways, among them access to information (through defendant cooperation and 'truth telling'), and increased Tribunal legitimacy. Most guilty pleas are accompanied by a statement from the Defendant at his/her sentencing hearing before the Tribunal. These statements are highlighted by the ICTY as a major reconciliatory mechanism in the Balkans. This paper considers the question of the ICTY's impact on reconciliation by considering the process that surrounds plea bargains at the ICTY and the 'reconciliatory' statements that it generates. In particular, the paper considers and contrasts the statements of 'remorse'

generated through the plea bargain processes of the ICTY against the facts of those cases and the discussion of the remorse by the tribunal. Beginning with a contrasting consideration of two former political leaders, Biljana Plavšić and Milan Babić, the paper argues that the ICTY 'got it backwards' in its celebration of Plavšić and grueling punishment of Babić, demonstrating how the ICTY seeks to fit 'remorse' into legal categories of its own construction, and how these legal categories impede the reconciliation that the ICTY cites as a goal.

Rana Jaleel  
Columbia Law School

*What is the Wrong of Trafficking?*

For something that everyone agrees must be eradicated, there has been no principled theorization of what the wrong of human trafficking is, nor how the socio-legal shifts in its meaning impact the apprehension of its harms. I theorize the wrong of human trafficking by analyzing the discrepancies and continuities between policy and the litigation brought in its name. From the Bush-era focus on sex trafficking to Obama's 'modern slavery,' the criminal paradigm, which favors individual prosecutions, endures. I argue that recent EEOC Title VII litigation shows that trafficking is wrong because it is implicated in a global regulatory practice of racism that marks individuals, groups, and regions as undemocratic. This conceptualization illuminates how attention to trafficking as a locus of oppression is viewed as evidence of national freedom. While trafficking is a global problem, the countries deemed backwards because of it are gendered and racialized along historical and economic faultlines

Florence Seow  
Kanagawa University, Japan

*International Law and the Disaster-Marginalisation Correlation*

Social scientists have observed that marginalised people are at greater risk of incurring disaster-related damage. The disaster-marginalisation correlation raises questions of distributive justice, and can be perceived of in terms of the concept of the subaltern: law is a tool of 'social mobility' that may be used by subalterns to reduce their vulnerability to disaster. Developments in international law demonstrate that disaster is increasingly becoming a concern of the international community; however, the disaster-marginalisation correlation is not easily dealt with under state-centric international law, even in the ostensibly humanist fields of international human rights law (IHRL) and the emerging international disaster law (IDL). Employing an approach informed by subaltern methods and perspectives, this paper evaluates the fairness of international law that is applicable to disaster (specifically, instruments and mechanisms of IDL and IHRL) by considering the law's capacity to be used by marginalised people to address their disaster-related vulnerabilities.

**1.8 Session: IP, History, Heritage**

**Room: WB127**

Chair & Discussant: Brian Frye  
University of Kentucky

Panelists: Matthew Birkhold

Princeton University

*Fan Fiction & Adaptation Rights around 1800*

Fan fiction is often considered a modern phenomenon. But fan fiction is not new – nor are the legal and aesthetic issues it raises. Reminiscent of fan fiction today, 18th-century readers regularly wrote stories using popular characters invented by other authors. This paper investigates the customary norms and proprietary interests that influenced the production of fan fiction in Germany around 1800. Situated between the decline of the ineffectual privilege-system and the contested rise of copyright, 18th-century Germany is unique in Europe for lacking clear legal rules concerning literary production, resulting in a widely-accepted assumption that the lack of legal rules meant that there were no rules regulating literary borrowing. Scholarship has largely ignored extralegal practices vis-à-vis literary borrowings around 1800. What customary rules regulated literary adaptations around 1800? How did authors assert control over their literary characters? What can the history of fan fiction teach us about regulating fan fiction today?

Jenny Braun

University of Virginia

*Trans-Domestic Property and the Genealogy of U.S. Authorship*

During eighteenth-century England's literary property debates (that gave rise to modern copyright), printers, booksellers, authors, and jurists probed at the meaning of originality. Their metaphors—largely focused on the landed estate—described the origins of both property and government and then defended owner's rights in a manner that clearly engaged with the sources of property in North America. My work tracks how England's copyright terms tie to settler-colonial anxieties during the Imperial Crisis, and this paper looks at how England's literary property metaphors then circulated in early national U.S. literature. Particularly, this paper examines Washington Irving's treatment of domestic relations and property law to suggest colonial and post-colonial anxieties about fatherhood, implicating the parental role in shaping the marketplace of both literary originality and national identity.

Rebecca Curtin

Suffolk University

*Hackers and Humanists: Transactions and the Evolution of Copyright*

This paper is a work of legal history that examines the way in which two transactions have influenced copyright culture and informed copyright policy: free software licenses in our own time and contracts for authors' rights starting in the sixteenth century. Nascent contracts that gave authors some rights in their work aided in the rise of the idea of the author as the sole creator, and eventually the copyright holder, of literary works in print. Free software licenses have been at the forefront of a revolution turning in virtually the opposite direction, giving the user a role in continuing the life of an expressive work. The analogy between the contracts for authors' rights and free software licenses over time suggests that we are in the midst of a rise of the collaborative user every bit as important to the culture of copyright as was the rise of the author.

Paolo Farah  
Edge Hill University, UK

*Intellectual Property Rights and Intangible Cultural Heritage*

The increasing sensibility regarding cultural heritage provides momentum to better define a legal framework for the protection of these peculiar intangible goods. It is indeed fundamental to ascertain whether the current intellectual property rights (IPRs) regime represents an adequate model of protection vis-à-vis intangible cultural heritage. As a matter of fact, a comparison of the rationales for these two domains of legal protection is scarcely attainable as specific relevance must be given to topical concerns of the countries implicated. These concerns are pivotal for elaborating the needed legal protection. Our analysis begins framing the crucial issues detected in literature regarding intangible cultural heritage and then proceeds to investigate the ways in which the actual IPRs regime grants protection to intangible goods. Our evaluation supports the idea that without a many-faceted remodeling, current intellectual property laws represent an unsatisfactory footing to protect intangible cultural heritage, as one can infer from the inefficacy of IPRs under the patent and copyright regimes to ensure protection of cultural heritage, besides falling short of fostering an apt comprehensive social policy.

**1.9 Panel: Bodies in Pain: Spatial Violence and Legal Personhood in 20th Century Literature**  
**Room: WB129**

Chair & Discussant: Ravit Reichman  
Brown University

This panel contends with varying conceptions of torture, trauma, and pain to address geographies of violence. Each paper analyzes issues of personhood and the ways in which humanity can be degraded and later recuperated through imaginative fiction. The panel provides both temporal and global breadth, with case studies from turn-of-the-century Chicago, sites of violence in the 1970s Southern Cone, and the marginalized space of the postwar American Indian reservation. Can the dehumanization of the American emigrant reflect upon bodies traumatized by war and political violence across time and space? Perhaps, the panel suggests, we can map the bodily language of law and politics through works of twentieth-century literature.

Panelists: Nicolette Bruner  
University of Michigan  
*"The "Wild Beast" in the Slaughterhouse: Traumatized Bodies and Conceptualizations of Personhood in Upton Sinclair's The Jungle (1905-1906)"*  
Although Upton Sinclair's *The Jungle* (1905-06) is famous for catalyzing a public outcry about food contamination that led to the establishment of the Food and Drug Administration, the novel as a whole engages in a much larger conversation about the meaning and nature of personhood: first, by destabilizing the universality of the category of human personhood through attention to the ways that immigrants were pushed to its margins; second, by revealing the humans behind the corporate persons that shaped Chicago, including how the changing legal status of those corporations had constructed

a body beyond the physical; and third, by confronting the problem of animal personhood in the form of both slaughtered livestock and the purported “animal nature” of the slaughterhouse workers. Ultimately, I argue that personhood in The Jungle – even animal personhood – rests in financial and political power, a conclusion in line with contemporary U.S. jurisprudence on the corporate person.

Audrey Golden  
University of Virginia

*“The Uruguayan Torture Series”: Luis Camnitzer and the Politics of Bodily Pain in the Southern Cone”*

During the 1970s, South American dictatorships carrying out Operation Condor employed state policies of torture, supplying manuals depicting the proper methods for inflicting pain upon the human body. In 1984, the exiled Uruguayan artist Luis Camnitzer exhibited a collection of textual paintings, “The Uruguayan Torture Series,” in New York City. The paintings reflect the use of torture by the regimes in the Southern Cone; within the images, dismembered bodies appear alongside seemingly banal English-language inscriptions that unsettle connections between image and language. The exhibit permeated geographic borders as it depicted South American violence for a distinctly American audience. Yet it also crossed disciplinary borders, appearing on the eve of the U.N.’s ratification of the Convention Against Torture. In this paper, I ask how Camnitzer’s collection provides new ways to read the bodily language of international law, and how an aesthetic intervention into political violence reimagines the stakes of human rehabilitation.

Mai-Linh Hong  
University of Virginia

*“Fallout Country: The Reservation and the Space-Time of War in Silko’s Ceremony”*

In 1946, the U.S. government released horrific details about the effects of atomic bombing in Japan, and launched “civil defense” efforts aimed at preparing Americans for nuclear attack. Drills and fallout shelters soon became hallmarks of Cold War life for middle-class Americans. In Indian Country, however, the Atomic Age was old news: uranium mining and atomic bomb testing had taken place on or near reservation land for years, exposing Native Americans to radioactive fallout. In Silko’s Ceremony, a traumatized, Native American veteran returns home to a landscape of loss, displaced violence, and environmental degradation. Tayo wanders the reservation, constantly vomiting, seeking a way to rebalance his world. My paper reads Ceremony as a critical response to the idea of civil defense and the post-war militarism from which it arose. The economically stifled reservation, a space cordoned by colonial violence, offers an important counter-image to the sealed, stocked, underground fallout shelter.

March 10

10:30-12:15

**2.1 Panel: Law, Neoliberalism, and New Political Subjects**

**Room: WB102**

Chair & Discussant: Marianne Constable  
UC Berkeley

This panel asks the question: Can the political-economic trends associated with neoliberalism be effectively countered by a revived social-democratic defense of positive rights designed to make possible, in progressive fashion, universal equality and participation? It has been argued that neoliberal reforms – including welfare retrenchment, zero tolerance crime policy and mass incarceration, and the shift to a for-profit model in education – represent a replacement of the democratic aspiration to universal inclusion (and the guarantee of basic welfare) with the political-economic imperative that social inclusion be contingent on paid labor and economic productivity. Panelists explore what is at stake in the transformation from liberal democracy to neoliberalism by looking to the fading horizon of social democracy, and by tracking this transformation through analyses of communicative practices, legal logics, and the construction of neoconservative-neoliberal political alliances.

Panelists:

Ashleigh Campi  
University of Chicago

*Who are Choice Feminists? Understanding the Diagnosis of Neoliberal Feminism*

This paper aims to fill a gap in existing accounts of neoliberalism by tending to the relationship between political-economic ideas and traditions, on the one hand, and the investments of actors in every contexts of work and family life, on the other. My account of this relationship develops through an interpretation of popular 'postfeminist' discourse in the U.S. and the U.K. and seeks to explain why women invest in neoliberal discourses. I draw on sociological accounts that profile women's understanding of feminist ideals such as equality, autonomy, and empowerment, and their narrative of their own life and its relation to the wider society. I bring these studies together with work by Angela McRobbie, Anita Harris, and Beverly Skeggs, which document the invocation of feminist ideals by government and media, which invite young women to 'develop capacities' and devise a 'life-plan.' These discourses seek to motivate investments in ongoing training, multitasked and flexible work, and individual responsibility for managing education, employment, and caregiving work. The sociological accounts I draw on suggest that women have internalized a language of self-development and personal responsibility. In interpreting this material, I suggest that what has been termed by some 'neoliberal feminism,' is not adequately explained as increased support among women for neoliberal political-economic ideals. I make the case that the rhetoric of individualism and choice appeal to women faced with the pressures of navigating new contexts of work and family life because they offer a



framework in which women can affirm their life decisions. I make the case that an understanding of these investments helps build a more encompassing diagnosis of the success of neoliberal politics.

Jack Jackson  
Whitman College

*The Jurisprudence of Obamacare & the Welfare-State Left*

The ascendancy and the sprawl of neoliberalism in recent decades have been met with many declarations of ends: the end of the welfare state, of the law, of non-market ends, and of liberal democracy. In my paper, I want to think about the Supreme Court decision in *Natl. Federation of Independent Business v. Sebelius* (a.k.a. the Obamacare decision) against the backdrop of these declared ends, and more particularly think about how the principal opinions in the *Sebelius* case constitute a break with them (one break being intentional and explicit, the other break being ironic). Additionally, it seems to me that the legislation that gave rise to the litigation of the case also signals, in key parts (not entirely, but nonetheless importantly), a welcome departure from the ends of neoliberalism. Against the neoliberal trifecta of “deregulation, privatization, and withdrawal of the state” from social welfare, the Affordable Care Act stands as a rebuttal with its renewed regulation, redistribution, and welfare-state expansion in the service of expanded health insurance and medical care. In thinking about that expansion, I will conclude with a brief word about why the welfare state should not be seen singularly as a sign of liberalism’s limits, and instead should be reconsidered as a critical component of a variety of emancipatory political projects, in particular queer emancipation from material dependency upon the biological family and also as the partial emancipation of workers from the scene of wage labor.

Paul Passavant  
Hobart And William Smith Colleges  
*Punishing the Crime of Democracy*

According to Giorgio Agamben, with “spectacular capitalism” a subjectivity open to “whatever,” to infinite communicative potential, emerges. In this paper I develop this insight to argue that whatever being has a doppelganger who enjoys punishing not only ordinary criminality, but those who exercise their rights to democracy as well. With contemporary society’s reflexive understanding of infinite communicative possibilities and the communicative equivalence of all opinion, evidence of institutional efforts to prevent people from exercising their rights of speech and assembly by police brutality simply add one more frame to a universe of infinite communicative possibility that some remix and others enjoy. Communicative capitalism and its correlative subjectivities have implications for practices of civil disobedience. The communicative equivalence of all opinion indicates the loss of a structuring metanarrative of commitment to improving the material recognition of human dignity or democratic strength. This “decline of symbolic efficiency” not only indicates a weakened sense that police brutality is wrong as it no longer shocks the public’s conscience, it also indicates the weakened hold upon us of the

horizon to which non-violent civil disobedience must be oriented. Subjects prepared to receive the critique borne within civil disobedience are waning. Thus, civil disobedience merely appears, sharing a common plane of communicative potential with ordinary criminality and with police violence. As we shall see from examples of the policing of Occupy! and from the reaction to Edward Snowden's revelations, for some, police violence presents another opportunity for a mashup. For others, the exercise of the right to assembly or the disclosure of governmental wrong doing are criminal in themselves, and the extra-judicial punishment of these crimes are enjoyed, or where prevented (for example, Snowden's flight), angry frustration is expressed.

## 2.2 Session: The Politics of LCH 1

**CANCELLED**

## 2.3 Session: Rhetoric

**Room: WB104**

Chair & Discussant: Samantha Godwin  
Yale Law School

Panelists: Doug Coulson  
Carnegie Mellon University

### *The Law as Epideictic*

This paper will examine the traditional division between the rhetorical genres of forensic and epideictic speech as they relate to modern legal discourse. Based on a claimed distinction between pragmatic and non-pragmatic purposes of speech, the rhetorical tradition has only recognized the pragmatic functions of legal discourse and neglected the many ways in which it participates in forms of symbolic, ceremonial, and ritual discourse, encomium and invective, eulogy, epic and lyric poetry, philosophy, and history, all traditionally categorized as epideictic rather than forensic speech. This paper will compare legal discourse with specific forms of epideictic speech as well as consider the epideictic qualities of law's pedagogical or didactic purpose, its ability to establish a sense of communion or social unanimity, and its role in shaping collective memory.

Carlo Pedrioli  
Barry University

### *Justice Scalia, Sexual Orientation, and the First and Second Personae*

In several major cases since 1996, the U.S. Supreme Court has developed the constitutional rights of sexual minorities under the Fifth and Fourteenth Amendments to the U.S. Constitution. In all of these cases, Associate Justice Antonin Scalia has dissented vigorously from the Supreme Court's trajectory toward promoting the rights of sexual minorities.

This project, drawing upon rhetorical theory, considers Scalia's rhetoric of sexual orientation. In his dissents, Scalia performed and constructed various rhetorical personae, or roles, including the first and second personae, that produced rhetorical hypocrisy grounded in a heteronormative ideology. The first persona, or speaker of the dissents, that Scalia performed was that of a neutral justice. The second persona, or the audience implied in the dissents,

that Scalia constructed would well receive appeals to tradition and majoritarian rule and, ignoring consideration for minority rights, be susceptible to the alleged political threat of sexual minorities. Although Scalia's performance of the neutral justice was skillful, his construction of the second persona undermined his performance of the first persona. The analysis of this project should contribute toward a deeper understanding of both the anatomy of marginalizing legal discourse and the credibility problem that incongruence between rhetorical personae in one's rhetoric can cause.

Jack Sammons  
Mercer University

*Surprise and Persuasion*

Because we are grounded in mystery we are always a question to ourselves. Not only is our next thought always something of a surprise to us (to varying degree), but so is meaning. What are the implications of this for legal rhetoric, specifically for the persuasion of judges? Since what we seek in 'true persuasion' is something always already there in the situational context awaiting its uncovering, what good legal rhetoricians do most effectively is offer openings for 'creative discovery' of an ontology manifested in the legal conflict. To say this in its boldest form: What good legal rhetoricians do not do is persuade, but rather they let persuasion happen. Good lawyers know this which may explain why they seldom speak in terms of the sort of rhetorical techniques we teach. Good legal rhetoricians do not produce particular thoughts in judges nor should they try. What they can do is to argue towards those openings through which that which persuades within the situation is uncovered, and the judge surprised by it in his or her thinking. Or, to put this in Heideggerian terms, there is a form of persuasion which turns upon truth as *aletheia*. Does this matter? Have I simply shifted from active to passive voice in thinking about legal rhetoric? I think it matters; I think there is a rhetoric of happening, as we might call it, different from one of control; I think there are different understandings of the ethics of rhetoric turning upon this difference and closely related differences in our appreciation of others; I think that perhaps *pathos* and *logos* are more one than we often realize; I think that Aristotle's *Rhetoric* and *Poetic* must be read together; and I think that those of us, the ones who already feel these connections, should be confirmed in our belief that law, poetry, and music need to be constantly reminded of their shared origin in a certain form of truth.

Susan Tanner  
Carnegie Mellon University

*Redefining the Right to Be Left Alone: Rhetorical Use of Normative Privacy Ideologies in Post 9/11 Discourse about Security and Privacy Laws*

This paper will examine the shift in the discourse about cultural values and how those values have influenced Court decisions about privacy law in the post-9/11 era. As we grapple with security issues in the age of 'terror,' legal ideologies are confronted with an increased public demand for safety, while maintaining a commitment to the cultural mythos of privacy and individual liberties. The paper will explore the way in which Brandeis' conception of the right of privacy was appropriated to fit a new definition of privacy in conjunction with the USA Patriot Act. Using Robert Cover's theory of *nomos* and the law as a rhetorical lens, I will examine the way in which 'privacy' is framed within legal

discourse as the binary opposite to 'security,' and how Brandeis' argument has been appropriated to respond to rapid changes in government surveillance law.

## 2.4 Panel: Apartheid, Division and Socio-Legal Philosophies

Room: WB105

Chair: George Pavlich  
University of Alberta, Canada

Discussant: Jennifer Culbert  
Johns Hopkins University

How did the humanities and social sciences shape, or contest, the foundations of apartheid thinking? Approaching the question from different disciplinary perspectives (Roman-Dutch jurisprudence, philosophy, sociology, etc.), this session highlights the concepts of humanity, race, community, legality, hierarchical sociality and associated knowledge frameworks. It highlights a social metaphysics that provided a basis for political separation and claimed European superiority. Papers investigate how seeming neutral methods or approaches were embedded in racial and patriarchal politics. The question of the continuance of this in post-apartheid thinking is raised

Panelists: Rene Eloff  
University of the Free State, South Africa

*Apartheid, the Reformational tradition and the perversion of critique:  
Philosophy at the University of the Free State 1952-1968*

In this paper I examine the intellectual history of the Department of Philosophy at the University of the Free State, South Africa, in the period 1952-1968. During this period the teaching of philosophy becomes exclusively focused on the tradition of neo-Calvinist Reformational philosophy, principally developed by the Dutch legal theorist Herman Dooyeweerd. Historically this is significant in as far as it coincides with the coming into power of the Nationalist Party government in 1948 and the consolidation of the Apartheid policy. I argue that the neo-Calvinist philosophy, as received in South Africa, provided a social metaphysics that supported and justified the central tenets of the Apartheid policy. This metaphysics crucially entailed the idea that the order of God's creation determines the "natural differences" between civilizations races and people, thus providing the philosophical basis not only for their political separation, but also for the superiority of European civilisation. I further argue that the reception of the neo-Calvinist tradition at the University of the Free State involved a perversion of what Foucault calls the "critical attitude" in as far as it taught the art of how to submit to governance.

George Pavlich  
University of Alberta, Canada  
*Administrative Sociology and Apartheid*

Although sociological discourses are multiple and varied, with deeply critical versions challenging the auspices of apartheid, there is also a strand of what I call 'administrative sociology' that actively defined, supported and defended the vanguard of apartheid thinking and practice. It cloaked its biopolitical commitments beneath images of scientific neutrality, casting as necessary its findings of apartheid society. The legacy of this strand of sociology remains subject to few explicit critiques, and its complicity in social atrocities is under-referenced (despite the decisive role of such professors of sociology as Hendrik Verwoed and Geoffrey Cronje). This paper charts a selected genealogy of administrative sociology in context, before pointing to the broader biopolitical implications of a 'science' whose dangerous administrative guises continue to thrive globally.

Karin Van Marle  
University of Pretoria, South Africa  
*Legacy and Complicity*

Commentators on the South African transformation have described it as a substantive revolution, meaning that following Hans Kelsen a change in the fundamental principle (Grundnorm) underlying the South African legal system has changed. If the new Grundnorm is the Constitution and the value framework that goes with, what was the previous one?

The aim of my paper is to critically reflect on the legacy of Roman-Dutch law, its role during apartheid and its continued role in post-apartheid law and jurisprudence. What is Roman-Dutch law's complicity with the racism, patriarchy and economic exploitation integral to apartheid? Central to the application of Roman-Dutch law in South Africa was 'an overriding concern for external orderly arrangement and "fit" rather than 'concerns for justice'. (Van der Merwe 1989:59) But what are the relation between such formalism and conservative politics, in the past and in the present?

## **2.5 Session: Governmentality, Normalization and Responsibilization**

**Room: WB116**

Chair & Discussant: Peter Swan  
Carleton University

Panelists: KB Burnside  
Duke University  
*Life and Death, and Normal*

In death penalty work, defense team members are trained against what is often known as "normalizing" when interacting with their clients, which consists either in the failure to recognize symptoms of mental illness that a client presents, or to unconsciously assimilate those symptoms into more familiar, "normal" frameworks of behavior. Members are instead advised to notice and diagnose certain types of behavior that trace back to somatic and psychiatric disorders, such as for example brain damage or schizophrenia. Ironically, this very

process of diagnosis and psychiatric categorization is precisely what is considered by critical-historical and philosophical scholarship as “normalization,” where psychiatry itself is considered the normalizing science par excellence. This paper puts this branch of criminal defense discourse in conjunction with what is broadly known as the critique of the human sciences in order to interrogate their seemingly inverse conceptions of normalization, and seeks to thereby open up new avenues of inquiry into the questions of otherness and assimilation, power-knowledge dynamics, and the relationship between normality and abnormality.

Luke Haqq  
UC Berkeley

*Grounding reproductive policy: liberal neutrality or perfectionism?*

We live in an age in which we have unparalleled abilities to shape the characteristics of future people. The availability of contraception and abortion in many countries, in addition to pre-implantation genetic diagnosis, amniocentesis, blood testing, and chorionic villus sampling, enables people to choose not to bring children into existence possessing certain pathological traits. Additionally, people can foster desired traits by, for example, searching sperm and egg donors who meet their desired criteria. In the past decade, a number of in vitro fertilization clinics have contracted with couples who desired that their future child be disabled. In light of these considerations, I am interested in exploring how we should conceptualize health. To what extent should we be concerned with promoting it in reproductive policy? And given that on a ‘species norm’ account of health, the pathological will always exist, to what extent should reproductive policy discourage its existence?

Sarah Swan  
Columbia University

*Third-Party Policing Goes Home: Gender, Control, and Responsibilization in the Domestic Sphere*

In the last thirty years, the state has increasingly called upon businesses, professionals, and industrial actors to perform third-party policing. These private parties, who do not engage in nor benefit from the misconduct they are deployed to address, are compelled to enforce laws and prevent misconduct by enacting some method of control over the primary wrongdoer. Now, third-party policing is swiftly becoming a significant part of the domestic realm, and a growing number of legal mechanisms compel family members, particularly female intimate partners and mothers, to play this role. For example, some cities have enacted ordinances that levy fines against parents if they do not prevent their children from bullying others. In this paper, I examine the movement of third-party policing into the context of intimate, familial, and close social relationships, and explore how gender, race, and class interact with ideas of control in this context.

Mark D. White  
College of Staten Island/CUNY

*Rethinking the Welfare Criterion in Law-and-Economics*

This paper will critique the standard methodology of welfare economics as used in neoclassical law and economics and propose an alternative approach based on human dignity, interests, and choice. After examining the nature of welfare or well-being as used in economics, focusing on problems with definition, measurement, and implementation, this paper will suggest how an economic analysis of the law can be reoriented toward a stronger institutional focus on rules and laws which enable and regulate choice in order to promote well-being in a way more consistent with human dignity.

## **2.6 Panel: The Force of Law**

**Room: WB119**

Chair: Patricio Boyer  
Davidson College

Discussant: Ravit Reichman  
Brown University

One of the binding elements in our work in law and humanities is not only a set of shared concerns but (and perhaps above all) an archive of common texts. Working from this assumption, this panel brings together four different perspectives around Pierre Bourdieu's seminal piece, 'The Force of Law' (1986-87). From the vantages of literature, religious studies, and history, the panelists aim to create a diverse conversation grounded in a commitment to a key work of criticism with which each engages differently. The idea, ultimately, is both to reread and reinvest in a key text together, and to discover new points of convergence in scholarship from a range of fields.

Panelists: Patricio Boyer  
Davidson College

Chaya Halberstam  
University of Western Ontario, Canada

Ravit Reichman  
Brown University

Augusta Rohrbach  
Washington State University

## **2.7 Panel: Borders, Transgressions, and Legality in the Everyday**

**Room: WB121**

Chair: Allison Alexy  
University of Virginia

Discussant: Allison Tirres  
DePaul University College of Law

As scholars and citizens, we interact with literal and figurative borders on a daily basis. Fuzzy borders curve around our bodies, homes, families, communities, and nations, marking some sense of difference between inside and out. Tenacious borders snake through academic institutions, slicing up

conversations that might otherwise naturally occur. In this new age of interdisciplinarity, academic borders are increasingly policed to emphasize some apparent value from STEMs, denigrating Humanities as little more than superfluous flowers. Arguing for the value of Humanities scholarship, and in the spirit of interdisciplinary thinking, this panel explores how borders are made, transgressed, and policed in everyday lives. Based on ethnographic research with groups of people who regularly evade or mobilize borders, this panel brings together legal and anthropological methodologies to examine how work on the periphery directly impacts people and practices in the center. We analyze borders as central to human experience.

Panelists:

Macario Garcia

University of Virginia

*Incarceration and Mobility: Figurative Models of Mobility and Real-World Consequences*

Incarcerated people in the United States are forced to live behind prison walls with little access to outside resources. Within the prison borders there is an attempt to control the movement of incarcerated peoples' bodies and possibly the mobility of their ideas and actions. As the issue of mobility is of great concern for the prison administrators, a large bureaucratic infrastructure exists in order to control the movement of visitors, staff, and incarcerated people alike. In essence, mobility has become the central focus of prison administrators who are attempting to control a population that has been deemed dangerous. In the United States, ideas of mobility are manifested in literal and figurative concepts that govern the lives of individuals and collectives. In this presentation, I examine American conceptions of what it means to be mobile and how perceptions of mobility translate into ideas of punishment that have lasting consequences.

Mary Pancoast,

University of Virginia

*National Water and Refugee Seedlings: Negotiating Legal and Social Citizenship in Jordan*

Folk estimates suggest that refugees constitute 45% of Jordan's current population, straining Jordan's limited resources and challenging national understandings of autochthonous citizenship. Legal regimes managing refugees recognize two important border crossings. Refugees must cross borders between nation-states, and refugees must cross borders between categories of legal citizenship. However, my research suggests a third border refugees must cross, that of social citizenship. Utilizing data collected during my preliminary fieldwork in Amman, Jordan, I will discuss how nature metaphors, particularly those of water and seedlings, are deployed by Palestinians and Jordanians alike in ways that mark the boundaries of social citizenship. While many former Palestinian refugees may be legal citizens in



Jordan, they have yet to cross social borders allowing for full citizenship. In this presentation, I will examine the construction of borders surrounding social citizenship, how these boundaries differ for legal citizenship, and the implications for refugee groups migrating to Jordan.

Chiara Giorgetti,

University of Richmond, School of Law

*Nationality and International Law: Myths and Consequences*

Nationality identifies and recognizes individuals under international law and provides them with rights and obligations. Nationality allows individuals to enjoy many human rights and afford the possibility of being represented in international courts and tribunals by their state through diplomatic protection. Further, globalization has increased the number of dual citizens and the complex problems that derive from that. Nationality is regulated by domestic legislation of each state. However, international courts and tribunals retain the right to review issues of nationality, including nationality of convenience or “effective nationality.”

In my presentation, I will discuss how nationality shapes individuals’ rights. And how about dual nationality claims? Because nationality is at the core of international law but also at the core of a human experience in a global society, this presentation will particularly benefit from the interdisciplinary approach of this panel.

Allison Alexy,

University of Virginia

*Law Transgressing into Families: Transnational Child Custody Disputes in Contemporary Japan*

Responding to international pressure, the Japanese Diet recently voted to join “The Hague Convention on the Civil Aspects of International Child Abduction,” an international agreement regulating parental abduction. The Hague Convention engages borders in two ways: first by acknowledging so-called international marriages that produce children with multiple citizenships, and second by attempting to regulate illegal cross-border movement. Yet my research suggests a third key understanding of borders that will dramatically impact any attempt to enact The Hague Convention in Japan: figurative social and legal borders surrounding families. In legal decisions and social norms, Japanese families are often represented as cohesive social units responsible for solving their own problems. In this presentation, I examine how social and legal borders have been constructed around Japanese families, what happens when some people and laws transgress those borders, and the implications for international conventions governing transnational families.

## 2.8 Session: Resistance 1

Room: WB127

Chair: Jill Stauffer  
Haverford College

Panelists Noa Ben-Asher  
Pace Law School

### *Lawmaking by Lawbreaking*

There are times when lawbreaking is desirable. Lawbreaking and other forms of legal dissent can occasionally save democracies from demise. Among the most well-known examples are those lawbreakers who openly opposed and defied the Fugitive Slave Act of 1850, which set penalties upon those who aided slaves in escaping their captors. But civil disobedience constitutes only one fraction of defiant democratic acts. The literature on democratic lawbreaking lacks a broader conceptual framework. This Article takes on the task of formulating such a framework by examining types of lawbreaking that trigger and accelerate democratic lawmaking. This phenomenon the Article calls 'lawmaking by lawbreaking.' The Article identifies three different types of actors that, at times, engage in lawmaking by lawbreaking: the President through 'white holes', juries through nullification, and individuals and social movements through expressive disobedience. Each of these has recently featured on the public stage. First, 'white holes'—which are executive acts that suspend existing legal norms to protect against state violence—were illustrated in the immigration context. A 2012 executive memorandum called Deferred Action for Childhood Arrivals (DACA) directs relevant federal agencies to suspend the usual legal treatment of individuals who immigrated to this country as children. Second, New Hampshire has just become the first state to enact a statute expressly permitting parties to inform juries in criminal trials about their right to nullify laws that they perceive as unjust. Finally, the Occupy Wall Street Movement, which captured a global audience beginning in September 2011, exemplifies expressive lawbreaking. There, a disparate group of individuals explicitly set out to inspire critical thinking about social justice and our economic system. These three types of lawbreakers share a function that we are accustomed to associating with official adjudicators and lawmakers: they independently judge existing laws, and dismiss them when they seem unjust. Thus understood, these lawbreaking acts may seem contrary to the rule of law, an objection the article discusses, but they also create the very conditions for meaningful democratic lawmaking.

Jesse Centrella  
Savannah Law School

### *'Getting Up': Graffiti as a Social Utility*

Graffiti has a knack to promote a message, and this message has grown increasingly socially orientated. Like a giant Post-it note, juxtaposed against mundane structure, replaced upon irrelevancy, and which notifies broadly, graffiti has significant inborn potential to serve as a social utility. Over the last forty years graffiti has evolved, an actualization that art-scholars characterize as the post-graffiti era. In addition to describing an aesthetic transformation with a fluid, organic, and defiant disposition, post-graffiti signifies graffiti's social and artistic legitimization, an important consideration in its efficacy as a social tool. This paper evaluates graffiti's role in shaping social policy and ultimately,

the law, by fostering communal awareness and consensus formation. At its core, this paper suggests that graffiti is a unique medium for societal and governmental critique—raising the question, whether legal action curtailing graffiti is criminalizing the act, or criminalizing the speech that graffiti artists seek to publicize.

Roger Fisher  
York University, Canada

*'Furies in St. James Park': The Occupy Movement as a Greek Tragedy*  
The 'Occupy Movement' has often been compared to Melville's short story *Bartleby the Scrivener*, but that comparison perpetrates the derogatory manner in which the 'Occupy Movement' was portrayed in the mainstream media. The existential threat to the established political order posed by the 'Occupy Movement' is as ancient as the one depicted in Aeschylus' play *The Furies*, and in both narratives the existential threat was defeated, transformed, and absorbed by the established political order. In Toronto, the 'Occupy Movement' ended on November 21, 2011, when a court ruled in *Batty v. City of Toronto* that protestors have no right to assemble in a public place without being subject to city by-laws and removal orders. No other outcome was foreseeable, which suggests that in a Greek myth and in litigation under the Canadian Charter of Rights and Freedoms, 'law is prophecy and nothing more' (Oliver Wendell Holmes).

## **2.9 Panel: Human Rights in Times of Austerity and Insecurity: Ideological Antinomies?**

**Room: WB129**

Chair: John Laurens Strawson  
University of East London, UK

Human rights entanglement with law has been based on the contradiction between the between universal values and the provincial outlook of the state. As the articulation of universal human rights came to be adopted by states through treaty ratification and incorporation into domestic law a process of the subjection of human rights to the requirements of the state became evident. While at the international level the idea of human rights appears subversive of existing political, economic and social regimes once it meets their edifices it dissolves. This process, this panel will suggest is particularly marked in the current period framed by September 11 2001 and the 2008 financial crisis. Human rights are sacrificed in the name of the security and the market economy. However, echoing Koskeniemi understanding of international law generally, this discard of human rights is frequently done in the name of human rights. In particular many states draw on a mythic human rights tradition in order to tame civil and political and economic and social rights. Thus anti-terrorist laws that increase police power, state surveillance and controls on migrants and austerity measures that cutback welfare, health services and social opportunities are claimed as being consistent with human rights. These times offer a critical vantage point to reassess human rights discourse (political and jurisprudential) through highlighting the juxtapositions of the international and the national, the individual and community and the the past grand narrative of human rights and the current attacks on human rights. The papers will

interrogate these themes through different frames of reference including the post-political, the post-colonial and the post-liberal.

Panelists:

Jeremie Gillbert

University of East London, UK

*Are Human Rights Neo-Liberal? Exploring the Paradoxes between the Individualistic Liberal and the Socio-Economic Redistributive agendas of human rights law*

Human rights law is often seen as being born from the individualistic liberal proclamation of the enlightenment period. While certainly the proclamation of the rights of the mainly male and well off individuals versus the eminent power of the state do form an important part of the origins of human rights law, this only represents one aspect of human rights law. The social and trade unionist lead political ideas of the industrial revolution have also marked the development of the human rights law. Moreover, the post-colonial struggle for the recognition of a collective cultural identity of peoples does also form a central part of the architecture of the current human rights system. This multiple ideological origins of the human rights project give it a truly universal but also contradictory content. On the one hand human rights law is seen as mainly protecting the civil and political rights of the individual against State power. On the other hand, the human rights approach to economic, social and cultural rights are inherently base on a collective and redistributive approach to justice and society. This inherent traction within the system was tamed during the 1990's with the fall of the so-called communist block. However, in a time of crisis of the individualistic market based system, the other facet of human rights law on collective redistributive justice might provide an important and rejuvenating approach to human rights law. This presentation aims at examining some of these contradictions within the human rights legal system and explore how it could play an increasingly important role within the economic and social sphere by providing a non-politically marked approach to collective rights and redistributive justice.

Barry Collins

University of East London, UK

*"Human rights, Ideology and the Post-Political"*.

What is the relationship between human rights discourse and the political? It is clear that the deliberative approach to Human rights evident in the work of Ignatieff and Habermas presupposes the political as a sphere of communicative rationality and consensus. This is reflected, I will argue, in United Nations priorities and strategies on transitional justice. I will argue that this version human rights offers a neat ideological support for a post-political conception of democracy. In this account, political antagonism is supposed to be managed by experts and contained within a discourse of conflicting rights. The disruptive nature of traumatic political memory (of past atrocities, for example) can accordingly be rendered "safe" and contained within existing political structures. In this paper, I will argue for more radical ways of thinking

about human rights and historical memory that are not contained by notions of political consensus of deliberation.

John Laurens Strawson  
University of East London, UK

*The Mythic Tradition of Human Rights*

In hard times there is a growth of nostalgia for better times past. As human rights have been eroded through anti-terrorism and anti-austerity measures an appeal is made to a old age when human rights were sacrosanct. Governments, courts and activists in different ways build their case for the defense of human rights on an assumed tradition. Government's make political appeals which often link the identity of state to human rights, courts engage in history-making as their deliver judgments and many activist cling to faith that previously human rights were respected. A jumble of historical events constructs this tradition: Magna Carter, the Petition of Right, the American Declaration of Independence, the Declaration of the Rights of Man and Citizen, the United Nations Charter. A pre-history of Classical Greek philosophy and Roman law is mobilized to sustain it. Human rights in this account has no beginning - and no end. Emergency laws, new security measures and enforcing budget cutbacks are present as exceptional to the human norm by governments. Courts negotiate them in the same manner although with greater elegance. For activists they are seen as unprecedented. The record in engrained discrimination of past regimes appears to be reimagined without racism, sexism and homophobia – as if slavery, serfdom and colonialism were parallel universe. This paper will argue that this nostalgia for human rights represents an opportunity for scholars to engage with human rights in new way – but one which must resist the security agendas of research councils and government. The grand narrative of human rights memory must to deconstructed if we are to have a human rights future.

**March 10**

**13:45-15:30**

**3.1 Session: Childhood**

**Room: WB121**

Chair: Clifford Rosky  
University of Utah

Panelists: Samantha Godwin  
Yale Law School

*A Critique of Parental Rights*

In this paper, I argue the legal and social deference afforded to parental discretion and autonomy in raising children implies that children far exceeds any justifiable under a child protectionist framework as welfare maximizing paternalism. Instead, such parental rights long recognized by the courts as possessing independent vitality and often expressly in conflict with a child's

best interests, instead imply an unspoken quasi-property like status for children. While the rhetorical justification for children's subordination to parental preferences (regardless of whether or not they are demonstrably in a child's best interests) has shifted away from expressly recognizing children as possessions or extensions of a father's estate towards one centered on children's best interests, the basic legal and social relationships have been retained. The legal and social status of children in the family has been a relative blind spot for people concerned with egalitarian concepts of justice. Serious inquiry into the extent to which parental power over children are justified under even the standard child protectionist framework for children's legal status is a place to start.

Noya Rimalt  
University of Haifa, Israel

*The Maternal Dilemma*

What happens when the law formally transforms and replaces traditional maternal supports such as maternity leave with a gender-neutral system of parental protections and rights? Feminist scholars and advocates for gender equality have long argued that by embracing gender-neutral parental policies, the law can be significantly helpful in combating gender stereotypes, facilitating social change in the division of labor in the family and overcoming current barriers to gender equality in the workplace. These assumptions have been very influential in generating legal reforms in parental policies in many western countries. This paper questions these assumptions. It argues that several decades after many Western countries including the US have adopted gender-neutral parental policies it is time to critically evaluate their actual impact on the division of labor at home and on gender equality in the workplace. A close analysis of relevant data reveals that while gender-neutral equality based parental reforms are firmly in place in the statute books in all these countries, in reality, parenting and caretaking at home are still predominantly maternal. The article refers to this problem as 'the maternal dilemma' and explores its various implications for the struggle for gender equality.

**3.2 Panel: The Limits of Contract**

**Room: WB103**

Chair & Discussant: Kerry Abrams  
University of Virginia

A contract is a legally-enforceable promise. Lawyers and judges spend much of their time drafting, interpreting, and enforcing contracts. But there is a large class of promises the legal enforceability of which is either contested, denied, or revocable. This panel explores the socio-legal underpinnings of this resistance to contract, and, conversely, the desire to enter into agreements that are unlikely to be legally enforced. Panelists will consider diverse literary examples, including the exposé of the fragility and limits of contract presented in Helen Hunt Jackson's Indian Rights novel *Ramona*, George Eliot's non-contractual understanding of parent-child ties in *Silas Marner*, and the S/M contract entered into in Leopold van Sacher-Masoch's *Venus in Furs*. Each panelist will analyze the relationship between the literary explication of the limits of contract and the development of contract law.

Panelists:

Sarah Abramowicz  
Wayne State University

The Story of Adoption: The Narrative of Childhood and the Resistance to Contract in George Eliot's *Silas Marner* and Victorian Adoption Case Law  
This paper reads George Eliot's 1861 novel of adoption in the context of English adoption case law, and argues that both the novel and its legal counterparts display resistance to bringing together childhood and contract law in the form of parentage contracts. The paper examines how the shared enterprise of distancing childhood from contract law helped, ironically, to frame law and literature as opposed and competing enterprises.

With a fantasy of an adoption without law that saves both the adopted child and adoptive parent, *Silas Marner* teaches that parent-child ties are created not by biology or by law, but by a child's memories and early experiences, and by the narrative through which the child makes sense of those experiences. Eliot registers a shift from a legal to a narrative definition of parentage that is also visible in nineteenth-century adoption case law. This shift, in turn, was accompanied by the increasing tendency of adoptive parents to claim a right to custody on the basis of a legal instrument such as a contract or will that purported to rewrite parent-child ties, and the reluctance of courts to enforce such contracts.

The paper explores the larger concerns that animate the resistance to legal adoption in both Eliot's novel and in English adoption case law. It argues that the resistance to bringing together childhood and law in the form of parentage contracts--a resistance that continues to this day--stemmed, in part, from the discomfort engendered by the contradictions between Victorian contract doctrine, which promised self-determination and freedom of choice for all adults, and Victorian theories of child development, which emphasized the extent to which childhood experience determines the adult self.

Elizabeth Emens  
Columbia University

Bound: The Imaginative Surplus of Contractual Intent

In Sacher-Masoch's *Venus in Furs*, Severin signs a contract enslaving himself to his mistress Wanda, in exchange for which Wanda will, as often as possible and particularly when in a cruel mood, wear furs. Mistress and slave entertain the idea of moving to a country where such a contract for slavery could be enforced. Wanda ultimately decides, however, that what she desires is to be unique in owning a slave—to have a slave in a country where no one has slaves—and “solely on account of my beauty and personality, not because of law, of property rights, or compulsions.” In a very different context—suicide rather than sex—a psychiatric patient signs a “no suicide contract” promising his doctor that he won't try to kill himself and outlining the steps he'll take if he feels the urge. Neither the mistress and her slave, nor the doctor and her patient, could think that their contract would be enforced in a court of law. Rather, in both scenarios, the parties sign something they call a contract for purposes that must exceed the literal force of contract law. Through these and other examples, this paper explores this excess, this imaginative surplus of contractual intent, both for what it says about the extralegal purposes law may play in our lives, and for what it says about the role of imagination in the mainstream legal domain of contracting.

Victoria Olwell  
University of Virginia

#### Romance and Perilous Contract in 19<sup>th</sup>-Century America

This essay takes a historical perspective on the relationship between legal contract and literary writing in the late nineteenth-century US. I argue that the literary genre of romance functioned as a response to the crisis in popular and legal ideas of contract that was brought about by the US nullification and violation of treaties with Native American tribes. In the late nineteenth century, the US government changed its policy towards indigenous groups by redefining their political status so that indigenous tribes, nations, and other political entities were no longer seen to possess the political independence and legitimacy to form contract. This change, as it was intended to do, stripped tribes of land rights that had been established by treaty and disabled them from operating as collective contractual entities on their own behalves in any future relations with the US government. This negation of existing treaties and of treaty-making status, however, happened during the same decades when US national citizenship and just economic relations alike were being themselves redefined on the basis of contract. Thus, contract was exposed to be a highly fragile means of agency, because contractual subjectivity could be revoked, at the very moment it was also advanced as the major legitimate grounding not only for a citizen's relation to the state, but for a whole range of "consensual" relations, from marriage and personal bequests to wage labor and commerce. The paper I will present shows how the literary genre of the Indian romance, launched by Helen Hunt Jackson's wildly popular Indian Rights novel *Ramona*, exposed and critiqued the limits of contract by staging the modes of abstract personhood definitive of contract in tandem with the modes of abstract personhood that were then recognized to define romance as a genre. While most recent critics argue that the romance plot of *Ramona* and its imitators distracts from anything remotely resembling either the political peril faced by indigenous peoples or the political constitution of US citizenship, I argue that both of these were integrated into the formal structure of romance, rather than the merely thematic level that has been the focus of critical assessment. And it was at the level of form that the romance exposed the fragility and limits of contract for an audience who, judging from the reception and sales of such romances, could not read enough about it.

### 3.3 Session: Biopolitics

Room: WB104

Chair & Discussant: Patrick Hanafin  
Birkbeck College, UK

Panelists: Margaret Denike  
Dalhousie University

*The Biopolitical Anatomy of a Lie: Needing to Believe Lance Armstrong*  
Released in the Fall 2013, the footage of Alex Gibney's film, *The Armstrong Lie* captured far more than he had ever intended when it was first shot in 2009 as a 'feel good' documentary on Lance Armstrong's comeback from retirement after his record seven wins of the Tour de France. It captures in spectacular form the 'anatomy of a lie' — the machinations of a con into which Gibney himself had been unwittingly enlisted, together with the millions of followers, dedicated sponsors, and supporters to his Livestrong Cancer Foundation, for whom



Armstrong's success was 'nothing short of a miracle.' When put into the context of socio-cultural and bio-politics, we might say that this footage, together with various testimonials and the investigative work of British and French journalists, also documents the deep cultural, capital, and political investment, not only in collectively enabling, sustaining, and concealing certain lies about Armstrong's (or, for that matter any athletic hero's) capacities and abilities, but in disabling the possibility of their very exposure. In this paper, I use these archives to elucidate certain biopolitical formations that imbue the 'Armstrong Lie' and the technologies that enable it, as they play out in western sport/medicine/media, and as they are facilitated by the threat of litigation. As perhaps one of the most high profiled cancer survivors and accomplished athletes in a sport that has long been notorious for systemic and pervasive doping, Armstrong stands as both evidence of what biotechnologies can do to extend human life and enhance performance, as he is a testament to the power of the collective fantasy that such interventions are not in fact behind the accomplishments we so want to see as 'natural'.

Patrick Hanafin  
Birkbeck College, UK

*Becoming Normative: Rights, Contestation and Biopolitics*

In this paper I examine the potential of Roberto Esposito's work for a re-imagining of the relationship between norm and life by thinking the possibility of contestation that subjected selves can exercise in, through, and against the law. In contemporary regimes of biopower when the material lives of individuals are devalued and their full citizenship is threatened in the name of a totalizing narrative of Life, the question of resistance arises and the extent to which an 'affirmative biopolitics' is possible. This is a (bio)politics which does not valorize an abstract ideologically rigid notion of Life which restricts and governs individual lives (a 'politics over life'), but is rather a 'politics of life' driven by the actions of singular living beings acting in relation with one another. In developing this argument I examine how we can contest the normalizing force of law with what Esposito, (engaging with Canguilhem and Deleuze), terms a 'norm of life'. In other words, how can we undo the hegemonic construct of the fixed and bounded transcendent subject of legal normativity and instead think a transversal subject within law, which engages in a creative re-definition of law and rights from within? In so doing, I examine how Esposito's thought around a 'politics of life' can provide a means of thinking and performing the relationship between norm and life otherwise.

William F. Stafford Jr.  
UC Berkeley

*Minimum Wage and the Jurisprudence of Living*

In India in 2007, a government commission on the unorganised sector engaged a jurisprudence concerning the determination of a minimum wage, presenting a logic parallel to that of the Supreme Court. This is significant as minimum wage is linked to constitutionally prohibition of forced labour and earlier invocations by the Court of its stewardship of the yet-to-be-completed social and economic revolution, by entertaining petitions concerning fundamental rights, for the purpose of which any person would have standing. Where the Commission attempts to provide a definition of the unorganised worker, it can be seen as

performing a jurisprudence concerning labour as a subject of law, and passing through the category of labour, to modify the relationship of law to economy, while maintaining economy as a juridical order. I will explore the techniques employed by engaging with their movement through concepts of revolution, necessity, survival, measurement and peculiar paradoxes of metrology.

**3.4 Panel: Readers for Justice: Articulation of Teaching, Researching and Extension Programs for a More Humanistic University**

**Room: WB105**

Chair: Sandra M. Wierzba  
University of Buenos Aires, Argentina

Discussant: Rita Tineo  
University of Buenos Aires, Argentina

This panel will present some reflections around the idea of a humanistic approach to Law, which seems indispensable in societies where access to university essentially depends on the individual interest of applicants, since there are no pre-established requirements related to national interests and a background where the total number of Law graduates increases each year moved by the idea of a rapid progress at both financial and social levels. In this context the Project called 'Readers for Justice' came to light at the School of Law of the University of Buenos Aires (Argentine Republic) in 2009. Currently, the research team has the following characteristics:

The team is interdisciplinary. It is formed by professionals of different fields of knowledge: Law, Translation, Engineering, Education, Sociology, Literature and Fine Arts, among others. Likewise, its members are either university professors, graduate professionals (some of them retired) and students.

The Project intends to work on a university three-tier system: Academic teaching, Research and University Extension Activities. In this latter sense, the University provides the community with certain educational and cultural initiatives which have a clear humanistic approach (e.g. reading activities, an interdisciplinary digital library). It also analyses the impact such activities have through research-action projects and incorporates all developments and results to be applied to academic activities in different fields of knowledge.

Essentially, the project is centered on 'books', more specifically on fiction literature. Literature intends to be a bridge connecting different fields of knowledge, cultures, ideologies and education levels.

Our aim is to exchange ideas with scholars attending this Session, regarding the potential positive impact at different contexts that a Project of this kind may have in the formation of future professionals, and on the society as a whole. We would also like to debate the possible obstacles to be faced in its implementation, the possible solutions and the possible collaboration and interaction among the different work teams.

Panelists: Rita Tineo and Andrea Fernández  
University of Buenos Aires, Argentina

*"A Humanistic oriented Research, Extension and Academic Project developed in the University of Buenos Aires". 2. "Experiencing a Reading to community Project at the University".*

The University of Buenos Aires is a public University. As such, it not only develops programs to provide university education, but also focuses on research and extension activities to consolidate the advancement of the society as a whole. As members of this university community, we are aware of the social commitment it implies. There must be a return on the investment that the community makes by supporting public education. Crises are good opportunities to reflect and find creative solutions for social development. This research project has been developed around the idea of constructing bridges that may allow the emergence of professionals with a more humanistic profile. It also intends to connect people through social interaction. It is intended as a continuum: research-training-extension scheme. This scheme evolves by carrying on a research into the effects that the reading of literary works may have on law students. Then, it evolves further by training students through the incorporation of selected readings which are related to the different fields of the law they have to learn. Lastly, it generates an environment where university students reach the community by undertaking extension activities. These extension activities have a direct impact on all actors.

Before starting the community reading project, we asked ourselves the following questions:

- Is there any connection between literature and better citizenship?
- Can reading literature help us question our view of the world in order to incorporate other life experiences?
- Can reading fiction help us remember our past, improve our understanding of the present and create a better future?
- What happens when reading aloud to an audience? (both to the reader and the audience)
- Is it possible to improve concentration by reading aloud to others?
- Can we develop more citizenship awareness just by sharing a reading project? Social interaction is necessary in countries where social mobility is directly related to access to education. It also strengthens both faculty and students' social commitment by making them aware of social reality. We do not wonder to what extent this social interaction is possible. We only know it is necessary. Thus, we know it has to be made possible just simply because it is necessary

Margarita Rico  
University of Buenos Aires, Argentina

*“Literature, Civil Law & Engineering: “Instrucciones para subir una escalera” (“Instructions to climb a ladder”), Julio Cortázar.*

In this short story, the author plays with the idea of providing meticulous details for an act we exercise in a daily and automatic way. For us, readers, this is an opportunity to approach the prevention of damage (In Law studies) or heuristic algorithms (In Engineering studies). In any case, the fiction allows us a more human and imaginative approach to problems that in the University are – essentially- object of instrumental analyses.

Rosa Vila

University of Buenos Aires, Argentina

*"Literature, Humanism and Civil Law in 'Las buenas inversiones' ('The good investments'), by Julio Cortázar".*

A single square meter for Humanities? In the story "Good Investments" (Las buenas inversiones), included in the book "Around the day in eighty worlds" by Julio Cortázar, the main character, Gómez, decides to change his life, leave the city and establish in a rural area, where he will be able to open his canvas chair, read the newspaper and eat sparingly in a single square meter. The likelihood that oil might exist in the subsoil of such place disturbs his peace and, after some negotiations, he signs a document that might bring him a lot of money in case such precious fuel is finally confirmed to exist. When this actually happens, he returns to the city and purchases an apartment on the highest floor of a building with a full-sun terrace. In there, he opens his chair and tries to recover his inner space.

The story playfully poses a question on today's society transformation and the adaptation of human beings to the advantages and disadvantages inherent to progress. Certain degree of tension, always dealt with in a funny way, is sensed in the story between the advancement of science and the role of human beings in this new scenario. The polysemy of the title makes the reader wonder what wise investments are. Is it better to invest in feasibility studies to assess the oil exploitation business, as the Venezuelan company does, or to invest in a place, no matter how small, so as to find one's inner being, as Gómez firmly believed? Can these two scenarios coexist?

Although the story was written in 1969, it is worthwhile to take this anecdote for analysing today's debate on the funds assigned to hard sciences research and scarce resources allocated to humanities. Is it good that economic resources be assigned only to chemistry, biotechnology, or informatics, among others? Should culture and social sciences research be also financed? Such investment, which for some people has no rapid and tangible results, has a considerable importance as it encourages the formation of professionals with a more human perspective, in addition to their own specific skills. The story is also a good opportunity to evaluate law students' education. Not only several legal business and their specifics, the right to property, hydrocarbon exploitation and environmental law are dealt with in the story. We can also deeply analyse the use of technical and everyday language. Moreover, in view of the different fields of knowledge, literature can act, in a Babelian-tower fashion, as a bridge to join different languages.

Sandra M. Wierzba

University of Buenos Aires, Argentina

*"Interdisciplinary Digital Libraries: an opportunity of convergence for the humanistic and the instrumental matters?"*

University courses, academic events and specialized texts often provide interesting examples of how Literature interacts with several distinct fields of knowledge. Such interactions are expressed in oral presentations, essays and epigraphs. But those relationships are not generally available in Interdisciplinary Libraries, probably because its organization on such a database would be complex. In this sense, it should be noted that literary works –more than any other piece of writing- allow multiple interpretations. Moreover, every fiction work entails, at least, an indirect reference to the idea of Justice and Law. However, we understand that it is possible to organize the relations we can find between Literature, Law and other fields of knowledge, overcoming the mentioned complexity.

The “Readers for Justice” Interdisciplinary Digital Library (of non complete texts), born at the University of Buenos Aires, promotes the selection and analysis of texts by students, graduates and law professors regarding their own knowledge, and the systematization of its contents based on agreed criteria, that are informed to readers. This fosters the deepening of studies and the creation of new meanings by various interpreters. Besides, it should be noted that this resource is digital, free and that the kind of information included could be interesting not only for the legal community, but also for other educational communities and general public as well. For all the above reasons exposed, we could be in the presence of a kind of development that could favour a democratic and liberal education, where both instrumental and humanistic approaches could converge.

### **3.5 Session: The Politics of Judgment**

**Room: WB116**

Chair & Discussant: Hadar Aviram  
UC Hastings

Panelists: Mairead Enright  
University of Kent, UK

*Religious Hacking and Political Judgment in the Law of Contract*  
Contracting is an element of the market, and a mode of neoliberal government. At the same time, contract is inevitably relational, and - in its references to the private autonomous determination of value - contains ineradicable if incoherent traces of older, pluralist, communal ambitions. That is where contract's constrained political potential lies. The contracts of religious individuals and institutions - for marriage, property, trade, insurance and arbitration - are marked by that potential. They demonstrate precarious efforts to author new religious legal norms, and to improvise their - sometimes transgressive - relation to the law of the state. Occasionally, these transgressive religious contracts find their way to state courts. When they do, they meet a form of judgment which is resolutely and peculiarly depoliticised in ways which go beyond mere deference to the contract's parties. This paper considers possibilities for opening judgment to the political in religious contract disputes.

Alexandra Harrington  
McGill University, Canada

*Juridical Creation of Memory: The Implications of the Inter-American Court of Human Rights' Use of Non-Monetary Remedies*

This paper will examine the Inter-American Court of Human Rights' practice of crafting non-monetary remedies that perpetually place the victims of atrocity and the acts themselves in the public eye. Examples of such non-monetary remedies include requiring the implicated state to erect monuments and statues to the victims, requiring the implicated state to rename public spaces or streets in honor of victims, and, in at least one instance, requiring the implicating state to designate an annual day to honor disappeared children. The paper will then scrutinize the compliance of the implicated states with these non-monetary remedies over time to determine both whether and how they are actually implemented and also how states comply with these remedies in contrast to compliance with strictly monetary remedies that are ordered in the same case.

G.W. Jones  
Johns Hopkins University

*Responses to Political Hate Speech: A Case of Constitutional Divergence?*

The economic turmoil of recent years has fueled the rise of hate groups around the world, from white nationalist militia groups in the United States to the rise of the Golden Dawn party in Greece. While legal systems in the E.U. and elsewhere abroad have attempted to directly confront and punish hateful speech, the United States continues to be an outlier by continuing to afford strong constitutional protection to such speech. This growing rift in the legal response to hateful speech is occurring alongside a broader trend of global convergence across legal economic systems. This paper explores the disparate treatment of hateful speech uttered in the context of politics, and examines whether law can serve as meaningful rejoinder to such speech, or whether ongoing conditions of crisis and austerity will continue to exacerbate societal cleavages and fuel extreme rhetoric.

Paul Tiensuu  
University of Helsinki, Finland

*Democracy Against the Majoritarian Rule: The Judicial Concept of Democracy*

There is a growing tendency, not only amongst politicians but also political philosophers, to view democracy as legislative instrumentalism, opposed to the constitutional and liberal traditions of legal theory. A known representative of this current is Chantal Mouffe, who distinguishes democracy as 'equality, identity between governing and governed, and popular sovereignty' from the 'modern' liberal ideas of rule of law and individual liberty. In this presentation I formulate a defence of the rights-based liberal view, arguing that modern legal theory does not so much oppose or limit democracy, but instead defends a judicial concept of democracy. Despite defining democratic logic as exclusive majoritarian rule, Mouffe agrees that democracy necessitates continuation of the political antagonism. But upholding antagonisms necessitates judicial safeguards, and from principles of equality and of unity of ruler and ruled, I derive a judicial concept of democracy based on protection of political minorities against the majoritarian rule.

### 3.6 Session: Problematizing the Trial

Room: WB119

Chair & Discussant: Noa Ben-Asher

Pace Law School

Panelists:

Raphael Ginsberg

University of North Carolina at Chapel Hill

*Victims Know Best: The Valorization of Victims' Views of Justice*

What constituted justice generally and in specific cases was previously the product of a complex process involving the police, judges, juries, and media figures. These figures disseminated competing conceptions of justice.

However, because of the victims' rights movement, new voices define justice for specific crimes and criminal justice generally: victims and, especially, victims' family members. Victims proclaim what should happen to defendants throughout the criminal justice process. Or, they weigh in on the justice of broader legal developments, such as sentencing changes. This paper examines one example of this, Mark Lunsford, whose daughter was raped and murdered. Throughout her murderer's trial, Lunsford continuously declaimed in the media that her murderer was guilty and deserved to die. His words went unchallenged, as did his role as legal arbiter, demonstrating the power of victims' families to determine what constituted justice in the public sphere, and silencing alternative conceptions of justice.

Jeffrey Johnson

Eastern Oregon University

*Evidence and the Pursuit of Truth in the Law*

Lawyers should be much more concerned with the concepts of truth and evidence. The entire profession depends on truth. It is what police detectives, District Attorneys, juries, trial judges, appellate judges, and academic lawyers offering interpretive theories, are all concerned with. But, since truth is seldom apparent on its sleeve, these legal actors are equally dependent on evidence as the only(?) reliable(?) means of determining truth. I defend a commonsensical theory of [good] evidence. I argue that this view, inference to the best explanation, captures most, if not all, of a lawyer's appeal to evidence. It is far from clear, however, that a single unifying concept of legal truth survives as the unequivocal goal of the trial jury's use of evidence to determine guilt or innocence as contrasted with the academic lawyer's use of evidence to defend a positivist theory of the nature of law.

Nancy Marder

Chicago-Kent College of Law

*Jurors and Social Media: Is a Fair Trial Still Possible?*

Slowly but surely the Sixth Amendment's guarantee of a fair trial is being eroded as social media invades the jury room. Essential evidentiary rules control what jurors can learn about a case and what they can say about it during a trial. In just a decade, the rapid growth of easy online communication has threatened to dissolve the careful walls we have built around the jury. The key question is whether courts can now persuade jurors to resist the siren call of online communication when they serve as jurors. We cannot ignore this problem. Having jurors refrain from using the Internet while they serve as jurors is likely to grow harder in the years ahead and will require taking what I call a

'process view' of a juror's education. It recognizes that every stage at which the court interacts with jurors creates an opportunity to educate them. From start to finish--from jury summons to jury verdict--there are opportunities for the court to educate jurors about the need to avoid online communication about the trial. This paper explores what it means to take a process view of a juror's education in order to protect a defendant's Sixth Amendment right to a fair trial.

### 3.7 Panel: The Punitive Imagination

Room: WB102

Chair: Austin Sarat  
Amherst College

This panel brings together scholars interested in the cultural conditions and presuppositions that undergird America's approach to punishment and in the life of punishment in American culture. Among the questions we might wish to explore are: What assumptions about persons and social institutions provide the basis for American punitiveness? How does punishment depend on, and influence, prevailing views of free will, responsibility, desert, blameworthiness? Where/how are those views subject to challenge in our punitive practices? How is punishment portrayed in popular culture? And, how do our imaginings of punishment get played out in our practices?

Panelists: Daniel LaChance  
Emory University

#### *Beyond Just Deserts: Redemption in an Age of Retribution*

The terms "rehabilitation" and "redemption" have sometimes been used interchangeably in popular and scholarly discourses about punishment. In this paper, I explore important differences in the meaning of these two terms and the roles they have played in the cultural life of capital punishment in the United States since 1976. Both rehabilitation and redemption refer to positive personal change, but rehabilitation denotes the modern, state-facilitated transformation of the mind, while redemption describes the divine, grace-driven transformation of the soul. Many have suggested that skepticism about the state's capacity to rehabilitate fueled the nation's punitive turn in the last decades of the twentieth century. But if many Americans had lost faith in rehabilitation, a good number of religious conservatives and leftist abolitionists remained open to the possibility that religious awakenings could redeem wayward men and women. Through analyses of narratives of redemption on death row—and Americans' responses to them—I argue that belief in condemned inmates' capacity for redemption has tested the retributive underpinnings of capital punishment in ways that have strengthened them.

Linda Ross Meyer  
Quinnipiac University

#### *"And When She Was Bad"*

At the beginning of the documentary, "Mothers of Bedford," a prison worker recounts a conversation with her son. As she drives with him by the razor-wired grounds of a penitentiary, she explains that this place is where the bad people go who do bad things. The boy ponders this and then asks, "where do the good people go who do bad things?" The political and ethical difficulty we have in imagining and deploying such a category, which describes humans as good and bad at once, will be the subject of this paper.



Keramet Reiter  
UC Irvine

*Protest Bookends: The Supermax Years, 1971-2011*

During the 1980s, California built more than 3,500 cells designed for long-term and total solitary confinement. These supermax prisons were built as part of a state- and nation-wide incarceration boom. But supermax prisons cannot be explained merely as a collateral consequence of mass incarceration; they were also a particularized response to mass protest movements in and out of prison in the 1960s and early 1970s. California is an especially good example of this; correctional administrators who designed the state's supermaxes describe the institutions as primarily necessary in the context George Jackson's radical prison organizing and bloody escape attempt from San Quentin State Prison in August of 1971. Jackson, along with two other prisoners and three correctional officers died in the attempt. This paper examines the reality and the myth-making around George Jackson's death in 1971, and traces how competing narrative interpretations of Jackson's escape attempt have (1) continued to shape correctional operation decisions in California today and (2) have resurfaced in subsequent protests, especially around the recent hunger strikes initiated in California's Pelican Bay Security Housing Unit in the summers of 2011 and 2013.

Austin Sarat  
Amherst College

*Scenes of Execution: Spectatorship, Political Responsibility, and State Killing in American Film*

This Paper examines scenes of execution in American film over the course of the twentieth century. Drawing on the filmic concept of the gaze, we examine the nature of viewing such scenes and the political meaning attached to that act. Three motifs of spectatorship emerge. First, viewers are often positioned as members of an audience, participating in both individual and collective acts of spectatorship. Second, in many scenes, viewers have a privileged gaze. Third, the positioning of the viewer often shifts such that we stand in the shoes of the condemned. We conclude by asking whether and how scenes of execution provoke in viewers an awareness of the political responsibility inherent in their identities as democratic citizens in a killing state.

**3.8 Session: Resistance 2**

**Room: WB127**

Chair & Discussant: Marc Roark  
Savannah Law School

Panelists: Daniel Farbman  
Harvard University  
Breaking Silence: John Jolliffe's Fight Against the Fugitive Slave Law in the Courtroom and in the Novel  
In the decade before the Civil War, John Jolliffe represented almost every fugitive in Cincinnati facing a return to slavery under the 1850 fugitive slave law. By law, his clients were silent in the courtroom – Jolliffe was their only voice before the commissioner who would decide their fate. Jolliffe's most

famous client was Margaret Garner and more than a century before Toni Morrison confronted her historical silence and retold her story in *Beloved*, Jolliffe himself retold Garner's story in the second of his two rough but fascinating anti-slavery novels: *Chattanooga*. This paper tells the story of how and why one of the first generation of American cause lawyer's turned to the novel. It considers the constraint that Jolliffe faced trying to speak for his clients against a law that he abhorred in a hostile legal culture. Out of that constraint, Jolliffe's two novels clamor voices and stories unwelcome in the courtroom. The paper offers insight into both the understudied world of the abolitionist lawyer and the constraints that limit the narratives available to cause lawyers today.

Budrunnisa Khan  
University of Virginia

*'Oh! Blessed Rage for Order': Law, Poetry, and the Rhetoric of Slavery in M. NourbeSe Philip's Zong!*

In this paper about Marlene NourbeSe Philip's poetry cycle *Zong!*, I plan to concentrate on the complex interplay between *Zong!* and its source, a judicial opinion. By comparing and contrasting the rhetorical and generic conventions in the two texts, I will reveal how Philip approximates the trauma of slavery from an account that avowedly refused to do so and hence crafts a profound elegy for the victims of one of history's grimmest tragedies, the Zong massacre in which slaves were jettisoned from the namesake slave ship. I plan to discuss *Zong!*'s innovative formal features and the book's deconstruction of historical legal discourse about slavery and linguistic reconstruction of the drowned slaves' humanity. I then hope to elucidate the contemporary significance of the Zong case and show how Philip's book demonstrates the Zong's apparitions lingering into the present, testifying that language's complicity with violence is an association elided at our peril.

### **3.9 Session: Affects**

**Room: WB129**

Chair & Discussant: Jessie Allen  
University of Pittsburgh

Panelists  
Julie Lane  
South Dakota State University  
*Searches, Vulnerability and Affectivity: Assessing Interpersonal Encounters Between Agents of the State and Legal Subjects*  
I conduct a textual analysis of U.S. Supreme Court opinions related to searches conducted by the state, giving particular emphasis to those involving explorations of the physical body. I deconstruct the Court's approaches to assessing 'consent' in interpersonal encounters between suspects and agents of the state. I place this analysis within the context of a body of feminist legal theory that critiques tendencies within western legal structures to: 1) universalize the experiences of legal subjects through the process of objectifying 'reasonable persons'; 2) render invisible embodied and situated subjects; and, 3) assume the existence of autonomous, self-determining

subjects capable of resistance to authority and coercion. I conclude that these tendencies provide insufficient recognition of legal personhood and suggest that greater attention be given to vulnerability and affective dimensions of the human experience in such encounters.

Karen Petroski  
St. Louis University

*Fictions of Omniscience*

Who is the law's implied reader? This question could be, and has been, approached from purely theoretical perspectives. But the law itself also proposes a set of answers through what this paper calls 'fictions of omniscience': propositions about readers of legal texts that are conventionally used as premises for reasoning in specific legal settings. Each such fiction posits readers who have access to and comprehend an entire corpus of texts, conventionally accompanied by acknowledgment that the posited reader is not an actual person. Such fictions operate, sometimes subtly, in many places in modern Western law. The paper analyzes some of the most powerful and widespread fictions of omniscience. After tracing the history of these doctrines, summarizing justifications for and criticisms of them, and mapping their differences, the paper proposes a framework for understanding their implications for modern conceptions of legal authority and its relationship to information access.

Caprice Roberts  
Savannah Law School

*Law's Essence: Dialectic between Passion and Reason*

Law's essence, its soul, can neither be learned nor actualized without coupling passion and reason. Societal progress requires legal action—creativity within principled reason to cure injustice. Lawmaking and interpretation benefit from critical, independent thinking even when duty of office trumps conscience. Justices Cardozo and Brennan advocated melding heart and mind, but times of crisis cause the pendulum to swing between these poles. Though law speaks in a language of elements, met and unmet, it must aim toward justice lest its principles wane. The law is iterative, a discourse among tensions to be balanced. It is not a binary inquiry between emotion and logic, theory and practice, or policy and rules. It must combine these (perceived) poles. The legal lens is a kaleidoscope for viewing the intricacies in context while appreciating the substance, texture, and intersection of all components. The view requires the observer (reader) to see all present as well as all that has fallen out of frame in order to exercise wise judgment.

March 10

15:45-17:15

**4.1 Roundtable: The Ethical and Emotional Landscape of Lawyerland**

**Room: WB116**

Chair: Steven L. Winter  
Wayne State University

Traditional justifications for the study of law and literature include the claims that it develops a capacity for empathy, illuminates the plight of the oppressed, and helps one appreciate of the constitutive nature of legal texts and the worlds those texts invite us to inhabit. But to be a lawyer is also to enter into a particular form of life. The process of becoming a lawyer is thus a process of becoming a certain kind of person who goes through the world and interacts with others in a particular way. This panel both considers these traditional justifications and explores how literature can be also used to examine the questions of who one becomes once one commits to being a lawyer, whether that person is a morally admirable person, and whether there are ways of lawyering that allow one to be both a good lawyer and a decent human being.

Panelists: Anne M. Coughlin  
UVA Law School

Lawrence Joseph  
St. John's University

John F. Stinneford  
University of Florida

Steven L. Winter  
Wayne State University

**4.2 Session: Histories and Stories 2**

**Room: WB102**

Chair: Martha Umphrey  
Amherst College

Panelists: Marianne Constable  
UC Berkeley

*'As Heretofore Enjoyed': Illinois Juries and the History of the Unwritten Law*  
In 1931, the Illinois Supreme Court found that an 1827 statute allowing jurors to judge the law was unconstitutional under the terms of the 1870 constitution. In Mark DeWolfe Howe's words, the decision meant that 'the legislature in 1827 had ... violated the constitution of 1870.' The odd temporality of this situation sheds light on relations between law, language and history that correspond to a period of 'new unwritten law' at the turn of the 19th to 20th century. This period of 'unwritten law' marks a transitional moment in the development of a sociolegal positivism that today valorizes the articulations and authoritativeness of written law.

Carol Guarnieri  
University of Virginia

*Subject to Space: Revolution and Abolition in the Eighteenth-Century British Atlantic World*

This talk will put two foundational British common law decisions on subjecthood, Calvin's Case (1608) and Somerset's Case (1772), in conversation with early American founding documents to examine the way that American colonists considered the geographic reach of subjecthood. It will then counterpose American revolutionary rhetoric with British abolitionist writing in order to think about the ways that the spatial boundaries of subjecthood were redrawn in response to political exigencies. I will consider the language of these cases in their reports as well as their popular reception in the eighteenth century in order to better understand the ways in which legal categories like subjecthood are transmuted by the print cultures in which they are taken up and disseminated. New conceptions of global space and the real bodies of the colonists and the enslaved that feel the disparate impact of the king's varied protections lead to mutations in the theory of how far ligeance can extend.

Anne Sappington  
Trinity College Dublin, Ireland

*Dissecting the Early-Modern Body Politic*

In this paper, I examine early-modern anxieties around the legal fiction of the corporation as a body politic. Using reports on the case of Sutton's Hospital (1612), the source of Lord Edward Coke's famous assertion that a corporation 'hath no soul,' I contextualize F. W. Maitland's observation that kings (as possessors of bodies politic) were 'corporations sole.' Finally, I investigate parallels between the early modern use of the terminology of the body politic and current concerns about corporate personhood.

Martha Umphrey  
Amherst College

*Dis-articulated Marriage, Inarticulate Judgment: Speech Indeterminacies in a Same-Sex Homicide Trial*

This paper explores the ways in which marriage both is narrated and resists narration in the nation's first same-sex marital homicide trial, Massachusetts v. Rintala (2013). In the context of constitutional equality arguments that emphasize the ways in which same-sex marriages are 'the same' as heterosexual marriages, the Rintala trial reveals instead the frictions and indeterminacies engendered when classic courtroom narratives of domestic violence collide with the continuing non-normativity of same-sex relationships. What does it mean to be a 'wife' in a same-sex marriage, and how might the destabilization of that term have contributed to the trial's hung jury?

#### **4.3 Session: Punishment**

**Room: WB103**

Chair: Tania Tetlow  
Tulane University

Panelists: Hadar Aviram  
UC Hastings  
*From Ward to Burden/Consumer: Imagining the Inmate in an Era of Austerity*

One of the major economic assumptions behind criminal punishment is that, by incarcerating a person, the state assumes responsibilities for his/her basic necessities during incarceration. This project, a chapter in my forthcoming book, examines the ways in which the financial crisis and the discourse of austerity it generated have challenged this assumption by questioning whether the bottom line of criminal punishment is financially worthwhile. By reimagining the offender not as ward of the state, but as a financial burden and consumer of precious resources, the new discourse focuses our attention on categories of inmates long forgotten: the old and the infirm. Moreover, a myriad of policies, ranging from the benign (early releases and resentencing of low-risk expensive offenders) to the sinister (cost-rolling of incarceration expenses onto the inmates) show the extent to which the perception of inmates as burden/consumer provides a false sense of free agency and criminal accountability.

Amanda Fisher  
Savannah Law School

*Pulchritudinous Penance: Gendered Justice for Female Sex Offenders*

This paper scrutinizes the legal arena surrounding female sex offenders and how the criminal justice system struggles to abrogate social gender expectations in favor of justice. Treatment of female sex offenders reflects broader social constructions of gender expectations. These stereotypes are often reinforced by seemingly inane consequences of moral actions, displacing blame for excuse, and culpability for malady. This paper considers how legal depictions of female offenders (particularly in the realm of sex crimes) continue these tropes. The paper juxtaposes criminological theory's attempts to understand gender labels in the application of various incidents of sex crimes, with themes exemplifying societal gender perspective interwoven throughout literary channels. Gender inequities in the application of laws, such as sex offender registries, are indisputable when viewed within the context of case analyses, historical evolution of heat of passion crimes and the feminist influence thereon, and a dissection of gender consequences within the literary sphere.

**4.4 Session: Constitutions**

**Room: WB104**

Chair & Discussant: Panu Minkkinen  
University of Helsinki, Finland

Panelists: Mark Antaki  
McGill University, Canada

*From Shorthand to Keywords: Uncovering the Implicit Constitution of Law*

Just because people use a word does not mean they are fully aware of its implications – perhaps particularly if they use it all the time. We hardly notice, quickly forget, and are mostly ignorant of, the linguistic changes tied to our ways of being-in-the-world. However, when examined together, the words we take most for granted reveal a complex web of assumptions that both structures and limits our thinking. Our forms of life are bound up with our language games. My presentation will be about a research project I have just begun on legal language. The project aims to transform some of the shorthand

jurists use into keywords so as to shed light on the taken-for-granted common sense(s) of contemporary law. In so doing, I hope to contribute to fundamental reflection on legal language tools (e.g. dictionaries and encyclopedias) as well as to contribute to the elaboration of an approach to the teaching and theorizing of law that takes seriously the rhetorical dimensions of legal texts. In so doing, I also aim to show that the experience of transforming one's shorthand into keywords is not simply the experience of applying another discipline to one's own; it is the experience of understanding how one has been 'disciplined.' In my talk, I will outline the project as a whole, situate it within my own intellectual itinerary (the project emerged from my teaching of Canadian constitutional law) and provide some more concrete thoughts on specific keywords, such as 'values,' 'proportionality,' 'expression,' and 'legitimacy.'

Marinos Diamantidis  
Birkbeck College, UK

*The Financial and Constitutional Crisis in Greece: Neo-Byzantine Constellations*

The paper zooms on the jouissance with which many Greeks ridiculised public rituals in crisis-hit Greece (parades etc) and argues that these acts constitute attempts to break with the time of perpetual progress that modern Greece was supposed to have entered in the 19th c, and to re-enter the time of Byzantine tradition. Far from being analogous to later occidental medieval and modern state rituals for the efficacious glorification of power, Byzantine theo-political rituals never quite fully sanctified power; instead, they mimicked the irreducible violence of sovereign power. By ridiculing standardized solemn national state rituals of western origin, Greeks seem to re-dispose of an Eastern ritual economy that allowed power to operate yet never quite hid its violence behind narratives of legitimation (from the Divine Right of absolutist monarchs to the Kantian Right of modern republics).

Dana Lloyd  
Syracuse University

*The Rule of God and the Rule of Law: Native Americans Contesting Sovereignty*

This paper examines the interplay between law and religion in determining sovereignty – a concept that has both legal and theological meanings, origins, and implications – in the Native American context. I explore different conceptions of sovereignty as they appear in various Supreme Court decisions and Native American scholarship that critiques them. The role U.S. courts have assumed in this debate, I argue, is in secularizing sovereignty. A native response, then, should be theological. I show the absurdity of trying to revive tribal sovereignty through appeals to the U.S. courts – a result of different definitions of sovereignty held by the different parties: the U.S.'s definition is tightly related to ownership of land, whereas Native theology sees the matter through completely different lenses – the land is sacred, and therefore should belong to everyone. Nevertheless, Native Americans seem to have to accept the U.S. definition in order to be heard in its courts.

**4.5 Panel: Secrecy and Exposure During the Cold War and the War on Terror Room: WB105**

Chair: Anna Krakus  
University of Southern California

How are painful truths exposed under the extreme conditions of a totalitarian state or the organizations of a police state? To what is the state itself exposed when its secrets are revealed? Because revelations also conceal and concealment must reveal something, the dialectic of secrecy and its opposite is bound to be paradoxical. Objective facts about actions and techniques and subjective truths about identities are collected, protected, distorted, dissimulated and disseminated by actors within an apparatus of security. A simple model of the surveillance state assigns secrecy to the operations of the state which in turn strives for total surveillance of the lives of subjects. Surveillance capabilities are mechanisms for discipline and control and, when lacking accountability, result in abuse of power. The task for activists seeking reform is thus a reversal that will create government transparency and privacy for persons: from state opacity to state transparency; from personal transparency to personal opacity. However, that totalitarian states and secret police organizations retain and embellish aspects of spectacular authority, as well as engage in selective disclosures of information, frustrates any clear-cut model of secrecy and surveillance. Moreover, the activities of persons, whether adapting to or resisting the state, exhibit a variable mixture of opacity and display of the self. Exposures of secrets, of crimes, of lies, and of silences are often at the same time the exposure of bodies to physical violence. This panel looks at both sides of the Iron Curtain during the Cold War and its geopolitical aftermath that continues to the present. Examples that will be considered range from the writings of dissidents in the Soviet gulag to the writings of a former CIA agent turned whistleblower; from the limited opening of files of the Polish Secret Police to the unauthorized disclosure of documentation of the NSA's electronic surveillance.

Panelists: Eric Sapp  
Stanford University

Anna Krakus  
University of Southern California

#### 4.6 Session: Literature 1

Room: WB119

Chair: Leif Dahlberg  
Kungliga Tekniska Högskolan, Sweden

Panelists: Michaela Brangan  
Cornell University

*Real Property in the Postcolony: Reimagining Toloki in Zakes Mda's Ways of Dying*

Zakes Mda's novel *Ways of Dying* has been criticized as an abandonment of radical politics in favor of post-apartheid individualism, lacking self-reflexivity and narrative vision. The main character seems to waltz through the novel lost in imagination, heedless of others' struggles. Further, he seems not to suffer for his isolating hubris; instead, he laughs. Such strange, improper heroism: what politics are served here? With Judith Butler's recent work, in dialogue with Roberto Esposito, Robert Cover, and Achille Mbembe, I examine how notions of legal ownership—real, objectively valued, proper—are radically displaced in the novel, as Toloki's imaginings are reinterpreted as a communitarian conduit



for resistance politics. He maintains a singular 'propriety' that in some ways resists community, but affirms the sense that resistance is bodily. Further, this reading supports the claim that exposing violence and injustice at their 'real' locations may be performed through imaginatively exposed bodies.

Catherine Frank  
University of New England

*Witnessing Women: Character Evidence in Anglo-American Law and Literature*  
George Eliot's *Adam Bede* (1859) and Hawthorne's *The Scarlet Letter* (1850) both focus on transgressive women and the problem of 'character.' Bracketing the 1850s, their novels offer a window into a mid-century discourse of character and practices of character formation that not only highlight their different literary modes, but also speak to legal efforts to define and allocate responsibility for wrongful actions. Hawthorne and Eliot's interest in character was matched by their legal counterparts, Maine Jurist John Appleton and Thomas Denman, Lord Chief Justice. Both reformers, Appleton in particular advocated throughout the 1850s for the removal of restrictions that prohibited interested parties from testifying at their trials, and yet in these novels, which not only could admit the central characters' testimony but indeed encourages them to explain themselves, the accused will not speak. This paper will explore what the realist Eliot and Hawthorne, the writer of romance, shared in terms of their approach to character evidence and the subjects it produced and, further, what the changing conventions of literature and of criminal procedure suggest about the status of character as a narratological and evidential construct.

Melissa Ganz  
Marquette University

*Justice and Judgment in Frankenstein*

Criminal responsibility underwent an important shift in eighteenth-century England. Before this period, responsibility for crimes depended mainly on causation. Jurists focused less on whether a person *meant* to commit an act and more on whether he actually committed it. English law thus made little distinction between children and adults; children ages eight and older were routinely punished for felonies including murder. In the late seventeenth and eighteenth centuries, however, criminal responsibility became linked to new ideas about human understanding. Reformers maintained that one could not be guilty of a crime unless one fully understood the consequences of one's actions and intended those consequences. By the middle of the nineteenth century, jurists had embraced this idea, raising the age of criminal capacity to fourteen.

In this paper I argue that Mary Shelley's *Frankenstein* (1818) embraces the conception of criminal intent being formulated by jurists and philosophers, and that the novel helps justify the raising of the age of criminal capacity. Victor Frankenstein places responsibility for the deaths of his brother, friend, and fiancée squarely on the shoulders of the being whom he creates and promptly abandons. But while the novel acknowledges the horror of the creature's violence, it refuses to condemn him. Shelley emphasizes the creature's lack of understanding and lack of criminal intent. During his formative years, the novel

shows, the creature receives no education, love, or sympathy; he has no parent to shape his reason or guide his will. Shelley invites readers to sympathize with rather than to blame the creature—to excuse rather than to hold him responsible for his acts.

Daniel H. Strait  
Asbury University

*The Judicious Reader and the Perilous 'Middle Way' in Robert Browning's The Ring and the Book*

Martha Nussbaum uses the concept of the 'judicious spectator' in her book *Poetic Justice*, in which she argues that reading literature develops our moral and ethical capacities. Influenced by Adam Smith's *Theory of Moral Sentiments*, Nussbaum claims that not only does judicious spectatorship cultivate a reader's powers of literary critique and judgment, but it also fosters a dialogue about moral and ethical concerns so central to life in the public sphere. For Nussbaum, and, of course, for Smith, reading literature—novels, dramas, poetry—entails making complex moral and ethical judgments. In developing her argument, Nussbaum incorporates Wayne Booth's ethical claim that keeping company with good books constantly tests the moral and ethical positions a reader holds, and, ultimately, opens rather than forecloses on dialogue about what is ethically important in human experience. In this paper, I plan to explore how reading Robert Browning's poem *The Ring and the Book*, particularly Book IV ('*Tertium Quid*'), calls for the judicious reader, one who must exercise a moral and ethical sense to confront and respond to the hidden difficulties and complexities associated with the moderate—and persuasive--'middle way' between competing extremes. Browning's poem invites further consideration about how the literary imagination relates to and informs a life of social, moral, and ethical practices in the public sphere.

**4.7 Session: Resistance 3**

**Room: WB121**

Chair: James Martel,  
San Francisco State University

Panelists: Anthony Farley  
Albany Law School  
*Fugitivity and Debt*

Sometimes we think that we have escaped from a deadly shock only to find that the passage of time brings with it repetitions of same shocking death from which we thought we had escaped. The deadly shock returns to catch us unawares, again and again. Psychoanalysis sees in this repetition of surprise the story of an individual trapped within the event-horizon of an early trauma. What can happen to an individual can also happen to a people. The Middle Passage is one such trauma, and its mode of repetition is jurisprudence. Slavery is death, a shock. It is not over. Slavery to segregation to neosegregation is repetition, not emancipation. Slavery to segregation to neosegregation is white-over-black to white-over-black to white-over-black. It is the same deadly sameness, the sameness of death, again and again and again, world without end. When we write of the Middle Passage we write of the mass death that is the first moment of capitalist accumulation. When we write

of jurisprudence we write of the method of conflict resolution that places that first moment of capitalist accumulation somewhere beyond the reach of authoritative memory. The law is law only in so far as it effects a foreclosure or, to use a psychoanalytic term, repression. Law is law only in so far as it successfully forecloses or represses memory of the Middle Passage. The Middle Passage is the event of mass death that capitalism blindly repeats as equal justice under law. White-over-black is the beginning and the continuation of the Middle Passage, of slavery, of death. The pursuit of equal justice under law is the repetition and perfection of the death that is white-over-black. This deadly sameness is all there is and all that there can ever be to equality and justice under law. Jurisprudential struggles for law have only brought us back to the Middle Passage, and they have done so again and again. All is not lost! A working-through of the repetitions is possible and necessary. It is only memory, achievable by working-through the repressions, that allows us to live in the present. And only those who live in the present can begin anew the class struggle that we so traumatically lost the last time round. The abolition of debt is the working-through of the trauma of capitalist accumulation and the effective return to the present. I will return to Freud through Sandor Ferenczi, to Marx through Rosa Luxemburg, and to an anarchist tradition that has the Nineteenth Century as its center, abolition of the wage system as its beating heart, forgiveness of debt as its spirit, and the general strike as its body. And I will illustrate it all with a discussion of present-day free associations in the psychoanalytic and anarchist communist senses of that term.

Jennifer Terrell  
American University In Cairo, Egypt

*Apartheid as Analogy: Intertextuality, Law, and the (Post)Colonial Moment*

In 1973 the UN elevated apartheid to a crime against humanity that can be prosecuted by the international community. Instead of becoming a universal concept, one must constantly reference the specificity of South Africa in order to explain what constitutes apartheid and conversely how to dismantle it. This has proven problematic for the state where the apartheid analogy endures, Israel. This paper explores the apartheid analogy and the possibility of intertextuality as a methodological approach that would enhance our understanding of law and the global activist movements that rely on past struggles to propel future change. First, I consider the law of both states and explore the legal justification to deploy this analogy. Then I explore politics as speech-acts and texts that foment the apartheid analogy, especially among global activists whose virtual participation within these states has produced a contentious politics over the naming of Israel-Palestine as an apartheid state.

Reginald Wisenbaker  
Savannah Law School

*A Case for Muslim-American Reparations*

Muslim Americans are often targets of ill-founded hate, discrimination, and suspicion. Through popular cultural portrayals, salacious media reporting, and targeted governmental policies Islam has been conflated with terrorism. To compound the harm, discriminators often fail to differentiate between the religious associations they describe as 'Muslim' and other groups who presumably share similar characteristics. What results is an odd form of discrimination that sweeps a large swath of individually distinct groups into a

collective and labels them as terrorists. This paper considers how society's beliefs and suspicions are not combatted by the legal system, but rather are further legitimated. The paper considers how legal claims draw on popular cultural misconceptions, reifying rather than reforming cultural stereotypes. The paper considers how legal responses to Japanese Americans after World War II invoked the social engine of repair for those Americans subject to systematic discrimination and considers whether such a response is warranted today.

#### **4.8 Panel: Boundaries and Bookmarks: Media Law as Social Regulation**

**Room: WB127**

Chair: Jennifer Petersen  
University of Virginia

While legal scholars often see the intersection of media and law as residing primarily in the representations of law in media texts, this panel investigates this intersection as an example of the productive power of law. The passage of laws regulating media and court cases applying existing law to media (collectively, media law) are often ways of regulating the social body. Said another way, media law actively shapes the institutional character and social role of the media, and defines the contours of the public sphere. The effect is to create the playing field in which individuals and groups publicly act and interact – and thus indirectly to govern their conduct. Analyzing the way that law shapes the operation of media, the use of media technologies, and the impact of these interactions on different groups of people is key to understanding the parameters of politics and political action at any given time. Critical humanities scholarship provides the lens that allows us to see these intersections and the power relations constituted through media law. More specifically, the authors in this panel draw from such fields as critical political economy, critical geography, public sphere theory, critical historiography, and theories of authorship to interrogate the embedded power dynamics within media law. The idea that legal discourse - through both legislation and regulation - creates discursive social 'boundaries' is a thread linking these papers together. From this, the papers gathered in this panel establish the mechanisms via which media law actively constructs the boundaries of political action and demonstrate the way that these laws promote or hinder social change. Discursive boundaries that are interrogated include the construction of the local within UK regulatory discourse and its use to further neoliberal governance, the notion of indecency within American FCC policy and its use as a form of social and political regulation, and how First Amendment decisions about new technologies (e.g., code, hyperlinks) regulate and delimit the uses and expressive potentials of digital culture; the mechanism for this limitation is the imposition of ideas of authorship based in a romantic vision of literary production.

Panelists: Jennifer Petersen  
University of Virginia

*Speaking Machines: Law and Computer Communication*

Computer communication poses interesting challenges to First Amendment law. Communication via hyperlinks, code, and algorithms do not fit easily within the models of expression most central to First Amendment theory in which there is a speaker with a clear intent and will. This issue was at the heart

of *Universal v. Corley* (2001), which asked whether binary code, the 1s and 0s of machine language, was speech. The judges in the case suggested that this code was speech when written out and used to communicate among programmers, but not when run. The paper shows that the line the judges drew between code as text and functioning code was based in literary models of authorship. In *Corley*, the imposition of this vision enabled a decision that sets a low bar of constitutional review for regulation of code. Further, this vision is insufficient to capture the expressive capacities of digital communication.

Christopher Ali  
University of Virginia

*Local, Localism, Locality, Localness: Constructing the local in UK media law and policy*

This paper interrogates recent attempts by the UK government and the communications regulator, Ofcom, to discursively construct “the local” within media policy and legislation. “Localness” in the UK media ecosystem has become an almost obsessive focus for Ofcom since its creation in 2003. This reached its zenith with the creation of a new digital local television programme service in 2011. The announcement of this local service came on the heels of the passage of the *Localism Act*, which devolved certain federal responsibilities to municipalities. Through a critical discourse analysis of relevant policy documents, this paper argues that a noticeable shift within regulatory discourse from a more expansive definition of “the local” to a more hermetically closed definition has paralleled a larger trend of decentralization and neoliberalism within UK federal governance. This paper sheds light on the discursive construction of the local as a political economic, legal and social phenomenon.

Hector Amaya  
University of Virginia

#### **4.9 Session: Religion, Feminism and Critique**

**Room: WB129**

Chair: Susan Heinzelman  
University of Texas, Austin

Panelists: Yael Machtinger  
York University, Canada  
*The Quantifying Quandary: To Count or not to Count? Using Jewish Divorce Refusal to Critique Scientific Methods and Embrace Storytelling*  
In 2011, a statistic quantifying mesuravot get, women refused a Jewish divorce in North America was released. In this paper, I'll question quantifying as a preferred scientific method of analysis in socio-legal studies, and will argue that attempts to place numeric value on women experiencing Jewish divorce refusal is not only doomed, and will hinder the struggle they face, but also hinders our 'curiosity-driven' research more broadly. Obsession with and attempts to

quantify these women prevents meaningful and constructive engagement with and usurps attention from the issue of divorce refusal by men, anchoring wives to unwanted marriages. Furthermore, I will use divorce refusal as a model to investigate questionable uses of quantifying and will support an alternate method of inquiry and analysis which more accurately illustrates significance of the issue at hand (get refusal), and which is 'politically relevant' - the use of storytelling in academic research and the need for women to speak and others to listen in order for there to be legal and social change.

Ruthann Robson  
City University of New York (CUNY)

*Dressing Religiously*

How democracies should treat religious dress continues to be a contentious issue, but this paper suggests that religious dress should raise more questions about the policing of dress in general than the tolerance of religion. Building on my 2013 book, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes* (Cambridge University Press), this paper will analyze current issues in the UK, US, Canada, and Turkey.

**March 11**

**8:30-10:15**

**5.1 Panel: The Propertization of Humanities? The Relevance of Property for the Study of Law and Culture** **Room: WB102**

Chair: Peter Schneck  
University of Osnabrueck, Germany

'Property is in.' With this statement, Franz and Keebet von Benda-Beckmann and Melanie G. Wiber open their 2006 edited volume *Changing Properties of Property*. This panel, which is hosted by former participants, faculty members, and organizers of the annual Osnabrueck Summer Institute for the Cultural Study of the Law (<http://www.blogs.uni-osnabrueck.de/lawandculture/>), seeks to reflect on the role of ownership and proprietary regimes within the humanities. The talks on this panel, located in the disciplines of German Studies, American Studies, and Postcolonial Studies, explore the manifold conceptualizations of property across historical time, space, ethnicities, and professions. They share the notion that the concept of property has always been a contested one, both in Europe and in the United States. In Europe, debates about intellectual property raged as early as the 18th and 19th centuries. On the North American continent, 19th-century legal and political discourses on property were intimately tied to the country's rapid geographical expansion and its relationship with the indigenous inhabitants. And 20th-century museum exhibits reveal that Western notions of African cultural property are deeply entangled within the colonizing discourse of possessive individualism. The panel will also reflect on the various agents involved in the

construction of property regimes. Aside from the legal profession and the courts, literary authors, museum curators, and social movements have also been crucially engaged in the formation and proliferation of property systems. The panel's contributions aim to establish a frame for discussing property as an analytical tool and its significance as a central concept in the humanities. This debate will eventually address the propertization of the humanities themselves as an attempt to critically reflect on and to possibly reclaim the relevance of law and the humanities scholarship.

Panelists:

Simone Knewitz

George Washington University

*"A man's home is his castle": The Struggle over Eminent Domain and the Property Rights Movement in the United States*

Since the late 1970s, a so-called "property rights movement," orchestrated by public interest firms such as the Pacific Legal Foundation and the Institute for Justice, emerged in the United States, fighting in courts against the alleged intrusion of the state into private property rights. Eminent domain issues, such as, most prominently, the Supreme Court case *Kelo v. City of New London* (2006) played a particularly significant role in this endeavor. In *Kelo*, the Supreme Court discussed the question whether private economic development satisfies the Constitution's requirement that the government has a "public use" for property that it takes by eminent domain. Invoking the "takings clause" of the 5th amendment, property rights activists rallied to support the plaintiff Susette Kelo and used the case to further their own libertarian agenda. Since then, the movement has become widespread, and has been responsible for the increasingly ideological public debates around property in the US. Focusing especially on the *Kelo* case, I investigate the cultural work of the property rights movement. My paper will delineate the evolution of the movement, tracing and critically evaluating the public discourse on property that it triggered. Why did property rights become so prominent on the public agenda at that particular moment? Why does the debate center on questions of eminent domain? And which larger cultural issues are being negotiated in this context? I argue that the debates are the symptom of a political power struggle, with conservatives seeking to shift political institutions and public opinion into a libertarian direction, transferring property issues from the legal to the cultural realm and sanctifying the right to property in the process. Simultaneously, however, the debate's impetus can also be interpreted as a reaction to neoliberalism and the perceived erosion of individual agency in the face of globalization and a more precarious economic climate

Claudia Lieb

Westfaelische Wilhelms University Muenster, Germany

*Interdisciplinary Conceptualizations of Intellectual Property in 18th-Century Germany*

In 18th-century Europe, the property rights of publishers were more important than the property rights of authors: By buying a manuscript from an author, printers, booksellers, and publishers received the right to unrestricted reprint. As early as 1710, England set out to stop this practice with the Statute of Anne, the first statute of modern copyright. German legal practices of recognizing the

rights of authors, by contrast, did not begin until 1808 (Badisches Landrecht). In my talk, I will demonstrate that the German copyright has its roots in an 18th-century debate between philosophers, jurists, and literary authors. Most of them emphasized the importance of property rights and fought against the reprint of books without the consent of the authors, which incurred protest from publishers and printers. In this debate, a theory of geistiges Eigentum – intellectual property – emerged. By looking at texts by authors such as Johann Gottlieb Fichte, Johann Stephan Pütter, and Christoph Martin Wieland, I will shed light on how each of these Germans conceptualized intellectual property. I will demonstrate that their arguments took two forms. While Lockean argued that individuals had the right to control the fruit of their labor, personality theorists claimed that intellectual property was a part of the author's personality, an idea that was compatible with the contemporary theory of the genius.

Sabine N. Meyer  
University of Osnabrueck, Germany

*The Properties of Removal in Contemporary Native American Literature*  
In his Columbia Guide to American Indian Literatures of the United States since 1945, Eric Cheyfitz has emphasized the "imbrication of U.S. Indian literatures and federal Indian law" (100). "[...] [F]ederal Indian law," he argues, "has been the indispensable but obscured text and context to an understanding of U.S. Native American oral and written expression" (8). It is on this premise that my talk, as well as the greater project from which it derives, rests. While the latter explores the interfaces between Indian removal legislation and representations of removal in Native American nonfictional and fictional texts from the 19th to the 21st centuries, my talk will concentrate on Diane Glancy's *Pushing the Bear: A Novel of the Trail of Tears* (1996). This literary text is one of the first contemporary novelistic representations of Cherokee dispossession during the Removal Era. My analysis of Glancy's novel will demonstrate that the removal debates were, to a great extent, struggles about different legal and cultural concepts of property. Against the backdrop of 19th-century Western conceptions of property, such as the notion of Indian title developed by the Marshall court, Glancy tells a complex and polyvocal story about the intricate interactions of nonindigenous and indigenous property regimes within the context of removal. Particular attention will be paid to the ways in which the novel aestheticizes property and to the significance of property as an analytical category in the interpretation of Native American removal writings.

Pavithra Tantrigoda  
Carnegie Mellon University

*African Art, Authenticity, and Decolonizing Cultural Property*  
In 1987, the Centre for African Arts in New York organized an exhibition entitled 'Perspectives: Angels in African Art.' Among the exhibits that were chosen to represent 'African' art, a work called the "Fante female figure" became controversial as a result of its questionable authenticity. According to David Rockefeller, a curator of the exhibition, it had a "very contemporary" "western" appearance and was later in fact revealed to be almost certainly a modern piece produced in a workshop that "specializes in carvings for the international market in the style of traditional sculpture" which appear in museums throughout the West as 'authentic' African art. Using the above as a



case in point, this paper examines how notions of authenticity and cultural appropriation play out in the circulation and consumption of African 'traditional art' and such cultural artifacts in the West. It examines the process through which a work of art is translated into cultural property, constituted as it is within a nexus of commodity chains and aesthetic criteria that bring into tension 'universal standards' against 'traditional' and 'authentic' art forms. This paper also addresses the orientalist meanings that such work acquires in its circulation as 'cultural property' within "the colonizing discourse of possessive individualism," as well as the subversive potential of quasi-authenticity of exhibits such as the "Fante female figure" in a discourse on decolonizing African cultural property.

## 5.2 Session: The Politics of LCH 2

Room: WB103

Chair & Discussant: Cary Federman  
Montclair State University

Panelists: Thomas Crocker  
University of South Carolina

What's A Constitution Without Meaning? The Politics of Law and Humanities  
Particularly when it comes to constitutional criminal procedure, interpretation becomes a way of instrumentalizing doctrine. The Constitution comes to mean what the doctrine says, and the doctrine is in service of dominant social structures that emphasize the need for clear rules to guide police practice. Such doctrinal reasoning can create contradictions. For example, states of affairs the Supreme Court once labeled practices of the 'police state' can become normal policing practices doctrinally sanctioned. Transformed police practices reflect changes in political priorities and in part reflect altered constitutional understandings. But they do not tell us about broader constitutional meanings of principles no longer salient within interpretive practices. If judicial reasoning does not contemplate constitutional principles of privacy, for example, or First Amendment protections for associational freedoms, then it fails to give meaning to possible constitutional priorities. Such failure makes possible the paradox of occupying a state of affairs that once served as the organizing negative exemplar for the constitutional meanings of criminal procedure—the 'police state.' There was a time when the specter of the 'police state' haunted Supreme Court opinions. Extending from the post World War II-era through the Warren Court's criminal procedure revolution, in majority opinions and in dissents, the threat of a 'police state' motivated the Court to articulate the constitutional meaning of privacy as a constraint on police practices. But politics and times change, carrying with them new doctrinal understandings, though now in service of police practice, not the articulation of constitutional principles. This paper will first explore how instrumentalized doctrine can lead to the paradoxical state of a Constitution without meaning. Second, it will make the case that interpretive practices implicate a politics of social imaginary that make humanistic legal analysis essential to constitutional practice.

Enrique Guerra-Pujol  
Barry University  
*Gödel's Loophole*

Kurt Gödel, who is considered the greatest logician since Aristotle, reportedly discovered a deep logical flaw or loophole in the US Constitution. What was it? In this paper, the author revisits the original story of Gödel's discovery and asks, why is there is no record of and so little academic curiosity regarding Gödel's finding, especially considering Gödel's stature and extraordinary genius?

Panu Minkkinen  
University of Helsinki, Finland

*Wilhelm Dilthey and law as a human science*

Wilhelm Dilthey is usually regarded merely as an intermediate figure between Schleiermacher and Gadamer in the development of modern hermeneutics from its romantic infancy to philosophical maturity. As such an intermediate figure, Dilthey's contribution to the study of law would seemingly only concern issues relating to interpretation. But Dilthey's attempts to establish a philosophical grounding for the human sciences also offers avenues for a radicalisation of law. This paper will explore two such avenues. Firstly, it will trace the way in which Dilthey's original psychologist foundationalism gradually made way for a more vitalistic position, a 'life philosophy' that aligns him with a more Nietzschean stance. Secondly, the paper will illuminate the very particular position that Dilthey assigns to law as a mediator between the two systemic frameworks of human action, namely cultural systems and the external organisation of society, and its far-reaching consequences for law as a human science.

**5.3. Panel: Derrida and the Death Penalty**

**Room: WB104**

Chair & Discussant: Jennifer Culbert  
Johns Hopkins University

Derrida's Death Penalty Seminar, given from 1999 - 2001, was his most extended engagement with a legal issue, and arguably the most important since he first turned to law in 1989's 'Deconstruction and the Possibility of Justice.' The seminar ranges over the death of Socrates, the United States law of capital punishment, Victor Hugo and Albert Camus's literary and abolitionist texts, the history of the guillotine and other methods of execution, and, ultimately, the philosophical concepts of mortality, death and finitude. The recent translation of the Seminar's first volume (covering 1999-2000) provides English speakers with the first opportunity for a full consideration of his analysis of capital punishment, beyond the fragmentary discussions available in English to date. In this panel, we will take this opportunity to examine this important text from different theoretical perspectives, including the legal, philosophical, and psychoanalytic.

Panelists: Catherine Kellogg  
University of Alberta, Canada

*Cruelty, Death Penalties and the Beyond of Sovereign Knowledge*

In his first published work on the death penalty, Jacques Derrida points out what he calls "the most stupefying -- and stupefied fact" about the history of Western philosophy. As he says, "never to my knowledge, has any philosopher...contested the legitimacy of the death penalty". As Peggy Kamuf

says, Derrida indicts Kant, Hegel, Rousseau, Locke, with a “whack, whack, whack, whack”. And at the end of his 1999 seminar on the Death Penalty, Derrida makes the astonishing claim that “even when the death penalty will have been abolished...it will survive, there will still be some death penalty” [meme quand la peine de mort sera abolie...elle survivra, il y en aura encore]”. He points towards a possible way of reading these two statements when he tells us that while the history of the death penalty is a cruel and bloody one, there is no contrary to cruelty. This is to say that while there are indeed, different types of cruelty, “there is no opposition between cruelty and non-cruelty”. Consequently, “there is no true, original place for a debate for or against the death penalty”. Indeed, as he goes on to say, “life is, it owes itself, to be cruel, wherever it keeps... the truth of itself”. He first signalled this line of thought in his 2000 address to the States General of Psychoanalysis, where he asked, “Where does cruelty begin and end? Can ethics, a legal code, a politics, put an end to this? What would psychoanalysis have to tell us on this subject?” Noting that nowhere is psychoanalysis more under attack than in the United States, and that States General are always “convoked at critical moments when a political crisis calls for deliberation” I want to suggest that in both his seminar on the death penalty, and in his address to the psychoanalytic institution, (where the political crisis to which he refers is that effected by what Austin Sarat so elegantly described as the ‘killing state’) Derrida calls upon philosophers, political scientists, jurists and historians to think psychoanalysis as something other than a philosophy, one that nonetheless provides an account for the ways that life might be said to “owe itself to be cruel”. More precisely he calls on those interested in legal codes, in politics, in the politics of the death penalty and other instruments of contemporary state cruelty, not to think in the terms of philosophy, but in the terms of something he calls “psychoanalytic knowledge,” the knowledge that emerges from the practice of psychoanalysis, a knowledge that acknowledges, if not an opposition to cruelty, at the least “a contrary to the cruelty drive”, which is to say, a knowledge that no longer “believes in the sovereign good nor sovereign evil”. What it means to have a knowledge that no longer ‘believes’ in the sovereign good (and thus the sovereign evil) and yet nonetheless provides a way to think what will ‘survive’ the end of capital punishment, is a provocation not just to psychoanalysis, but to those of us thinking the rationales of cruel punishment in the present.

Adam Thurschwell  
Independent

#### *Derrida's Mistake*

At several points in Jacques Derrida's Death Penalties seminar, he suggests that the Supreme Court's 1972 decision in *Furman v. Georgia*, which overturned all then-existing United States capital sentencing systems, was predicated on the finding that the method of execution (the electric chair) was excessively cruel under the Eighth Amendment's Cruel and Unusual Clause. That, of course, is completely wrong. Rather than holding that the method of execution was “unusually cruel,” the Supreme Court held that the incidence of execution was “cruelly unusual”— so arbitrary, given the enormous number of murders and tiny number of death sentences in any given year, as to be “cruel and unusual in the same way that being struck by lightning is cruel

and unusual.” Derrida went on to compound that mistake by asserting that the Supreme Court’s decision in 1976 to allow some amended state death penalty systems to go forward (in *Gregg v. Georgia* and its related cases) was based on the introduction of a new method of execution, lethal injection. Again, completely wrong – in those cases, the Supreme Court overturned systems that mandated execution upon conviction, but permitted systems that required the sentencer to consider, in addition to the crime, the individual circumstances and life history of the defendant before imposing death. As it turns out, Derrida’s ignorance of United States legal doctrine is virtually irrelevant to his own project in the seminar, and doesn’t detract from its quite profound and novel insights. Accordingly, in this paper, rather than criticize it I attempt to capitalize on his mistake by using it as a point of departure for the path he did not take, an analysis of *Furman* and *Gregg*’s actual holdings that would have illustrated and confirmed his larger theses in a way that that mistake kept him from recognizing. Along the way, and apart from this irony, I hope to show the deeper understanding of the United States law of capital punishment that his seminar provides.

#### **5.4 Session: Human Rights**

**Room: WB105**

Chair & Discussant: Sinja Graf  
Cornell University

Panelists: Benjamin Authers  
Australian National University, Australia  
*‘Justice: Our Essential Role’: Representing Legal Relevance in Human Rights NGO Reporting*  
In Human Rights Watch’s (HRW) Annual Report 2012, descriptions of atrocity sit next to depictions of the work of law, of human rights abusers subject to adjudication in international courts and tribunals. Linking violation and justice in the Report is HRW itself, portrayed as ‘an effective force for justice’ whose value to international human rights law justifies its more self-interested fundraising aims. This paper examines how HRW is positioned in the Report as a necessary intermediary between wrongs and their redress. Deploying a human rights aesthetic to create visual and textual symbols that denote the work of justice in a legalised, global form, the Report positions HRW’s research into and witnessing of rights violations as indispensable to law. The Report is thus a means for HRW to instrumentally represent its legal relevance and effectiveness, and so its worth as a recipient of donations in a time of austerity.

Sital Dhillon  
Sheffield Hallam University, UK

*Do Human Rights Travel? Are Human Rights Universal?*

The paper examines the roots of the international systems of human rights within the key principal of universality and those who view such rights as a vehicle for cultural imperialism, with particular reference of patriarchal or authoritarian systems. The examination includes a discussion of the often contradictory role played by Western states in espousing the need for universality selectively, and considers the case for individual rights, within understood concepts of universality.

Jeffrey Thomas  
University of Missouri, Kansas City

*Rule of Law, Culture and Human Rights: Law with Asian Characteristics?*  
This paper compares empirical data regarding cultural values in China, Hong Kong and Taiwan to data from the World Justice Project to explore the cultural impact on human rights.

### 5.5 Session: The Sacred

Room: WB116

Chair & Discussant: Dana Lloyd  
Syracuse University

Panelists: Michelle Castaneda  
Brown University

*Priestly Flutterings: Sacred Time and the Performance of Judicial Authority*  
In 'Priestly Flutterings: Sacred Time and the Performance of Judicial Authority,' Michelle Castaneda explores the embodied repertoire of judicial authority within the Western legal tradition. This paper focuses on modes of judicial embodiment emerging from the Medieval Catholic Church—specifically, the notion of a corporate body, chiasm, and the potency of the robe. Drawing from new materialism, performance studies, and Raymond Williams' concept of the residue, this paper is concerned with the persistence of medieval modes within modern legal performance. Framed within a 1940's debate about 'unfrocking' the judge, Castaneda argues that such modes remain useful for enacting the disenchantment of legal modernity. Thus, while the metaphysical framework within which medieval modes makes sense is officially forgotten, these modes not only persist, but persist as vehicles or agents of that forgetting.

Elisabeth Kincaid  
University of Notre Dame

*The Power of Religious Narrative: The Functional Application of Paul Ricoeur in Creating Spaces for Justice*  
Can the introduction of new narratives, specifically religious narratives, into public discourse and the academy contribute to understanding which laws promote the common good in a way that a more instrumentalist approach cannot? Paul Ricoeur's theory of the ethical role of narratives in developing the identity of each individual, both by challenging prior assumptions and expanding a sense of human connectedness, can also be applied on a political level to argue that establishing just laws requires maintaining space for the introduction of new narratives. A historical analysis of how a new religious narrative contributed to the British anti-slavery movement helps demonstrate this theory. Although many contemporaries argued for the instrumentalist view, that the slave trade should remain legal because of its economic benefits, Wilberforce and the Clapham Sect successfully challenged this perspective, leading to the establishment of more just laws and an expansion of the understanding of the common good.

Cynthia Merrill  
UC Los Angeles

*History, Counter-Memory and the Sacred: Expressive Identity and the Establishment Clause*

Town of Greece v. Galloway, to be decided by the U.S. Supreme Court this term, reminds us yet again of how Establishment Clause jurisprudence is hobbled by naive notions of history and instrumentalist conceptions of harm. While the 'endorsement test' currently employed by the Court emphasizes equality and a constitutional prohibition on expressive harm, these features of the doctrine are undercut by attention to the historical pedigree of contested state actions. When courts produce litanies of official acts venerating God or worship, they engage in monumentalizing discourse, suppressing the vital memory work of community members. Citing 'history and ubiquity,' they confuse heritage with legitimacy, coarsening historical understanding by concealing dissonance, dissent, and struggle within an 'unbroken' history. Such narratives do not recount but confer legitimacy—by regulating the collective memory of the nation's foundational commitments, a quest for essence enacted as remembrance. This paper argues that the injury of establishment in a pluralist society is centrally an injury of identity denial or coercive identity formation—individual and collective. Such disputes demand what Seyla Benhabib calls 'democratic iteration,' reinterpretation of constitutional commitments through contestation and evolving understandings of equality. Such a process requires, in turn, the interpretive power of the humanities to discern history and meaning as protean, political and dialogic.

Marc Roark  
Savannah Law School  
and  
Mary Hashemi  
Savannah Law School

*Zoning, Identity and Sacred Spaces*

Sacred spaces are described as places of eruption – where memory, identity, and personhood come into contact with one another. Spaces that are constructed out of memory and identity are particularly apt for legal claims, specifically when zoning laws and constitutional claims limit the use of the space for creating social meaning. This paper evaluates how religious identity is shaped and reshaped by legal claims to space. These legal claims often confuse the meaning of the sacred identity with the space, creating contradictions of interiority versus exteriority, dislocation versus placement, and mobility versus static. The paper considers how these themes emerge in zoning challenges and constitutional claims when advocates seek to preserve the 'sacred space.'

**Panel: The Road to Hell is Paved with 'Particular Intentions': Literary, Historicist and Authorial Perspectives on Evidence**

**Room: WB119**

Chair: Randy Gordon  
Gardere Wynne Sewell LLP

Using Marianne Wesson's *A Death at Crooked Creek* (NYU P 2013) as a springboard, this panel will examine the question of what counts as legal evidence and why. In legal studies and practice, evidence is a domain heavily guarded by rules. But rules (and their exceptions) grow out of law stories—narratives from particular places and times. Our program will not suggest that rules of evidence should be discarded; rather, it will suggest that a considered reflection on the narrative sources of evidence rules can open new avenues for understanding how they came to be in the first place (and why, consequently, they must be reexamined and rejustified from time to time).

Panelists: Randy Gordon  
Gardere Wynne Sewell LLP

*Truth in Context*

If we need current, collateral proof that Professor Maitland was spot-on in his observation that all law is history, then Marianne Wesson's *A Death at Crooked Creek* provides a copious dose. The book is principally an investigation of a standard textbook evidence case, *Mutual Life Ins. Co. of New York v. Hillmon*, but it pauses to consider a range of larger cultural narratives that grew up to define and describe life on the frontier. In my paper, I'll sponsor a historicist reading of the *Hillmon* case to conclude that the Supreme Court was constrained to read the facts of the case in light of the then-dominant view (in the East) of the West as a seething cauldron of lawlessness. Accordingly, it announced a new rule of evidence that would allow the admission of certain hearsay testimony, testimony that, in *Hillmon*, linked neatly with a narrative chain that paralleled the dominant public narrative

Peter J. Durand  
Swiss Re America Holding Corporation

*Sherlock Holmes and the Case of the Scheme Under Brogue*

The death of drifter, John Hillmon, on the banks of Crooked Creek near Medicine Lodge, Kansas, in March of 1879 was called an accident. The next twenty-two years were spent trying to adjudicate whether John's widow, Sallie Hillmon, was entitled to the death benefits of certain life insurance policies John had procured just prior to his misadventure. The primary dispute was whether or not John Hillmon was really dead. The identity of the corpse became the central focus of the insurers' investigations. The insurers felt certain the body proffered was not Hillmon's, but was instead the body of an unidentified traveler who was murdered in Hillmon's place so the death benefits could be collected while Hillmon was still alive to spend them. Several well-known efforts to dupe insurers by presenting "imposter" corpses had been unsuccessfully attempted in this period and the insurers naturally assumed this was another attempt. In reaching this assumption, the insurers were using inductive reasoning. Imagine, if you will, an alternative ending in which the great consulting detective, Sherlock Holmes, is brought into the case in 1897 by The New York Life Insurance Company. The great detective was famous for his powers of deductive reasoning. As Holmes said in *A Scandal in Bohemia*, "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit his theories, instead of theories to suit facts."

Will the application of Holmes' famous powers of deductive reasoning dictate a new conclusion?

Marianne Wesson

University of Colorado

*A Death at Crooked Creek*

The 1879 death of John Hillmon, which initially seemed like an open-and-shut case of accident (or "misadventure, as one coroner called it), gained notoriety when his life insurance providers, suspicious of fraud, refused to pay his wife and beneficiary. They didn't believe the body was Hillmon's, or claimed they didn't. The result: six trials over a quarter century and a Supreme Court ruling that led to a new exception to the hearsay rule, a durable and influential precedent now so well-established that it has been forgotten by most that its origin is an unsolved mystery about the identity of a corpse. In my book I juxtapose the history of the Hillmon trials with my own 2006 attempts to resolve the mystery of the dead man's identity through DNA testing and other methods, giving readers an opportunity to watch the oscillation between historical objectivity and human sympathies to historical subjects.

### 5.7 Session: Legal Fictions

Room: WB121

Chair:

Julen Etxabe

University of Helsinki, Finland

Panelists:

Joana Agular

Universidade do Minho, Portugal

*Is Justice for sale? More readings on Saramago and the Law*

In a private conversation, near the end of his life, Saramago would have said that the much debated and highly notorious global economic crisis would in fact be a deeply cultural crisis. In a text which he considered one of his most emblematic writings about justice, published in 2005 and entitled 'From Justice to Democracy, by way of the bells', he leaves us with an extraordinary wakeup call for the simulacrum of democracy that most of today's western world shares, in which 'the mouse of the human rights will implacably be eaten by the cat of economic globalization'. A world in which, daily, modern and metaphorical bells ring the death toll for an agonizing justice. Considering areas of cultural and ethical-humanistic training as of secondary relevance or as luxuries, victims, therefore, of the economic and budget constraints that affect today's western democracies, will inevitably lead to the death of Justice envisioned by Saramago: a justice thought of as 'a companion in our daily doings', as spontaneous emanation of a society in action, 'a justice that manifests itself as an inescapable moral imperative, through the respect for the right to be that every human person is entitled to'. A reflection on the report published in 2007 by the task force that was charged with drafting a new program on general education in Harvard makes it clear that a training in citizenship must follow, if not precede, a professional training. Under the penalty of rendering meaningless and ineffective that same professional exercise. Under the penalty, most of all, of stirring up in society its most primeval instincts and practices of vigilante justice, likely to jeopardize Law's own survival as we know it.



Jessie Allen  
University of Pittsburgh

*Pretend Property: Legal Fictions, Scientific Inventions and the Discovery of Patent Law*

We need the humanities to understand law's trickery and revelation, its ineluctable combination of discovering and making things up. William Blackstone's property theory has been mocked for its fictional approach. Common law estates are the kinds of creatures that delight readers of Harry Potter books. Unskeptical belief in the natural reality of such fantastic creations would be naïve, but Blackstone may not have felt the need to parse nature and creation. The quest to separate discovery from invention is oddly doubled in the U.S. Supreme Court's 2013 decision in *Myriad Genetics*. The Court ostensibly distinguished natural discoveries from synthetic inventions in order to allow patents only for inventions. But the justices seem equally concerned to separate discovery from invention in their own work in order to claim the legitimacy of found rather than made up law.

Lisa Siraganian  
Southern Methodist University

*Our Frolics through Corporate Intentionality*

How does corporate law figure intention, and how do individuals and groups negotiate or create agency within corporate law's strictures? This talk takes up these questions through the lens of recent American literary explorations while looking back through the longer history of corporate personhood in the twentieth century. My title invokes novelist William Gaddis's legal satire, *A Frolic of His Own* (1994), which implies that the artist or writer can only legally act within the compass of a company's jurisdiction and demands. The artist might be on 'a frolic of his own,' and thus acting off company time, but tort law understands and thus value her work in terms of the company's legal obligations. Also exploring novels by Ferris and Powers, this talk presents a theory of corporate intentionality through the lens of literary form, exploring how individuals and groups find themselves enveloped by, opposed to, or acting in conjunction with a corporate agency and voice.

## 5.8 Session: Literature 2

Room: WB127

Chair & Discussant: Imani Perry  
Princeton

Panelists

Leif Dahlberg  
Kungliga Tekniska Högskolan, Sweden

*Foreign Life, Foreign Laws*

In Caryl Phillips' 'Northern Lights' (2007), a story unfolds, told by named and unnamed characters, from a variety of perspectives, around the life David Oluwale, a Nigerian stowaway arriving in Leeds in 1949. The paper performs a reading of the complex narrative structure, composed of a polyphony of voices, artfully woven together into a story about an inhospitable North England community. The aesthetic beauty of 'Northern Lights' stands in striking contrast to the brutal treatment and, eventually, the savage murder of David Oluwale by two officers of the Leeds police force in 1969. Phillips' short story reads as

much as an accusation and judgment of the city as an elegy over a lost foreigner's life, denied existence by hostile laws. The paper argues that Phillips' account of David Oluwale confronts the denial and repression of a community that is more keen on preserving an untarnished self-image than facing up to its criminal history. At the same time, the strong moral envoi is tempered by the artfulness of the telling.

Vincent Mosley  
Savannah Law School

*The Law of Fairy Tales*

Fairy tales are contemporaneously regarded as more than the collection childhood notions and fancies meant to entertain children; among the most prominent of theories, the Jungian approach identifies fairy tales as the zenith of primordial archetypal events and characters representing the cumulative ideals and beliefs of the human collective consciousness. But not only have these monsters, heroes, and epic adventures entered into our consciousness, they have also entered into our system of justice; the instrumentality of our laws, for example, give us the recourse to vindicate or vilify the valiant warrior or the dastardly usurper, respectively. Our conceptions are shaped by the notions of righteousness, retribution, and redemption that fairy tales embody. In our own little pioneering nation, we have constructed a magical kingdom of jurisprudence. This paper will analyze how legal narratives invoke fairy tale structures to explain, demystify, or sometimes contradict our notions of the law.

Jeanette Sedgwick  
Independent

*Faulkner, Conceptions of Law, and Relevance*

In 'Legal Theory and the Problem of Sense' and *Law's Empire*, Dworkin writes that law is an interpretive concept. 'Conceptions of law are controversial just because they differ in this way in their post-interpretive accounts of legal practice, in their opinions about the right way to expand or extend the practice in topics or areas or procedures at present controversial,' he writes. This paper will explore the interpretation of the law as it is personified in Faulkner's novel *Sanctuary*. As all of Faulkner's writings, *Sanctuary* is convoluted and filled with ambiguity. Written in 1931, its main character was controversial. Though much has been written about the trial which is central to the novel, the focus of this essay is Horace Benbow, Faulkner's main character, an attorney, as an emblem of the law as an interpretive mechanism.

**March 11**

**10:30-12:15**

**6.1 Panel: Critique of Neoliberalism in Legal Scholarship**

**Room: WB102**

Chair: Corinne Blalock  
Duke University

Neoliberalism has been one of the dominant discourses in both political and critical theory over the last ten years, and yet remains largely absent from the legal discourse. This panel hopes to explore what a critical understanding of neoliberalism might add to the current legal conversation, as well as the consequences of its exclusion. Focusing on constitutional law, international law, and the educational imperatives of the legal academy itself, the papers in this panel argue that the concept of neoliberalism renders visible connections and shifts that have been obscured or appeared contradictory due to an unwavering focus on older models of political autonomy and legitimacy within the legal academy.

Panelists:

Corinne Blalock  
Duke University

*Legal Education and the (Re)production of the Entrepreneur*

A critical understanding of neoliberalism not only charts new paths for doctrinal legal scholarship, but also provides critical insight into the legal academy itself. Using the framework of Duncan Kennedy's now classic critique, this paper attempts to update his project to address the law school in its current iteration as neoliberal institution par excellence. This paper argues that in the shift to neoliberalism, the framework of legal education has moved from the explicitly hierarchical one Kennedy characterized to an ostensibly more egalitarian model aimed at producing the law student as entrepreneur—a highly rational and calculating entity whose value is defined by her ability to provide for her own needs and service her own ambitions within the instrumentalist law school structure. A critical understanding of neoliberalism therefore offers students without “big law” ambitions a means of questioning the institution, instead of merely questioning their place within it.

Jedediah Purdy  
Duke Law School

*Neo-Lochnerism: The Neoliberal Conception of Freedom in Contemporary Constitutional Law*

This paper argues that neoliberalism offers a way to understand seemingly disparate developments within the field of constitutional law over the last three decades. Although both classical liberal and neoliberal constitutionalism entail conceptions of personal freedom in economic life, under neoliberalism the paradigm has shifted from a focus on the labor contract to the model of consumer choice. The image of autonomy associated with consumer choice has assumed a far more wide-reaching status beyond the narrowly economic. As a shared assumption, the image ties together seemingly disparate developments in equal protection, substantive due process, first amendment political speech/finance, and federalism. Across these areas of constitutional law, the neoliberal conception of autonomy can be seen to provide a common rationality for superficially opposed “liberal” and “conservative” judgments.

Alvaro Santos  
Georgetown Law Center

*The War on Drugs as Neoliberal Governance?*

The “War on Drugs” in Mexico has triggered an overhaul of the country’s criminal and criminal procedure laws aimed at dealing more effectively with drug-related crimes and the horrifying violence and insecurity of recent years. These reforms are being introduced at the same time that other systems of social and economic security are being dismantled. On the one hand the discourse of “security crisis” and “war” has made it easier for the government to increase its policing and surveillance powers over the population, on the other it has enabled it to ignore structural economic factors underpinning the drug markets. The war-on-drugs reforms have thus been presented as urgent and necessary, confirming the rhetoric of inevitability of the market reforms and serving as containment of social unrest. The war-on-drugs reforms are changing the focus from economic policies and its efficiency and distributive consequences to policing and security, rearticulating the problem as one of ineffective judiciaries, criminal procedure codes, and police bodies.

Philomila Tsoukala  
Georgetown Law Center

*Technocracy and democratic legitimacy in the European Union*

The management of the euro zone crisis has brought forth a new framework of governance in the EU. This framework incorporates fields outside the legislative purview of the EU, such as labor policy, under the obligatory macro-economic governance regime, mandating deep transformations at the Member State level. These changes have not been brought about by democratic processes. They have been engineered by technocrats and presented as non-negotiable technical necessities for the maintenance of the common currency. The paper will address the problems of legitimacy raised by these concrete developments but also inquire into the more theoretical question of the relationship between technocracy and democratic government.

6.2 Roundtable: Peter Goodrich, Legal Emblems **CANCELLED**

**6.3 Session: Rights and Subjects**

**Room: WB104**

Chair & Discussant: Sital Dhillon  
Sheffield Hallam University, UK

Panelists: Nina Hagel  
UC Berkeley  
Truth and the Legal Subject: Rethinking Authenticity With and Beyond Foucault  
The concept of authenticity has faced intense criticism from across the humanities and legal theory, gradually falling out of fashion. Hardly anyone has done more to problematize this concept than Michel Foucault. Foucault’s

genealogies have cast doubt on the traditional ideas of authenticity—an inner essence, a unique self, a rudimentary or unmediated experience. At the same time, Foucault's theorization of subjection seems compatible with depictions of 'inauthenticity': a detrimental construction of the self, creating experiences of distortion, falseness, constraint. While power's constitutive and regulative capacities seem to render inauthenticity more intense and unavoidable than previously thought, Foucault simultaneously strips us of a language of authenticity, from which we could theorize the detrimental effects of subjection. This paper considers this tension in light of Foucault's later writings, which suggest how one might negotiate the vast battery of powers that mold us. This paper argues that Foucault's arts of the self resolve neither the philosophical nor political challenges that Foucault's genealogies pose for authenticity. Firstly, arts of the self alone cannot fully grapple with the alienating or 'deauthenticating' effects of the various powers Foucault details. Secondly, Foucault's later works do not provide the conceptual resources to theorize adequately why these 'deauthenticating' effects might be problematic. The paper concludes by considering how to supplement Foucault's arts of the self in order to address both the political and theoretical difficulties he reveals in the concept of authenticity.

Cameron Kuhlman  
Savannah Law School

*Becoming the Abyss*

This paper appropriates Nietzsche's phrase to suggest a more engaged, dialogical conception of the relationship between subject and object, as considered in the jurisprudential context. Foucault argued that the gaze was exclusively a violent instrument of power, the 'speaking eye' which surveys and describes everything, and becomes the 'depository and source of clarity.' By contrast, for Lacan, 'the gaze is not the vehicle through which the subject masters the object, but a point in the Other that resists the mastery of vision.' One can adopt a view of the Law, as an authoritative, objective depository, which simultaneously both consolidates and oppresses. Alternatively viewed through a Law-as-subject frame, one might engage the space between seer and seen. This meaning-making discursive space has the opportunity to be both non-violent and inclusive.

Hanna Lukkari  
University of Helsinki, Finland

*Human Rights, Politics, and the Possibility of Universality: Rancière on the Rights of Man and the Citizen*

To characterize human rights as 'political', as effect of politics rather than moral or legal norms limiting politics, seems to be in an uneasy relation to their alleged universality. To understand in what sense 'political' human rights can nevertheless be understood as universal, I turn to Jacques Rancière's essay 'Who Is the Subject of the Rights of Man?'. The analysis of Rancière's view shows that it is precisely in virtue of their political nature that human rights become universal. Because 'the human' is an abstract term resisting final

definitions, it invites political disagreement about how it is interpreted in positive rights of the citizen. The universality of the 'rights of man' lies in their ability to allow everyone, including stateless persons, to become political subjects and, should the positive law exclude one from the rights of the citizen, to contest this particular rendition of the rights of man.

Daniel Ohana  
Tel Aviv University, Israel

*Resisting Homogenization: Freedom, Justice, and the Punishment of Participants in Crime*

My paper explores the ethical and political implications of the post-foundational thought of the French philosopher Jean-Luc Nancy within the realm of the criminal law. For Nancy, the movement of sense enables experience to take place in the world, as it allows for the opening of an intelligible world, prior to the formation of conscious thought. Sense is singular and relational in its movement, coming-to-presence through the unmediated exposition and articulation of the plurality of beings (bodies) with one another. I focus on Nancy's radical conception of justice and freedom which underlines the absolute and incommensurable dignity of each singular (co-)existence. For Nancy, existence is a praxis which creates sense absolutely and immediately through its multiple bursts and 'we' are constantly responsible for maintaining the political space 'open' without reducing or subordinating it to a primordial foundation or goal. I attempt to demonstrate the pertinence of Nancy's account for contemporary criminal law theory by engaging with the specific question of the justification for the derivative structure of accomplice liability, which has recently been the focus of much debate in the literature. I suggest that by tying the liability of the secondary participants to that of the principal offender, rather than providing for absolute collective responsibility or holding the participants individually accountable based on the specific act(s) committed by each of them in strict isolation from one another, the derivative structure of accomplice liability can be justified as a mode of calling them to account for their actions that does justice to the freedom and singularity of their existence.

**6.4 Session: Justice**

**Room: WB116**

Chair: David H. Fisher  
North Central College

Panelists: Robert Herian  
The Open University, UK  
*'Feel your dark way as I lead you, father': Using Sophocles to Question the Relationship of Equity with Law*  
Using as illustrative Sophocles' Theban Plays, primarily Oedipus at Colonus, and a psychoanalytic methodology, the following paper will aim to examine aspects of the familial dynamic between equity and law, with the aim of rendering problematic the maxim and embedded perception that 'Equity follows the Law'. Foundational to understanding this dynamic is how the two tenets traverse and negotiate both with one another, with third parties, as well as with the topography in which they operate and perform. Forming part of a wider project, this paper also seeks the validity of the law of equity's continued place within the legal landscape, as well as the substantive quality of that continued

placement primarily with regard to the legal curriculum and equity's inclusion as one of the seven areas of knowledge students are required to complete in order to gain a qualifying law degree.

Monika Lemke  
Carleton University, Canada

*Social Injustice and the Rawlsian Liberal Citizen*

Liberal conceptions of justice permeate the society in which we live. On an individual level, we conceive ourselves as liberal citizens each with the ability to shape the society we participate in, but is this actually the case? Can we actually meaningfully shape society, and move towards a vision of social justice by adhering to the principles embedded in liberal citizenship? In my paper, I identify those notions embedded within liberal citizenship and institutions that prevent citizens from realising the goal of meaningful social change. By examining the Rawlsian prescriptions for ideal citizenship and Tommie Shelby's application of Rawls' 'duty of justice' within the non-ideal context of ghetto poverty, I argue that accomplishing a vision of social justice requires more than mere adherence to pure procedural justice and the institutions that uphold such a conception of justice. In lieu of the conference's focus, I suggest that social justice may only be brought about in a meaningful way outside the realm of conventional legal and political spaces. These marginal spaces foster a consciousness of injustice and allow for a commitment to social justice that would be otherwise unavailable to individuals operating with an adherence to the liberal-legal framework.

Antonios E. Platsas  
University of Derby, UK

*A Golden Machiavellian Moment in Time for the Theoretical Disciplines: Rebirth through Subversion*

It is only through subversion and rebirth that the theoretical disciplines can acquire anew their old splendour. First one must demolish in order for one to build anew. Rebirth is not without pain. Rebirth occurs through subversion. The Renaissance paradigm and by extension, modernity's paradigm are indicative of the rebirth one must now seek in order for the theoretical disciplines to revert to their central, if not prevalent, position in Academia. Demolishing the old by building the new is the way to proceed. The paper proceeds by negotiating that academics in the theoretical disciplines are to be reminded of the fact that, if sciences and technology form the new academic establishment, such a phenomenon is not necessarily without criticism. To this one must also be prepared to remind and be reminded that theoretical disciplines have always been perceived as the guardians of liberal values, even though theoretical subjects can arguably offer so much more than merely promoting and protecting such values. Academia thrived on its multiplicity. One must therefore now be aware of the fact that theoretical disciplines –upon rebirth– through the devices of subversion can be reinstated to the position which they always had in Academia. Above all, one must remind all parties affected that one cannot escape Machiavelli's principle which suggests that one must not indefinitely postpone a war to somebody's else advantage, in our case to the advantage of sciences, for such a war will not just go away. A war is ensuing but one must be prepared to fight such a war. To win a war, one must first inspire. To inspire one must now subvert.

Kathryn Temple  
Georgetown University

*'Tender is the Law': An Ethics of Care in Blackstone's Commentaries*  
As Paul Halliday has pointed out, William Blackstone's construction of law gives law a character, a personality, complete with feelings, motivations, desires. This paper explores the law's 'tenderness,' a tenderness most often expressed at the very moments law becomes most violent, in its efforts to manage criminal culpability. When Blackstone's law becomes tender, we can be assured that criminals are about to be exposed to the death penalty or to torture, but ironically, these moments create a space for an ethics of care around prisoners and their treatment. Unpacking these moments of tenderness allows us to understand Blackstone's role in developing a new understanding of prisoner's rights and the government's responsibility for their care.

### 6.5 Panel: Storytelling and the Law

Room: WB103

Chair: Jill Stauffer  
Haverford College

Taking seriously Jean-Luc Nancy's warning that the complacency that threatens any discourse of community is 'to think that one is (re)presenting, by one's own communication, a co-humanity whose truth, however, is not a given and (re)presentable essence,' this panel explores how storytelling may serve as a mode of communication that acknowledges irreconcilable truths and inconsonant realities in the experience of human existence and at the same time, provides a means by which it may be possible for people to nevertheless share a world. To the extent this is possible, the panel considers the important role storytelling may be able to play at law and in the realization of justice.

Panelists: Jennifer Culbert  
Johns Hopkins University

*The Use and Abuse of Fiction: Hannah Arendt's Practice of Storytelling*  
In an analysis of Hannah Arendt's practice of telling stories, George Kateb argues that Arendt fails to distinguish sufficiently between storytelling and ideology. Consequently, Arendt cannot defend her practice from critics who accuse her of either making things up or of denying reality in order to assert the validity of her claims and concepts. In this paper, drawing from Arendt's reading of Kafka's parable 'He,' I examine Arendt's storytelling practice to show how she does distinguish between two modes of meaning making. I then demonstrate why the distinction she draws matters in an analysis of one of Arendt's most controversial articles, 'Reflections on Little Rock.' Focusing in particular on how Arendt relates the past to the future, I discuss Arendt's representation of *Brown v. Board of Education* and its political implications. I conclude the paper by suggesting how Arendt's method of storytelling may inspire us as we engage in a renewed conversation about race and discrimination in the wake of the verdict in the George Zimmerman trial.

Sara Kendall  
Leiden University, Netherlands

*Stories of International Criminal Justice: Origins, Agency and Teleology*



The field of international criminal justice relies heavily upon storytelling to legitimate its work: stories of the Benjaminian ‘Great Criminal’ who threatens the very basis of the legal order; stories of conflict-affected individuals whose dignity will be restored through retributive legal processes; stories of the clear boundary between the medium of law and the field of politics. These narrative practices include the origin myths of the field’s foundation at Nuremberg, its progressive development following the end of the Cold War, and its culmination in the establishment of a permanent International Criminal Court in The Hague. This paper takes up several stories from within the field of international criminal justice. It begins from the origin myth of jurisdiction, considering the exchange between Hannah Arendt and Karl Jaspers about the proper forum for adjudicating international crimes. How have courts in practice told the story of their tenuous foundations? How are agency and responsibility attributed to individuals for mass crimes? Through what narratives does the field continue to justify its objectives?

Jill Stauffer  
Haverford College

*What gets Heard in a Hearing?: Law, Stories, and the Fragility of ??*

This paper addresses the perils and possibilities of human communication in scenes of transitional justice and political reconciliation. A strict accounting of facts may help shed light on abuses that were hidden, and that may help set up new expectations that where lawlessness once reigned, the rule of law will now offer equal protection. But a strict accounting of facts may also—at the same time—fail to do justice to the deeply entrenched different truths a divided society has lived in. Discerning truths and transmitting facts are both important aspects of world-building; they help to establish a shared world and set forth standards of judgment by which we hold ourselves and others accountable. But if we think that facts and truths fill out the vessel of communication, or that when we communicate facts and truths transparent understanding always ensues, we will not be able to explain why conflicting facts and truths always emerge—unless we content ourselves with saying that wherever truths conflict, only one of them is true. In many situations—especially those of post-conflict transition and reconciliation—meaningful experience will not bear out that conclusion. Indeed, every reconciliation pins its hopes on a fragile consensus—a new definition of past, present and future—that can only be won slowly, painfully and cooperatively, and will never succeed in erasing or redefining every resistant narrative. Even the soundest logic, bringing together facts and what justice requires, may fail to \*persuade\* people in the absence of conditions for successful hearing.

## **6.6 Session: Terror, Crime and Security**

**Room: WB119**

Chair & Discussant: Susan Sterrett  
University of Denver

Panelists: Matthew Festa  
South Texas College of Law  
*The Role of History in Modern National Security Law*  
National security and the law of armed conflict have received much attention in the past decade. Scholars, practitioners, and policymakers have attempted to

understand and promote best practices in engaging in military conflicts and post-conflict governance. Much of this commentary has relied upon military experience from the past. Many leading thinkers have looked to history for guidance on topics as varied as just war theory and international law to targeting and detention. At the same time, academic military history is completely moribund. Because of the dearth of contemporary scholarly history in the field, those who wish to consult historical sources for modern national security issues are forced to rely on either outdated or popular histories. This paper recommends a renewed academic consideration of military history as an area where scholarly historical studies are desperately needed in current legal and policy debates.

Andrew Poe  
Amherst College

*A Politics Beyond Secrets*

Edward Snowden's revelation of the US National Security Agency's international and domestic surveillance programs has provoked equal parts enthusiasm and rancor. Defenders of Snowden celebrate his truth-telling as revelatory of an emerging antidemocratic security state. Critics see his actions as treacherous, calling for his persecution under the US Espionage Act of 1917. Such revelations, and these competing interpretations, should give us pause: What are the politics of these revelations? This paper engages Snowden's revelations as emblematic of a new anarchic politics grounded in the denial of secrets. A logic for this politics presents itself – perhaps paradoxically – in Kant's famous essay 'Towards Perpetual Peace.' As this paper aims to show, Kant offers an articulation of the political use and dangers of secrets, grounded in competing norms of hostility and radical hospitality. This paper traces Snowden's actions as a parallel critique, illustrating the latent anarchic possibilities in a politics beyond secrets.

Jothie Rajah  
American Bar Foundation

*Law: A Post-9/11 Absence*

Osama bin Laden's killing is shrouded. Enacted in darkness, with the material reality of his body annihilated when slipped into unmarkable spaces, it is as if this killing is beyond the reach of law: beyond capture, trial, sentencing, and most potently, beyond a burial that acknowledged his (human) ties. What does the killing and burial of bin Laden tell us about the sites, sources, and nature of law's authority in a post-'9/11' world? If law is constituted by 'acts of language [that] are actions in the world', (White, 1990, ix) then the law embodied by these events is discernible through an analysis of Obama's announcement on the killing of bin Laden. Obama's announcement avoids the term 'law' yet makes present the relationship between 'law', 'justice', legitimacy, and violence. Through critical theory on language, and political myth, this paper explores the post-9/11 absence of law.

Josephine Ross  
Howard University

*The Supreme Court's Invisible Hand in the George Zimmerman Trial*

During the prosecutor's closing argument in the George Zimmerman trial, he tells the jury, 'Police are allowed to go up to individuals and ask them, what are you doing here? And that person can ignore him or not. Its not a crime.' The prosecutor's inability to truly separate the myth of the friendly police officer found in Fourth Amendment doctrine from the reality of such encounters corrupted the message given to the jury. And it was not only the prosecution that appeared confused about the concept of aggression applied to a Neighborhood Watch volunteer. At the end of Zimmerman's trial, the judge erred by refusing to instruct the jury on the aggressor rule. An aggressor cannot claim self-defense, not even under the laws of Florida. But the jury never learned this, arguably because Supreme Court case law on stop & frisk teaches judges to categorize aggressive police behavior as non-aggressive.

**6.7 Panel: Hearts and Minds: Evidence, Emotion and Epistemology**

**Room: WB121**

Chair: Brian L. Frye  
University of Kentucky

This panel addresses the effects of emotion and rhetoric on the evaluation of evidence.

Panelists: Brian L. Frye  
University of Kentucky

*Epistemological Skepticism & Motion Picture Evidence*

Courts have permitted the introduction of motion picture evidence for almost 100 years. During that time, they have developed rules of evidence governing the admissibility of different kinds of motion pictures in different contexts.

Several scholars have drawn on film theory that questions the epistemic value of motion pictures to argue that courts should be especially skeptical of motion picture evidence. This article uses recent film theory that rejects this radical skepticism of the epistemic value of motion pictures to argue that there is no reason to be especially skeptical of motion picture evidence. It also argues that courts have effectively developed a sophisticated epistemological theory of motion pictures, which may be useful to film theorists.

Erin L. Sheley  
George Washington University

*Victim Impact Videos and Narrative Integrity at Sentencing*

It is oft-noted that juries tend to make decisions based on the relative narrative coherence of the parties' cases rather than an evaluation of individual elements. The formal mechanisms through which the Rules of Evidence define relevance occasionally takes account of this phenomenon, when courts take notice of the importance of a particular fact to one side's "narrative integrity." Criminal sentencing proceedings—freed from the constraints of the FRE—have been criticized for allowing narrative to run rampant, particularly through the inclusion of victim impact statements and related media presentations such as victim impact and mitigation videos.

This paper will argue that the relevance of victim impact videos during a criminal sentencing process turns in part on whether and how effectively they convey the social experience of criminal harm—as distinct from, though mediated by—the victim's experience. In other words, we cannot only consider

"the victim," "the defendant," and "the state" as three separate entities vying for narrative control over accounts of harm in determining punishment. Rather, the stories of the victims and defendants already circulate through society outside of the courtroom and the function of "the state" in the trial context is to vindicate the interests of this society. Notions about criminal "harm" enter the culture through the experiences of individuals, as well as through political rhetoric and media representations, and, once there, shape social norms about the assignment of blame. Therefore, if the sentencing process cannot accommodate the stories of actual harm to individual victims it runs the risk of either coming to be viewed as illegitimate to a society guided by these norms or allowing free reign for generic representations of criminal harm produced by political and media actors to take the place of individuated victim accounts in the mind of a fact-finder. From this starting point I will identify the features of narrative testimony that allow might allow it to convey relevant information about criminal harm in the sentencing context, and consider whether these characteristics can be said to apply to video presentations, which filter narrative through a variety of intermediaries, some of them improperly coercive.

Mark Spottswood  
Florida State University

*Moods and Emotions in Legal Fact-Finding*

In this article, I draw on psychological models of the relationship between emotions and factual cognition to refine our understanding of the relations between feelings and reason at trial. Traditionally, the law has assumed that feelings inevitably corrode reason and must therefore be suppressed. I will suggest the need for more subtlety in managing both long-lasting, relatively mild "moods" and shorter-term, more intense "emotions."

Research suggests that mildly depressed moods may shift us towards more careful and deliberative approaches to decision-making, while happier moods nudges judges and juries towards greater reliance on intuition. Which decision-making style is more valuable will vary depending both on the type of case and the type of decision-maker who will decide it, which suggests that we might want to induce bad moods in some fact-finders and happier moods in others.

Accordingly, I will explore the extent to which our rules already achieve this end, and whether we might wish to either heighten or reduce such effects.

On the matter of emotions, the rules of evidence have encouraged judges to demarcate emotional involvement as a form of prejudice, but to tolerate moderate amounts of prejudice so long as the evidence is also relevant. I will argue, by contrast, that many forms of emotional involvement aid fair decision-making. When emotions undermine the accuracy of decision-making, however, our present rules will often fail to cabin the resulting prejudice because they ignore well-understood limits on the power of conscious control to override emotional effects. Modest reforms to Federal Rule of Evidence 403 and its state counterparts, coupled with an effort to educate judges on modern scientific understandings regarding the emotions, could substantially improve the quality of justice in emotionally charged cases.

**6.8 Panel: 'War, What is It Good For?': Transnational Perspectives on Migration, Insurgency and U.S. History**

**Room: WB127**

Chair & Discussant: Kendall Thomas

## Columbia Law School

This panel brings together interdisciplinary legal scholars to questions of the law of war that arise from the history of U.S. imperial projects and the consolidation of the American settler colonial state. These papers all consider American history and law in a transnational context, to ask about the effects of 'domestic' events on purportedly 'international' doctrines, as well as the impact of international affairs on domestic law and policy. How did the legal doctrines concerning insurrection and counterinsurgency emerge from the foundation of the nation as a settler colonial economy dependent on imported African slave labor? How have U.S. and global imperialist conflicts shaped U.S. immigration law and policy? More broadly, what has been the role of war in American colonialism, race relations and indigenous dispossession, and how have these in turn impacted U.S. constructions of sovereignty, citizenship and borders?

### Panelists:

Hawa Allan  
Columbia Law School

#### *The Insurrection Act of 1807: A Legislative Context*

The Insurrection Act of 1807 is a largely-unstudied statute that happens to be the linchpin of several iconic events in United States history – including public school desegregation in the South and the Los Angeles riots. The Act authorizes the president to domestically deploy federal troops to enforce the law in the event of an 'insurrection.' The Act is among the few exceptions to the general prohibition against federal military law enforcement, but its legislative history is little known. This paper, thus, considers the Act's legislative context – the social, economic and cultural context in which the statute's antecedent was enacted. While the Shay's Rebellion and the Whiskey Rebellion are considered to be the key historical events that contributed its enactment, my paper considers whether anxieties about slave revolts and the emergent Haitian revolution, which began in 1791, one year before the first version of the Act was passed, were also influential.

Sherally Munshi  
Georgetown University Law Center

#### *Imperialism, Immigration, and the Legacies of Indian Exclusion*

In 1913, Canadian authorities turned away the Komagata Maru, denying entry to the 374 passengers from India claiming the same rights as other subjects of the British Empire. An editor of the London Daily News observed, 'A shipload of Indians is not... a matter of much importance, and yet... if we could see the events of our time through the eyes of the historian of 2014, we should find that quire the most significant thing in the world today is the Komagata Maru... It is a challenge thrown down, not only to the British Empire, but to the claim of the white man to possess the earth.' This paper attempts to trace the continuities between nineteenth-century forms of imperial expansion and twentieth-century immigrant exclusion—continuities more readily apparent to observers on the eve of world war, decolonization, and establishment of the modern international legal system.

K-Sue Park  
Harvard Law School

*First Insurgents*

It is a standard presumption of U.S. military history that the 19th c. Army waged a defensive campaign against 'irregular' tribal enemies, in a traditional form of 'counterinsurgency.' However, the principal combatants against American Indians were not uniformed soldiers, but white immigrants recruited to assume the risks of frontier conflict. During the early Republic, the government structured private incentives through civil laws to harness interpersonal interracial violence in the interest of expansion. Its tiny army policed immigrants and Indians, to prevent the eruption of full-fledged war. In this paper, I show that colonists employed civil-military 'counterinsurgency' tactics that predated both U.S. insurgencies and established government. I invert racially inflected binaries of 'regular' Western and 'irregular' other forces, to expose white immigrants in America as the 'first insurgents.' This analysis suggests counterinsurgency is aggressive and economically motivated, rather than defensive, or necessitated by the unique security threat of an 'irregular' enemy.

**6.9 Session: The Judiciary**

**Room: WB129**

Chair: Chris Geyer  
Cazenovia College

Panelists: Chris Geyer  
Cazenovia College  
*(re)Constructing a Landmark: The Question of Empathy in Brown v Board of Education*  
When President Obama nominated Sonia Sotomayor to the Supreme Court, he cited the case of Brown v Board of Education as an instance where the Justices employed empathy to resolve a difficult case. But was empathy really the core element of the Brown decision? Erwin Chemerinsky argues that Constitutional cases often require Justices to balance competing interests. Michael Klarman argues that judges 'occupy elite subculture, which is characterized by greater education and relative affluence.' In this presentation, I argue that the Brown decision wasn't so much a question of empathy as it was the benefit of a humanities based education for the justices involved, and that the value of a broad humanities education is precisely the ability to make decisions and determine policy in the face of competing interests with the weight of history bearing down.

Renee Knake and Hannah Brenner  
Michigan State University

*Shortlisted: Lessons from the Lives of Women Considered for the U.S. Supreme Court*

SHORTLISTED tells the stories of a total of fourteen extraordinary women who were qualified and considered for the nation's highest judicial office, but were ultimately not selected from the presidential shortlist as the respective

nominees. Some of these women may, individually, be remembered for their position as a potential nominee or for their significant contributions to the legal profession, but others have led a virtually invisible existence. This story line of women shortlisted to the Court has additional far-reaching implications beyond the obvious outsider narrative that it seeks to convey. Today, women in the legal profession are significantly under-represented in positions of power and leadership, despite relative parity among law students and lawyers entering the profession over the past two decades. Substantial attention has been paid to the barriers and obstacles that prevent women's advancement in law, but this paper reveals previously unexplored ways that women have been excluded from positions of power.

Steven Macias

Southern Illinois University, Carbondale

Critical Legal Biography: James Clark McReynolds

In this paper, I begin to think about what it might mean to write a critical legal biography, taking Supreme Court Justice James C. McReynolds as my subject. The last of the Four Horsemen to retire from the Court in 1941 after having served for over 26 years, McReynolds represents a unique opportunity to explore the effects of cultural contingency on the development of American constitutional law. A southerner born during the Civil War, a lifelong bachelor, a graduate of an elite university and law school, and U.S. Attorney General, McReynolds' cultural milieu allows us to consider how the categories of region, marital status, educational background, and political experience shaped his legal views, and ultimately shaped American constitutionalism in the early twentieth century. My presentation will focus on my proposed methodology for this biographical project.

Susan Schmeiser

University of Connecticut

*Empathy Narratives*

The subject of empathy has enjoyed considerable popularity in the humanities over the past couple of decades and has taken on a concomitantly significant role in legal scholarship. As a pillar of law and emotions scholarship, empathy has become a central theme in work on lawyer-client interactions and judicial decision making, a context that gained popular salience with President Obama's nomination of Judge Sonia Sotomayor to the U.S. Supreme Court as a perhaps unwitting exemplar of a jurist whose rich personal story promised a more compassionate jurisprudence. Beyond the turn to affect generally, narratives about empathy – whether in deficit or in excess – purport to unlock intractable problems, furnishing explanations for ills ranging from isolated acts of mass violence to pervasive democratic failures. Brain researchers and other scientists have joined in the effort to locate empathy at the center of contemporary intellectual and political life. What does the current celebrity of empathy tell us about the project of interdisciplinary work in law and humanities? What critical narratives complicate these empathy stories?

March 11

14:00-15:15

**Keynote Address: “The Humanities and Participatory Readiness.”**

**Room: WB152**

Speaker: Dr. Danielle Allen, Institute for Advanced Studies

March 11

15:30-17:00

**7.1 Session: The Stage and the Screen 2**

**Room: WB102**

Chair: Sabine N. Meyer  
University of Osnabrueck, Germany

Discussant: Lisa Siraganian  
Southern Methodist University

Panelists: Ummni Khan  
Carleton University, Canada  
Scoundrel or Savoir? Serial Killer or Suitor? Conflicting Representations of Sex Trade Clients in Popular Film  
Prostitution laws and policies are currently being vigorously contested in the US and Canada. While historically the focus has been on the ‘prostitute’ as deviant, victim or worker, in the last twenty five years, the once anonymous and overlooked male client now represents a key figure in the debates. In this paper, I posit that one’s image of the character, identity and motivations of the male client has a significant impact on how one approaches the controversy over prostitution laws. I further contend that popular culture is an influential site for producing truth-claims of sex trade clients. Using a ‘law & film’ methodology, I will interrogate the conflicting representations of male clients in mainstream film to those in recent legal discourse. My goal is to analyse the ideological constructions of clients in law and film, and identify counter-hegemonic narrative interventions that, I argue, can be found in some popular films.

Diana Young  
Carleton University, Canada

*Sport in Popular Film; Transformation and the Body*

Films about sport often deal with themes of transcendence of a character’s own history and social location; there is a trajectory of the individual’s transformation through the uses and constructions of the body. In some cases characters are depicted as having a relationship with their own body, suggesting a bifurcation of the individual into embodied and disembodied components. In others, characters are seen as constituted by the body, as the process of transcendence is seen as somewhat unpredictable; embodied life follows a model of improvisation rather than mastery. These different conceptions of the



body may reinforce existing power structures or challenge them – in some cases they appear to do both. In this paper, I consider conceptions of agency through mastery of the body and the care of the body, and how these conceptions of the body's role in transformation emerge through popular culture and films about sports.

Penny Crofts

University of Technology Sydney, Australia

*The Walking Dead: Law, Horror and Wickedness*

Despite the centrality of blameworthiness to the criminal legal system's project, criminal legal doctrine reflects and reinforces a general tendency to avoid thinking about or engaging with questions of wickedness. This paper contributes to a jurisprudence of blaming through an analysis of the models of wickedness represented in criminal legal doctrine and *The Walking Dead*. Law transmits or constitutes individual subjectivities and authorises specific forms of individual identity. Horror raises questions about the adequacy of these conceptions of the legal subject. If we place survival as a central value, do we lose notions of right and wrong? If, as Weisberg and Binder (2000) recommend, we should evaluate law not for how well it represents us, but for who it enables us to become, what conception of humanity is enabled in legal doctrine in response to extreme threats?

Marilyn Terzic

Université du Québec à Montréal, Canada

*House MD: The Legal Anatomy of a Medical Drama*

House MD is a medical television drama that centers on the problem-solving abilities of Dr. Gregory House, an unconventional, misanthropic medical genius, and his team of specialists at the Princeton-Plainsboro Teaching Hospital. The opening sequence of the program is comprised of diverse anatomical and medical illustrations that allude to the diagnostic nature of the series. However, as the names of the actors are superimposed on each graphic, the visuals provide an allegorical view of the supporting cast members. Either way, the significance of these textbook drawings and radiographic images is not rooted in the tradition of medical science, but rather in the fundamental principles of law. To that end, this paper draws on theories of media aesthetics to describe and explain how this artistic deconstruction of the human body is used to effectively convey legal concepts and thus promote the sustainability of the health care system.

## **7.2 Session: Politics**

**Room: WB103**

Chair & Discussant: Matthew Festa

South Texas College of Law

Panelists:

Cary Federman

Montclair State University

Anarchism, Messianism, and Political Violence: Emma Goldman and Carl

Schmitt on Friends and Enemies

The purpose of this paper is to examine Emma Goldman's essay, 'The Psychology of Political Violence,' in light of the writings of Carl Schmitt. Goldman's essay is a justification of Leon Czolgosz's assassination of President William McKinley. Until Goldman thought through the problem of Czolgosz's assassination of McKinley, her view of political violence was sociologically and historically deterministic. In reflecting upon the problem of the psychology of the political assassin in light of turn of the century political and social thought, such as agency and will, Goldman now believed that social conditions provide the necessary conditions for political violence, but not the sufficiency for it. To sever any connection between anarchists who act on principle and those who are more clearly determined by their environments, Goldman turned her attention to the messianic side of violence. I suggest that her justification of violence is no different than Schmitt's friend-enemy distinction.

Sinja Graf  
Cornell University

*'To Regain Some Kind of Human Equality' - Developing a Political Theory of Crimes against Humanity*

This essay delineates the productive capacities of crimes against humanity in order to reflect on a political theory of global criminality. Once 'humanity' is tied to the notion of crime, a tension unfolds between the universality of humanity as a norm and the necessary particularity of the act enforcing the norm. I argue that it is this tension that provides the locus for a political theory of global criminality. Drawing on observations by Hannah Arendt and Carl Schmitt, I address the modes of inclusion and authority emerging from international criminal law in general and from crimes against humanity in particular. By distinguishing the concept of crime from the exception and the figure of the criminal from the enemy, this inquiry yields a picture of international criminal law as a hierarchically structured legal field providing a universal, yet minimal integration into the symbolic order of the law.

Peter Swan  
Carleton University, Canada

*Max Weber and the Constitution*

In the late 1980's the British social scientist, Colin Gordon suggestively argued that the projects of Michel Foucault and Max Weber were concerned with the governance of 'life conduct'. I would like to follow up Gordon's suggestions by looking at areas within Weber's work where we can see hints of his views on the constitution of individual and collective political subjectivities. While acknowledging Weber's suggestions for a thoroughly rational mode of governance through forms of law that shape individual life-conduct by habituation to socially valid modes of behaviour, I will locate this analysis within the context of an exploration of a broader Weberian theory of individual and collective subjectivity in the writings on the economic ethics of world religions and in his view of tragic choices that is constitutive of the political conduct of 'scientific' and political actors in the 'Vocation essays'.

Chair: Marianne Constable  
UC Berkeley  
Discussant: Linda Ross Meyer  
Quinnipiac University

This panel will explore the affects and emotional states that are produced by and through law. Feelings of awe, despair and disappointment are all part of the way that law both produces and maintains itself. This panel will focus on how subjects respond to law, how they are in a sense produced as feeling subjects through operations of legal affect. In the interaction between law as an abstract concept and feeling as a concrete, lived experience, the panelists will seek to locate the operations of law as it is actually manifest in human life.

Panelists: Maria Aristodemou  
Birkbeck College, UK

*There Is Only One Illegal Feeling: The Anxiety of Breaking Bad*

There is only one affect law should be wary of: it is the only affect that doesn't lie and it cannot be manipulated or manufactured by the symbolic order or by imaginary constructions. It is the affect of anxiety and it dwells in the realm of the Real. This paper will examine Lacan's concept of anxiety in parallel with the poetry of Fernando Pessoa and the TV series *Breaking Bad*. It will argue that the affect of anxiety, far from negative, is priceless because it is the most sure route to the truth of the subject. Anxiety occurs when the defensive layers we create to protect us from the Real are about to be lifted and warns of illegality: the illegality of not respecting boundaries and of jouissance beyond the pleasure principle. The paper will suggest that while the poet Pessoa encounters this anxiety, he shies away from its consequences. By contrast Walter White, finding himself in the space between two deaths, rises to the status of an ethical subject and seizes that freedom: for better and for worse.

James Martel  
San Francisco State University

*"Disappointing Law: Nietzsche and Benjamin and the avoidance of legal fetishism via failure"*

In this paper, I will discuss two thinkers, Friedrich Nietzsche and Walter Benjamin in terms of the way both of them employ disappointment as a tactic in their respective struggles against fetishism. While Benjamin has more of a reputation as a legal scholar, Nietzsche sets the tone for how to avoid fetishism more generally. By eliciting states of excitement and promise through his concept of the overman--the same promise that we find in the evocation of law--Nietzsche ultimately frustrates our hopes for redemption, our expectation that law (or the messiah) will redeem us. In the same manner, Benjamin too elicits our hopes for redemption, only to constantly disappoint us. His messiah too comes and does nothing, leaving us to our own devices. By collectively depriving us of what is normally an vehicle for legal (and other sorts of) fetishism, these thinkers give us a vision of law when it has left us dejected, that is subjects who were formed in expectation of a false form of redemption which they never receive. The rest, the next step, is left entirely to us.

Keally McBride  
University of San Francisco

*Empire's Lawgiver*

"To discover the rules of society most suitable for nations, it would require a superior intelligence, who saw all the passions of men without feeling any of them; who had no relation to our nature yet knew it thoroughly; who was independent of us for happiness, yet truly willing to pay attention to ours; and finally, who in preparing for himself a distant glory in the ages to come, could work in one world and reap his rewards in another." –Rousseau, *The Social Contract*.

Rousseau believed that every Social Contract needed a lawgiver, as described above. In this essay I examine the case of one lawgiver, James Stephen. Stephen was the Colonial Undersecretary of the British department of State for thirty years, issuing all legal decisions about legislation passed in all British colonies except for India and generally overseeing colonial policy. The colonies at this point were considered of little interest. Secretaries of State were attuned to larger issues of British foreign policy and domestic power struggles. As they came and went, all of them depended upon and generally deferred to Stephen's specialized knowledge about exotic places such as Newfoundland, Trinidad and Tabago, and Sierra Leone.

Stephen worked in a leaky basement on Downing Street in an office covered with maps of the Crown's possessions, and issued more than three hundred rulings every year with the aim of defining and upholding the rule of law in all territories.

In many ways, Stephen resembles Rousseau's lawgiver, avidly interested in promoting self-determination in the recognition of universal human capacities. He devoted himself to his work quietly, and was an extremely religious man who saw his bureaucratic work in the service of a larger sense of justice. In other ways, he does not resemble the disinterested lawgiver, as he was an ardent abolitionist. He felt his mission to humanity too much. He occasionally burst into personal diatribes when forced in his rulings to dissect the legality of colonial laws about the treatment of slaves.

Rousseau outlines the necessarily ideal character of a lawgiver. But looking at the affect of someone who worked as a lawgiver reveals that what becomes questionable in the lawgiving enterprise is the character of the law. Is law a force for good in *any* hands? Being a lawgiver requires that the lawmaker have a healthy skepticism about the character of the law or one perpetuates the current order instead of giving birth to a new one. And yet, the lawgiver must be devoted to it to the extent that she is willing to make it a life's work.

Shalini Satkunanandan  
UC Davis

*Plato, Law, Awe.*

In Plato's *Laws* the Athenian Stranger, who later in the dialogue proposes laws for a proposed Cretan city, suggests that a lawgiver will give utmost importance to *aidōs*: "Won't he consider the lack of awe (*aidōs*) to be the greatest evil for everyone both in private and in public life?" (647B). *Aidōs* has the senses of respect, reverence, modesty, and awe. It is closely related to and often used synonymously with *aischunē* or "shame." In this paper I explore the role assigned to *aidōs* by the Athenian Stranger in the *Laws* (though I will also consider appearances of *aidōs* in other Platonic dialogues as well). I argue that the Athenian Stranger's treatment of *aidōs* is instructive for understanding what thoughtful reverence for law was in might be (even now). My investigation is animated by the belief that thoughtful reverence for law ought to have a place in our repertoire of politically salutary feelings or moods, even though we rightfully fear that too much reverence for law might lead to unthinking obedience to law. We all already know the dangers of thoughtless obedience to law (though perhaps that lesson cannot be repeated enough). I venture that we ought also look at and prize what a proper reverence for law looks like. After all, it is also a worry when leaders and citizens all too readily sidestep, avoid, refuse, or exempt themselves from law. Even as we criticize *thoughtless* reverence, perhaps we should also investigate *thoughtful* reverence and see what kind of bearing might be involved in a genuine commitment to the rule of law and a refusal to simply view the law as an instrument to be embraced, wielded, or discarded for whatever political purposes we seek.

#### **7.4 Session: Narratives      CANCELLED**

#### **7.5 Panel: History, Historiography, Jurisprudence: Law's Potentialities**

**Room: WB116**

Chair:                      Nick Piska

Although legal practice is largely an historical enterprise, the tendency has been to see legal history as either a doctrinal adjunct to that practice or an historicist attempt to reclaim or find the past in its truth, largely ignored by the legal order unless it can be utilised by instrumental reason to justify reform in the name of some earlier 'truth' – whether by way of affirmation or rejection. In recent years much work has been done to revitalise legal history through a reflection on, and development of, a variety of transdisciplinary theoretical frameworks, from reflections on law's archive to post-'CLH' work on scope, scale and structure. The papers in this panel will continue these historiographical conversations on the relation of law and history through a consideration of how history contributes to the rethinking of law and, consequently, to a renewal of jurisprudence. Each of the papers engages with potentiality – whether an object such as the deodand or the objects of resistance, the forgotten element of sexual ordering, or historical ontologies of law – and thus frames or invokes legal history as a process of re-visualising, re-activating or re-opening potentialities. In doing so each of the papers engage with how history, and more broadly the humanities, might contribute to the rethinking of law and jurisprudence.

Panelists:

Maria Drakopoulou  
University of Kent, UK

*Prosopon and Person: reflections upon questions of tradition and sexual difference*

Over the last decade or so critical legal scholarship has seen a renewed interest in the thematics of jurisprudence and in particular in that of the person. This paper, in allying itself with this literature, also explores the notion of the person and its legal apprehension, though centring on the period of classical antiquity. This focus in ancient Greece and Rome is not intended as a mere historical inquiry, either as a contribution to the history of ideas, or to the genealogy of personhood legal or otherwise. Instead, the intention is to enter into a dialogue with recent jurisprudential engagements inspired by the Italian philosophers Giorgio Agamben and Roberto Esposito, and to do so by addressing the tradition upon which these engagements rest. A central claim of this body of work is that the western juristic conception of the person is located in law's indebtedness to theatre, Roman law and Christian theology; a claim that is sustained by reference to the textual tradition, which Agamben and Esposito evoke, albeit in entirely different ways and for different purposes. It is this tradition, or to be more precise the sexual economy of its constitution and its anchoring in specific texts, that this paper interrogates. Foregrounding analysis on the concept of oikonomia and its rise in Xenophon's Oeconomicus, and restoring to it its originary reference to the sexual order rather than to an order of governance, the paper reveals the shadowy threads which connect oikonomia to the notion of prosopon in classical Athens and to that of the legal person in republican Rome. I argue that a sexual economy already at work at the beginning of the tradition and foundational to it, though remaining silent in the transmission of this tradition, indelibly marked the points of its contemporary arrival. In seeking to recover this lost element however, I do not wish to suggest processes of erosion, exclusion, or indifference, but rather to unfold a problematic hitherto omitted.

Emily Haslam  
University of Kent, UK

*Slave Trade Abolition Litigation and International Criminal Histories*

This paper rests on a critique of dominant international criminal legal historiography which overwhelmingly traces the origins of international criminal law to the legal principles established in the Nuremberg and Tokyo Tribunals. It asks what might contemporary international criminal law look like if slavery and abolition were brought more firmly into the law's originary narratives. More specifically the paper traces narratives that emerge from the legal record about the roles of Africans, including slaves, in nineteenth century slave trade abolition litigation before Mixed (international) commissions at Sierra Leone which have been "lost" to, or overlooked by, international criminal legal histories. It shows how the re-imagining of the relationship between international criminal law and victims of international crime that such histories provoke offers the potential to re-imagine the relationship between contemporary international criminal law and its subjects.

Ed Kirton-Darling  
University of Kent, UK

*Inquests: the end of the deodand, the rise of the family and the tame death made savage*

The deodand, variously the instrument, object or personal chattel which an inquest jury declared to have occasioned, caused or moved to the death, was abolished in 1846. Almost simultaneously, the first iteration of the current Fatal Accidents Act 1976 was introduced, granting bereaved relatives some rights to compensation where negligent failings had led to death. Whilst the deodand was the property of the Sovereign, said to be taken to appease the wrath of God and to be distributed amongst the community, in many cases the value or the object itself was passed to the family of the bereaved. Early academic analysis of the end of deodands focuses on the erratic, medieval and archaic nature of the deodand, emphasising a shift in 1846 from superstition to rational modernity, while more recent work has identified the deodand's role as a compensatory device, a tool for juries to express opprobrium toward morally repugnant industrialists or an early health and safety mechanism. A powerful narrative citing economic necessity has developed, linking the removal of the deodand to the development of the expensive and frequently deadly railways, and in this formulation, compensation for the bereaved has been viewed through an economic and social lens; the family and the tortfeasor both benefitting from swapping the arbitrary deodand for the relative certainty of legal action. My research focuses on the role of the family in the inquest. Contemporary political, legal and cultural constructions of the inquest place family at the centre of the process, with a range of rights as part of the investigation. By comparison, in the historical inquest, the family is largely absent; appearing occasionally as a witness, as an assistant to the investigating Coroner, or in some cases, as recipient of the deodand. As a key site where family appears in the historical representation of the inquest, this paper will explore the deodand and its abolition, tracing the place of the family through the dual lenses of causation and compensation. My discussion will draw on the work of Philippe Aries and his discussion of Western attitudes to death, from a tame death to an invisible death, and the interlinked retreat of evil. I will explore the relationship between the deodand and philosophical approaches to causation, from Aristotle, Aquinas and Hume, and consider whether the abolition of the deodand can be characterised as part of a shift from community to private, from material to incorporeal, and from a public and explicable death to a hidden and savage death.

Hannah Phillips  
University of Kent, UK

*Historiography as Resistance*

"The promise of an historical event is always more than what was actually realised. There is more in the past than what happened. And so we have to find the future of the past, the unfulfilled potential of the past." (Ricoeur, 'Memory and forgetting') Our increased interest in the analytical potential of the concept of resistance has encouraged a number of provocative inter-disciplinary engagements, not least of all within the social sciences. When deployed in empirical research, resistance has often proved to be of great analytical utility, providing a lens through which to explore issues of power and social change.

However, such engagements with this concept can be seen to be stymied by their lack of reflection on the conceptual limits of resistance itself. Instead of questioning what it means to resist, some users of this concept have unwittingly assigned it a 'foundational' status. This is problematic, as while many working within the field of sociology seem to have agreed that resistance is comprised of an oppositional intentional act that is visible (to either the actor and/or target of resistance) and directed towards either preventing or facilitating change, there are many that would challenge this somewhat programmatic vision of resistance. In this paper I want to challenge programmatic understandings of resistance and will attempt to do so by exploring the extent to which an engagement with historiography can present an alternative understanding of resistance. More specifically I will argue that an engagement with the theories of history writing has the potential to re-politicise our understanding of the objects of resistance (i.e. those that resist along with their targets) through its questioning of the inevitability of what is being resisted. I will therefore argue that historiography can be regarded as a form of resistance that operates within power relations without a unified subject or a particular normative grounding (and thus challenge understandings of resistance that have been adopted in critical theory). In doing so, I will be concerned with developing an understanding of resistance that is less concerned with visible quantifiable outcomes than it is with opening up a field of enquiry.

Nick Piska

University of Kent, UK

*On Foucault's Historiographies of "Law and Order"*

In a recent book on 'Foucault's law' it is suggested that Foucault's law lacks a history. In this paper I will argue that the contrary is the case. Taking as my point of departure Foucault's comments in his 1979 lectures, *The Birth of Biopolitics*, that 'Law and order originally had a very precise meaning which can be traced back well beyond the liberalism I am talking about', I will argue that far from lacking a history, Foucault's law is deeply historical and related to his more sustained concern with 'order'. In doing so, I will investigate Foucault's historiographies of law and order, focussing primarily on his 1970-71 Lectures on the Will to Know, and will question how and why Foucault thinks law and the history of law. The underlying concern is to think and to imagine the contribution that an historical ontology of law might contribute to a jurisprudence which turns away from defeatism and instrumental subsumption and yet is politically relevant and, indeed, urgent.

## 7.6 Session: Queer Legalities

Room: WB119

Chair: Anne Dailey

Panelists

Anne Dailey

University of Connecticut

*The Psychodynamics of Sexual Autonomy*

This chapter examines the prevailing ideal of sexual autonomy from a psychoanalytic perspective. Sexual autonomy is now a central – if not the central – right of personal liberty in American constitutional law. *Roe v. Wade* laid the foundation for the principle of sexual autonomy by holding that women have the right to control the reproductive consequences of their sexual behavior. The Supreme Court's most definitive statement came in *Lawrence v.*



Texas, a 2003 case striking down Texas' ban on homosexual sodomy in which Justice Kennedy announced in his opening sentence: 'Liberty presumes an autonomy of self that includes . . . certain intimate conduct.' Jed Rubenfeld asserts that modern American sex law, which includes the law of rape, appears to be animated by the single principle that '[e]very individual has the right to decide what kind of sex to have, and with what sorts of people, and in what circumstances.' The modern ideal of sexual autonomy puts consent at the center of sex regulation. Consensual sexual relations, including fornication, adultery, and sodomy, presumably lie beyond the reach of law's regulatory power. There is, however, one sex law banning consensual relations that remains on the books in almost every state: the prohibition on adult incest. The incest taboo gives us insight into the role that law does – and should – play in regulating sexual choice. Most people support the ban on adult incest because sex between close relatives – even adult relatives – offends their sensibilities, although moral offense as a basis for sex regulation was exactly what the Supreme Court in *Lawrence* held to be unconstitutional. Some defenders of the laws believe that incest regulations properly guard against genetic abnormalities, despite the fact that many other conditions pose similar or even greater risks of genetic deformity or illness, and despite the fact that many couples, including homosexual couples, do not reproduce. It turns out that the only really convincing modern defense of the sweeping ban on consensual adult incest is psychoanalytic: sexual relations with one's mother or father, or sister or brother, are rarely, if ever, truly consensual. The law of incest recognizes that powerful unconscious forces deriving from the parties' close familial relationship render the conscious 'choice' to have sex an illusion. This chapter argues that the incest taboo opens the door to exploration of the ideal of sexual autonomy and the kinds of laws that might legitimately limit sexual relations. Certainly regulations that recognize external constraints on choice – violent rape, kidnapping, a gun to the head – justify the legal sanction. Laws that criminalize sexual relations with children, incompetent persons, or incapacitated individuals also make sense since the capacity to choose is so obviously impaired or lacking altogether. But this chapter explores sex regulations of a different sort: those (like the incest taboo) that raise the question of psychological constraints on free choice. What happens when we take adult incest rather than violent rape as our paradigm for sexual coercion? This chapter explores whether some relationships are so inherently psychologically coercive that sexual conduct can and should be regulated despite express consent on the part of both parties. Drawing on psychoanalytic theory, I identify three types of relationships raising concerns about psychological coercion: the prohibition on adult incest, the ban on sexual relations between therapist and patient, and the law of intimate partner rape. Exploring the psychological pressures inherent in these relationships leads us to a deeper understanding of the right of sexual autonomy and its limitations.

Annette Houlihan  
St Thomas University, Canada

*(III)Legalites: Intimacy, Illness and Law*

I created the terms (III)legal and ill-legalites to refer to the conflation of illness and illegality, specifically the HIV body who has come to signify the law's current reach within intimate spaces. Ill-legalities is a term I use to refer to the crimino-legal pathologisation of difference seen in the textual narratives of HIV

prosecutions. However, ill-legality encompasses those criminal laws which historically and contemporarily punish Other bodies, such as criminal laws against homosexuality, sadomasochism and HIV. The prosecution of these laws merge Other bodies with criminality and illness, but they also symbolise the interconnections of law and illness that carries forth a reflection of medico-legal norms of intimacy or rather procreative sexuality. My research on HIV prosecutions indicates that intimate bodies are positioned as ill-legal because of perceived (social, psychological, medical and criminal) pathology. However more recently, I have come to consider the impact of a more inclusive socio-sexuality on these laws, especially the crimino-legal HIV transmission offender. As we strive towards marriage equality and same-sex families does this create a push to punish based not so much on same-sex desire, but a same-sex desire that does not mimic procreative heterosexuality (monogamous, married, family)? This paper will consider how normativity is embedded within HIV prosecutions and how intimacy is re-written as intentionality and recklessness that may somehow speak to new discourses of homonormativity.

Darren Rosenblum  
Pace Law School

*Sex Quotas, Queer Performativity and the Corporate Elite's Auto-Reproduction*

This paper draws on a study I performed in 2011 of the French Corporate Board Quota (FCBQ) with a Fulbright Research Scholarship. In this paper, I attempt to elaborate how my results confirm some of Rosabeth Moss Kanter's work on the corporation. In *Men and Women of the Corporation*, Moss Kanter articulates how corporate institution constructs the individual's behavior within the corporation around sex and power. She describes how management focuses on 'the forces which lead the men who manage to reproduce themselves in kind.' In this sense, the men of the corporation view themselves as the standard-bearers for the corporation's success and in this narcissistic move, they select individuals to mount the corporate hierarchy who will mirror their own traits. Since Moss Kanter's work decades ago, women have come to play a larger, albeit underrepresented, category in corporate governance. In this context, the gender performativity work of Butler permits us to understand how the men and women of the corporation frame their gender ideation in relationship to their power position within the corporate hierarchy. In understanding the performance of stereotypes, Sedgwick's framework for depicting how the term 'gender' describes how for some people gender role matters more than for others as part of their self-identity and interaction with society. When re-thinking the reproduction of sex and power within the corporate hierarchy, both more gender and less gender people figure prominently in redefining the relationship between sex and power in an age of increased mixité. In this paper, I conclude that while Moss Kanter's assertions about the fixed relationship between sex and power may have shifted in some ways, her structuralist vision of corporate power remains vibrant.

Clifford Rosky  
University of Utah

*No Future? Queer Theory and the Queer Child*

Building upon two polemical works by queer literary and legal theorists, this essay adduces the principle that the government has no legitimate interest in discouraging children from being queer or encouraging them to be straight. On

the one hand, the essay expands Teemu Ruskola's claim that lesbian and gay youth have a right to come out, by adding that every child has an equal liberty to engage in queer speech and queer conduct. On the other hand, the essay critiques Lee Edelman's claim that children's interests should be displaced in arguments on homosexuality's behalf, in favor of a self-consciously 'narcissistic' figure that Edelman dubs the 'sinthomosexual.' While Ruskola limits his principle to children who identify as lesbian and gay, Edelman identifies homosexuality with adulthood, leaving little room for arguments on children's behalf. By attacking the state's interest in regulating children's sexual and gender development—rather than limiting ourselves to a new brand of identity politics—the essay proposes a more comprehensive and flexible case for the liberation of all children's queerness.

### **7.7 Panel: Virginia and the Legal History of the Civil Rights Movement**

**Room: WB121**

Chair: Jessica Lowe  
UVA Law School

The Commonwealth of Virginia has played a critical but under-explored role in the U.S. civil rights movement. Virginia's diverse political landscape often placed the state at the center of national debates over school desegregation, voter discrimination, interracial marriage, and racial pluralism. The state was home to well-known, racial moderates, such as Lewis Powell, and key civil rights voices, such as Walter Ridley and Oliver Hill. But the Commonwealth was also at the forefront of Massive Resistance. Many of Virginia's leading segregationists drew upon the writings of Thomas Jefferson and James Madison to justify delaying desegregation in the wake of Brown, creating state commissions that harassed movement participants, and amending the state's barratry laws to chill civil rights litigation. This panel will explore various facets of Virginia's civil rights movement to chart new directions in the study of southern legal history.

Panelists: J. Gordon Hylton  
University of Virginia  
Giles County, located in Southwest Virginia and the home to a small black population, was the first county in Virginia to shutter its "colored schools" following the end of Massive Resistance in the Old Dominion. Although the county had no previous experience with court ordered integration, its Board of Supervisors voted in March of 1964 (before the passage of the Civil Rights Act), to close its schools for blacks at the end of the school year, a decision that would forcibly integrate the county's white schools, something that no Virginia County had yet done, and which would not have been legally possible during the heyday of Massive Resistance. The decision was apparently prompted by rumors that a significant number of black students were planning to apply for admission to one of the county's previously all white schools the following fall. Unfortunately, the decision to fully integrate the Giles County schools was quickly followed by a decision to terminate the contracts of all of the county's black teachers at the end of the school year, a decision that touched off an NAACP-funded lawsuit that ended in 1966 with a 4th Circuit decision ordering the reinstatement of the black teachers. (However, only one teacher actually

returned.)

The decision to fully integrate the county's schools had a wide-variety of repercussions in Giles County. Certain historically segregated institutions--"little league" baseball, the community swimming pool, the first floor of the Pearis Theater (a movie house), and modestly priced restaurants and drug store lunch counters--quickly integrated for the first time.

However, the firing of the black teachers and their relocation elsewhere essentially broke the back of county's black middle class, and the bad publicity surrounding the firing of the black teachers prevented the county from receiving credit for its landmark decision.

H. Timothy Lovelace, Jr.

Indiana University of Maurer School of Law

*Lawyers and the Virginia State Conference of the NAACP, 1935-1965*

This paper will examine the most misunderstood organization in civil rights scholarship: the National Association for the Advancement of Colored People (NAACP). More specifically, the paper will chronicle the law practices and civil rights activities of a network of attorneys affiliated with the Virginia State Conference of the NAACP from 1935 to 1965. During this turbulent period in American history, the Virginia State Conference was arguably the most successful and best organized, state chapter of the NAACP. African-American lawyers were central to this success. Richmond-born and Roanoke-reared attorney, Oliver Hill, was a founding member of Virginia NAACP, and in its early days, the state conference routinely relied on the legal services of esteemed lawyers like Hill, Spottswood Robinson, and Samuel Tucker. Yet, the everyday law practices of these well-known, civil rights attorneys remain in relative obscurity, and the contributions of many more Virginia NAACP attorneys—Ruth Harvey, Martin A. Martin, and Robert Cooley, to name a few—have been relegated to history's footnotes. In fact, there are no comprehensive legal histories of Virginia's civil rights movement. And though the NAACP is the largest and oldest civil rights organization in the country, curiously, there are no civil rights histories solely devoted to state chapters of the NAACP or their affiliated attorneys. Much of the extant scholarship on NAACP lawyers has instead focused on nationally recognized lawyers, ignoring how the NAACP's federated structure facilitated democratic experimentation at the local and state levels. Furthermore, over the past two decades, many revisionist scholars have lambasted NAACP lawyers for being accommodationist, too domestically oriented, and largely unconcerned with issues of social welfare. This presentation will reconsider NAACP lawyers, a group whose history is filled with misconception, by analyzing Virginia's NAACP attorneys within their professional and social movement contexts.

Anders Walker

St. Louis University

School of Law

*Inner Conflict: The Segregationist Origins of Diversity*

Using Robert Penn Warren's 1956 memoir *Segregation: The Inner Conflict* as a starting point, this talk recovers the story of pluralism in the American South; showing how the legal system of Jim Crow fostered an idiosyncratic discourse of diversity, even as it furthered racial oppression. It discusses white proponents of pluralism, like Warren, and black proponents as well, among them Zora Neale Hurston and Ralph Ellison. While Ellison and Hurston placed a greater emphasis on equality than Warren, all three joined a regional chorus of writers, intellectuals, educators, elected officials, and judges; all of whom questioned the logic of racial assimilation. While many of these voices disagreed on questions of equity, they collectively articulated a politics of diversity at once more influential and also more complicated than prevailing accounts of civil rights concede. To demonstrate, the talk concludes with Supreme Court Justice Lewis F. Powell, Jr., a Virginia native born only two years after Warren who confessed "shock" at the Supreme Court's opinion in *Brown* and repeatedly extolled the values of pluralism over equality; even against the blistering dissents of fellow Supreme Court Justice and civil rights veteran Thurgood Marshall.

**7.8 Panel: Settler-Colonial Legal Studies: Considering Sites of Decolonialization Room: WB127**

Chair & Discussant Jothie Rajah

American Bar Foundation

This panel will explore the history and the historical legacies of settler colonial law in the U.S. and Canadian contexts. The three papers reflect on the possibility of decolonization through legal strategies in both sites, to consider the potential and limitations of international law, minority rights, and constructions of 'tribal sovereignty' in national jurisprudence to address contemporary legacies of colonialism.'

Panelists:

Stacy Douglas  
Carleton University, Canada

*'Beyond Winners and Losers: The Possibility of Extra-Constitutional Constitutionalism'*

In his *Law and Sacrifice* Johan van der Walt draws on the philosophy of Jean-Luc Nancy in elucidating his theory that law needs to acknowledge the sacrifice of every legal decision. In so doing, he adeptly maneuvers the critiques of metaphysics launched by Nancy to demonstrate the poverty of law's denial of the plurality of the world. I argue, however, that van der Walt's theory continues to engage in a form of monumental constitutionalism. Certainly, van der Walt insists that the legal system will not deliver complete emancipation for South Africans. However, he argues that the juridical may be put to use to get 'a little closer to a little more justice on earth' (van der Walt 2011: 395). As such, this theory continues to centralise the constitutional arrangement in the negotiation of political community and, rather than undoing the logic of communion, continues to, albeit with qualifications, set the production of community as its task. However, this is not an unescapable dilemma. I argue that van der Walt's contribution can be paired with the counter-monumental practices of the museum to offer an approach to constitutionalism that incorporates an

expanded adjudicational framework, along with a de-centering of the constitution, and the interruption of stable iterations of political community.

Genevieve Painter  
UC Berkeley

*Towards a Genealogy of a Liberal Choice - Indigeneity, Culture and Gender in International Law*

Modern international law often gives with one hand and takes away with the other. For example, where international law has denied self-determination, it has offered protection of culture in its stead, notably through the recognition of indigenous rights. Yet in recognizing women's rights as human rights, the human rights system frequently does so at the expense of 'culture', custom, and tradition. In short, culture is seen as both a solution for minority groups denied full self-determination and a problem for women seeking equality. How did this happen, and where does this leave indigenous women claiming both equality rights and self-determination? As part of a dissertation project that questions liberal multiculturalism's assertion that women's rights and minority rights are intrinsically opposed and in need of reconciliation, this paper investigates the legal field Sandra Lovelace entered when she brought her case to the UN. To explore why the UN read the case as a minority rights problem, the chapter traces a genealogy of the terms 'indigenous', 'minority', 'discrimination', and 'equality' in international human rights. After a closely curated review of the antecedents to the UN, the chapter uses analysis of the travaux préparatoires of three core human rights treaties to reconstruct the political and legal environment preceding the Lovelace decision. Drawing on archival research and feminist theories of international law, this paper investigates the irreconcilability of indigenous women's claims for equality rights and indigenous sovereignty.

K-Sue Park  
Harvard Law School

*"Colonial Analogies and Legal Assimilation: On the relation between tribal sovereignty and U.S. minority rights jurisprudence"*

In this paper, I suggest that the tension between the basic paradigms of American Indian law and U.S. minority rights jurisprudence illuminates the colonial logic of the latter. U.S. minority jurisprudence works analogically: to show that a group is an "insular, discrete minority" that has been denied equal protection, under the principle of legal precedent and analogical reasoning, each new struggle for legal protection involves what Janet Halley has called "like-race" arguments-- likening the group in question to the minority groups that the law has recognized, always beginning with racial minorities, whose legal definition emerged through the Civil Rights movement. In the present moment, this serial effort to obtain full citizenship under the law contrasts strongly with indigenous groups' ongoing struggle to assert independence from the state. Here, I consider the strategy of seeking inclusion in the state as legal assimilation; I explore the history of the use of this legal analogical reasoning to groups of people distinguished by their lack of political power in the Euroamerican state, including blacks, immigrants, and Indians, beginning during the last major phase of land dispossession or conquest, or the period following the Civil War. This history and the different jurisprudential paradigms

that develop from it prompt the question: can a colonial institution and key instrument of colonization, the law, become a vehicle of decolonization? I argue that it cannot, acknowledging that the answer depends on the particular character and history of the colonial state, as well as its legal system's relationship with international law. However, from the U.S. context, I argue for a position that nonetheless eschews legal logics of categorical exclusion and purity—the choice, for example, between a legal or non-legal path—and that can sustain what may, from a legal perspective, appear to be contradictions between radical critique and the urgent needs of life in a state of emergency.

## Participants

Sarah Abramowicz	Wayne State University	<a href="mailto:sabramowicz@wayne.edu">sabramowicz@wayne.edu</a>
Kerry Abrams	University of Virginia	<a href="mailto:kerryabrams@virginia.edu">kerryabrams@virginia.edu</a>
Joana Aguiar	Universidade do Minho, Portugal	<a href="mailto:jmasilva@direito.uminho.pt">jmasilva@direito.uminho.pt</a>
Allison Alexy	University of Virginia	<a href="mailto:alexyc@virginia.edu">alexyc@virginia.edu</a>
Christopher Ali	University of Virginia	<a href="mailto:cali@virginia.edu">cali@virginia.edu</a>
Hawa Allan	Columbia Law School	<a href="mailto:hawa.allan@gmail.com">hawa.allan@gmail.com</a>
Jessie Allen	University of Pittsburgh	<a href="mailto:jallen@pitt.edu">jallen@pitt.edu</a>
Matthew Anderson	University of New England	<a href="mailto:manderson@une.edu">manderson@une.edu</a>
Mark Antaki	McGill University, Canada	<a href="mailto:mark.antaki@mcgill.ca">mark.antaki@mcgill.ca</a>
Maria Aristodemou	Birkbeck College, UK	<a href="mailto:m.aristodemou@bbk.ac.uk">m.aristodemou@bbk.ac.uk</a>
Benjamin Authers	Australian National University, Australia	<a href="mailto:benjamin.authers@anu.edu.au">benjamin.authers@anu.edu.au</a>
Hadar Aviram	UC Hastings	<a href="mailto:aviramh@uchastings.edu">aviramh@uchastings.edu</a>
Shelby Bell	University of Minnesota	<a href="mailto:bellx500@umn.edu">bellx500@umn.edu</a>
Noa Ben-Asher	Pace Law School	<a href="mailto:nbenasher@law.pace.edu">nbenasher@law.pace.edu</a>
Ariel Bendor	Bar-Ilan University, Israel	<a href="mailto:ariel.bendor@biu.ac.il">ariel.bendor@biu.ac.il</a>
Matthew Birkhold	Princeton University	<a href="mailto:birkhold@princeton.edu">birkhold@princeton.edu</a>
Corinne Blalock	Duke University	<a href="mailto:corinne.blalock@gmail.com">corinne.blalock@gmail.com</a>
John Bliss	UC Berkeley	<a href="mailto:jwbliss@gmail.com">jwbliss@gmail.com</a>
Patricio Boyer	Davidson College	<a href="mailto:paboyer@davidson.edu">paboyer@davidson.edu</a>
Michaela Brangan	Cornell University	<a href="mailto:mjb492@cornell.edu">mjb492@cornell.edu</a>
Jenny Braun	University of Virginia	<a href="mailto:jennybraun@virginia.edu">jennybraun@virginia.edu</a>
Hannah Brenner	Michigan State Law	<a href="mailto:hbrenner@law.msu.edu">hbrenner@law.msu.edu</a>
Nicolette Bruner	University of Michigan	<a href="mailto:nbruner@umich.edu">nbruner@umich.edu</a>
Kb Burnside	Duke University	<a href="mailto:ksb20@duke.edu">ksb20@duke.edu</a>
Ashleigh Campi	University of Chicago	<a href="mailto:acampi@uchicago.edu">acampi@uchicago.edu</a>
Kerstin Carlson	American University of Paris, France	<a href="mailto:kcarlson@aup.edu">kcarlson@aup.edu</a>
Michelle Castaneda	Brown University	<a href="mailto:michelle_castaneda@brown.edu">michelle_castaneda@brown.edu</a>
Jesse Centrella	Savannah Law School	<a href="mailto:jcentrella@savannahlawschool.org">jcentrella@savannahlawschool.org</a>
Barry Collins	University of East London, UK	<a href="mailto:b.collins@uel.ac.uk">b.collins@uel.ac.uk</a>
Marianne Constable	UC Berkeley	<a href="mailto:constable@berkeley.edu">constable@berkeley.edu</a>
Anne Coughlin	University of Virginia	<a href="mailto:amc6z@virginia.edu">amc6z@virginia.edu</a>
Doug Coulson	Carnegie Mellon University	<a href="mailto:dmcoulson@msn.com">dmcoulson@msn.com</a>
Renee Cramer	Drake University	<a href="mailto:renee.cramer@drake.edu">renee.cramer@drake.edu</a>
Thomas Crocker	University of South Carolina	<a href="mailto:crocketp@law.sc.edu">crocketp@law.sc.edu</a>
Penny Crofts	University of Technology Sydney, Australia	<a href="mailto:penny.crofts@uts.edu.au">penny.crofts@uts.edu.au</a>
Jennifer Culbert	Johns Hopkins University	<a href="mailto:jculbert@jhu.edu">jculbert@jhu.edu</a>
Rebecca Curtin	Suffolk University	<a href="mailto:rcurtin@suffolk.edu">rcurtin@suffolk.edu</a>
Leif Dahlberg	Kungliga Tekniska Högskolan, Sweden	<a href="mailto:dahlberg@csc.kth.se">dahlberg@csc.kth.se</a>
Anne Dailey	University of Connecticut	<a href="mailto:anne.dailey@law.uconn.edu">anne.dailey@law.uconn.edu</a>
Nomi Dave	University of Virginia	<a href="mailto:nd4x@virginia.edu">nd4x@virginia.edu</a>
Kirsten Davis	Stetson University	<a href="mailto:kkdavis@law.stetson.edu">kkdavis@law.stetson.edu</a>
Margaret Denike	Dalhousie University	<a href="mailto:m.denike@dal.ca">m.denike@dal.ca</a>



Sital Dhillon	Sheffield Hallam University, UK	<a href="mailto:s.dhillon@shu.ac.uk">s.dhillon@shu.ac.uk</a>
Marinos Diamantidis	Birkbeck College, UK	<a href="mailto:m.diamantides@bbk.ac.uk">m.diamantides@bbk.ac.uk</a>
Stacy Douglas	Carleton University, Canada	<a href="mailto:stacy.douglas@carleton.ca">stacy.douglas@carleton.ca</a>
Maria Drakopoulou	University of Kent, UK	<a href="mailto:m.drakopoulou@kent.ac.uk">m.drakopoulou@kent.ac.uk</a>
Peter J. Durand	Swiss Re America Holding Company	<a href="mailto:durand@swissre.com">durand@swissre.com</a>
Philip Eloff	University of the Free State, South Africa	<a href="mailto:reneeloff@gmail.com">reneeloff@gmail.com</a>
Elizabeth Emens	Columbia University	<a href="mailto:eemens@law.columbia.edu">eemens@law.columbia.edu</a>
Mairead Enright	University of Kent, UK	<a href="mailto:m.enright@kent.ac.uk">m.enright@kent.ac.uk</a>
Etxabe, Julen	University of Helsinki, Finland	<a href="mailto:julen.etxabe@helsinki.fi">julen.etxabe@helsinki.fi</a>
Paolo Farah	Edge Hill University, UK	<a href="mailto:paolofarah@yahoo.com">paolofarah@yahoo.com</a>
Daniel Farbman	Harvard University	<a href="mailto:dan.farbman@gmail.com">dan.farbman@gmail.com</a>
Anthony Farley	Albany Law School	<a href="mailto:anthony.farley@gmail.com">anthony.farley@gmail.com</a>
Cary Federman	Montclair State University	<a href="mailto:federmanc@mail.montclair.edu">federmanc@mail.montclair.edu</a>
Andrea Fernandez	University of Buenos Aires, Argentina	<a href="mailto:acfernandez@derecho.uba.ar">acfernandez@derecho.uba.ar</a>
Matthew Festa	South Texas College of Law	<a href="mailto:mfesta@stcl.edu">mfesta@stcl.edu</a>
Catherine Finn	George Washington University	<a href="mailto:cfinn@law.gwu.edu">cfinn@law.gwu.edu</a>
Amanda Fisher	Savannah Law School	<a href="mailto:amfisher@savannahlawschool.org">amfisher@savannahlawschool.org</a>
David H. Fisher	North Central College	<a href="mailto:dhfisher@noctrl.edu">dhfisher@noctrl.edu</a>
Roger Fisher	York University, Canada	<a href="mailto:rfisher@yorku.ca">rfisher@yorku.ca</a>
Cathrine Frank	University of New England	<a href="mailto:cfrank@une.edu">cfrank@une.edu</a>
Brian Frye	University of Kentucky	<a href="mailto:brianfrye@uky.edu">brianfrye@uky.edu</a>
Melissa Ganz	Marquette University	<a href="mailto:melissa.j.ganz@gmail.com">melissa.j.ganz@gmail.com</a>
Macario Garcia	University of Virginia	<a href="mailto:mmg5pr@virginia.edu">mmg5pr@virginia.edu</a>
Brandon Garrett	University of Virginia	<a href="mailto:bgarrett@virginia.edu">bgarrett@virginia.edu</a>
Chris Geyer	Cazenovia College	<a href="mailto:cageyer@cazenovia.edu">cageyer@cazenovia.edu</a>
Jeremie Gilbert	University of East London, UK	<a href="mailto:jeremie.gilbert@uel.ac.uk">jeremie.gilbert@uel.ac.uk</a>
Raphael Ginsberg	University of North Carolina at Chapel Hill	<a href="mailto:trapido@email.unc.edu">trapido@email.unc.edu</a>
Chiara Giorgetti	University of Richmond	<a href="mailto:cgiorget@richmond.edu">cgiorget@richmond.edu</a>
Samantha Godwin	Yale Law School	<a href="mailto:samantha.godwin@yale.edu">samantha.godwin@yale.edu</a>
Audrey Golden	University of Virginia	<a href="mailto:ajg3ac@virginia.edu">ajg3ac@virginia.edu</a>
Ben Golder	University of New South Wales, Australia	<a href="mailto:b.golder@unsw.edu.au">b.golder@unsw.edu.au</a>
Randy Gordon	Gardere Wynne Sewell LLP	<a href="mailto:rgordon@gardere.com">rgordon@gardere.com</a>
Sinja Graf	Cornell University	<a href="mailto:sug3@cornell.edu">sug3@cornell.edu</a>
Carol Guarnieri	University of Virginia	<a href="mailto:ceg4b@virginia.edu">ceg4b@virginia.edu</a>
Enrique Guerra-Pujol	Barry University	<a href="mailto:eguerra@barry.edu">eguerra@barry.edu</a>
Nina Hagel	UC Berkeley	<a href="mailto:nina.hagel@berkeley.edu">nina.hagel@berkeley.edu</a>
Chaya Halberstam	University of Western Ontario, Canada	<a href="mailto:chaya.halberstam@uwo.ca">chaya.halberstam@uwo.ca</a>
Patrick Hanafin	Birkbeck College, UK	<a href="mailto:p.hanafin@bbk.ac.uk">p.hanafin@bbk.ac.uk</a>
Luke Haqq	UC Berkeley	<a href="mailto:lhaqq@berkeley.edu">lhaqq@berkeley.edu</a>
Alexandra Harrington	McGill University, Canada	<a href="mailto:alexandra.harrington@mail.mcgill.ca">alexandra.harrington@mail.mcgill.ca</a>
Mary Hashemi	Savannah Law School	<a href="mailto:mkhashemi@savannahlawschool.org">mkhashemi@savannahlawschool.org</a>
Emily Haslam	University of Kent, UK	<a href="mailto:e.haslam@kent.ac.uk">e.haslam@kent.ac.uk</a>
Alexandra Havrylyshyn	UC Berkeley	<a href="mailto:ahavry@berkeley.edu">ahavry@berkeley.edu</a>
Kathryn Heard	UC Berkeley	<a href="mailto:kathryn.heard@berkeley.edu">kathryn.heard@berkeley.edu</a>

Susan Heinzelman	University of Texas, Austin	<a href="mailto:sheinz@austin.utexas.edu">sheinz@austin.utexas.edu</a>
Robert Herian	The Open University, UK	<a href="mailto:robert.herian@open.ac.uk">robert.herian@open.ac.uk</a>
Sarah Higinbotham	Georgia State University	<a href="mailto:higinbothams@icloud.com">higinbothams@icloud.com</a>
Mai-Linh Hong	University of Virginia	<a href="mailto:mkh9b@virginia.edu">mkh9b@virginia.edu</a>
Annette Houlihan	St Thomas University, Canada	<a href="mailto:houlihan@stu.ca">houlihan@stu.ca</a>
J. Gordon Hylton	University of Virginia	<a href="mailto:jgh4sk@virginia.edu">jgh4sk@virginia.edu</a>
Lucero Ibarra Rojas	Universita degli Studi di Milano, Italy	<a href="mailto:luceroibarrarojas@gmail.com">luceroibarrarojas@gmail.com</a>
Jack Jackson	Whitman College	<a href="mailto:jacksoje@whitman.edu">jacksoje@whitman.edu</a>
Rana Jaleel	Columbia Law School	<a href="mailto:rana.jaleel@gmail.com">rana.jaleel@gmail.com</a>
Jeffery Johnson	Eastern Oregon University	<a href="mailto:jjohnson@eou.edu">jjohnson@eou.edu</a>
G.W. Jones	Johns Hopkins University	<a href="mailto:gjones38@jhu.edu">gjones38@jhu.edu</a>
Lawrence Joseph	St. Johns University	<a href="mailto:josephl@stjohns.edu">josephl@stjohns.edu</a>
Jeffrey Kahn	Southern Methodist University	<a href="mailto:jkahn@smu.edu">jkahn@smu.edu</a>
Catherine Kellogg	University of Alberta, Canada	<a href="mailto:catherine.kellogg@ualberta.ca">catherine.kellogg@ualberta.ca</a>
Sara Kendall	Leiden University, Netherlands	<a href="mailto:s.kendall@cdh.leidenuniv.nl">s.kendall@cdh.leidenuniv.nl</a>
Ummni Khan	Carleton University, Canada	<a href="mailto:ummni_khan@carleton.ca">ummni_khan@carleton.ca</a>
Budrunnisa Khan	University of Virginia	<a href="mailto:bak4pr@virginia.edu">bak4pr@virginia.edu</a>
Ville P Komulainen	University of Helsinki, Finland	<a href="mailto:ville.p.komulainen@helsinki.fi">ville.p.komulainen@helsinki.fi</a>
Elisabeth Kincaid	University of Notre Dame	<a href="mailto:ekincaid@nd.edu">ekincaid@nd.edu</a>
Ed Kirton-Darling	University of Kent, UK	<a href="mailto:e.kirton-darling-276@kent.ac.uk">e.kirton-darling-276@kent.ac.uk</a>
Renee Knake	Michigan State University	<a href="mailto:rk@law.msu.edu">rk@law.msu.edu</a>
Simone Knewitz	George Washington University	<a href="mailto:sknewitz@gwu.edu">sknewitz@gwu.edu</a>
Anna Krakus	University of Southern California	<a href="mailto:krakus@usc.edu">krakus@usc.edu</a>
Cameron Kuhlman	Savannah Law School	<a href="mailto:cckuhlman@savannahlawschool.org">cckuhlman@savannahlawschool.org</a>
Daniel LaChance	Emory University	<a href="mailto:dlachance@emory.edu">dlachance@emory.edu</a>
Julie Lane	South Dakota State University	<a href="mailto:julie.lane@sdstate.edu">julie.lane@sdstate.edu</a>
Monika Lemke	Carleton University, Canada	<a href="mailto:monika.lemke@carleton.ca">monika.lemke@carleton.ca</a>
Claudia Lieb	Westfaelische Wilhelms University Muenster, Germany	<a href="mailto:lieb@uni-muenster.de">lieb@uni-muenster.de</a>
Dana Lloyd	Syracuse University	<a href="mailto:dbarnea@syr.edu">dbarnea@syr.edu</a>
Herbert Lovelace	Indiana University	<a href="mailto:lovelace@indiana.edu">lovelace@indiana.edu</a>
Jessica Lowe	University of Virginia	<a href="mailto:jessicalowe@virginia.edu">jessicalowe@virginia.edu</a>
Hanna Lukkari	University of Helsinki, Finland	<a href="mailto:hanna.lukkari@helsinki.fi">hanna.lukkari@helsinki.fi</a>
Yael Machtinger	York University, Canada	<a href="mailto:yaelmach@yorku.ca">yaelmach@yorku.ca</a>
Steven Macias	Southern Illinois University, Carbondale	<a href="mailto:smacias@siu.edu">smacias@siu.edu</a>
Nancy Marder	Chicago-Kent College of Law	<a href="mailto:nmarder@kentlaw.edu">nmarder@kentlaw.edu</a>
Anna-Maria Marshall	University of Illinois	<a href="mailto:amarshll@illinois.edu">amarshll@illinois.edu</a>
James Martel	San Francisco State University	<a href="mailto:jmartel@sfsu.edu">jmartel@sfsu.edu</a>
Keally McBride	University of San Francisco	<a href="mailto:kdmcbride@usfca.edu">kdmcbride@usfca.edu</a>
Cynthia Merrill	UC Los Angeles	<a href="mailto:cynthia.merrill@earthlink.net">cynthia.merrill@earthlink.net</a>
Sabine N. Meyer	University of Osnabrueck, Germany	<a href="mailto:sabmeyer@uos.de">sabmeyer@uos.de</a>
Linda Meyer	Quinnipiac University	<a href="mailto:linda.meyer@quinnipiac.edu">linda.meyer@quinnipiac.edu</a>
Panu Minkkinen	University of Helsinki, Finland	<a href="mailto:panu.minkkinen@helsinki.fi">panu.minkkinen@helsinki.fi</a>
Vincent Mosley	Savannah Law School	<a href="mailto:vimosley@savannahlawschool.org">vimosley@savannahlawschool.org</a>
Sherally Munshi	Georgetown University	<a href="mailto:munshisherally@gmail.com">munshisherally@gmail.com</a>

James Nelson	Columbia University	<a href="mailto:james.nelson@law.columbia.edu">james.nelson@law.columbia.edu</a>
John O'Brien	University of Virginia	<a href="mailto:jobrien@virginia.edu">jobrien@virginia.edu</a>
Daniel Ohana	Tel Aviv University, Israel	<a href="mailto:daniel.ohana@mail.huji.ac.il">daniel.ohana@mail.huji.ac.il</a>
Victoria Olwell	University of Virginia	<a href="mailto:vjo2f@virginia.edu">vjo2f@virginia.edu</a>
Genevieve Painter	UC Berkeley	<a href="mailto:genevieve.painter@berkeley.edu">genevieve.painter@berkeley.edu</a>
Mary Pancoast	University of Virginia	<a href="mailto:mep2ae@virginia.edu">mep2ae@virginia.edu</a>
K-Sue Park	Harvard Law School	<a href="mailto:ksue.park@gmail.com">ksue.park@gmail.com</a>
Paul Passavant	Hobart And William Smith Colleges	<a href="mailto:passavant@hws.edu">passavant@hws.edu</a>
George Pavlich	University of Alberta, Canada	<a href="mailto:gpavlich@ualberta.ca">gpavlich@ualberta.ca</a>
Carlo Pedrioli	Barry University	<a href="mailto:cpedrioli@barry.edu">cpedrioli@barry.edu</a>
Imani Perry	Princeton University	<a href="mailto:iperry@princeton.edu">iperry@princeton.edu</a>
Jennifer Petersen	University of Virginia	<a href="mailto:jenp@virginia.edu">jenp@virginia.edu</a>
Karen Petroski	St. Louis University	<a href="mailto:kpetrosk@slu.edu">kpetrosk@slu.edu</a>
Hannah Phillips	University of Kent, UK	<a href="mailto:h.phillips@kent.ac.uk">h.phillips@kent.ac.uk</a>
Nick Piska	University of Kent, UK	<a href="mailto:n.piska@kent.ac.uk">n.piska@kent.ac.uk</a>
Antonios E. Platsas	University of Derby, UK	<a href="mailto:a.platsas@derby.ac.uk">a.platsas@derby.ac.uk</a>
Andrew Poe	Amherst College	<a href="mailto:apoe@amherst.edu">apoe@amherst.edu</a>
Jedediah Purdy	Duke University	<a href="mailto:Purdy@law.duke.edu">Purdy@law.duke.edu</a>
Jothie Rajah	American Bar Foundation	<a href="mailto:jothie2010@gmail.com">jothie2010@gmail.com</a>
Robert Raper	Northern Kentucky University	<a href="mailto:robert@rlraperlaw.com">robert@rlraperlaw.com</a>
Ravit Reichman	Brown University	<a href="mailto:ravit_reichman@brown.edu">ravit_reichman@brown.edu</a>
Keramet Reiter	UC Irvine	<a href="mailto:reiterk@uci.edu">reiterk@uci.edu</a>
Zach Reyna	Johns Hopkins University	<a href="mailto:zel.reyna@jhu.edu">zel.reyna@jhu.edu</a>
Margarita Rico	University of Buenos Aires, Argentina	<a href="mailto:margaritabv@fibertel.com.ar">margaritabv@fibertel.com.ar</a>
Noya Rimalt	University of Haifa, Israel	<a href="mailto:nrimalt@law.haifa.ac.il">nrimalt@law.haifa.ac.il</a>
Marc Roark	Savannah Law School	<a href="mailto:mroark@savannahlawschool.org">mroark@savannahlawschool.org</a>
Caprice Roberts	Savannah Law School	<a href="mailto:croberts@savannahlawschool.org">croberts@savannahlawschool.org</a>
Ruthann Robson	City University of New York (CUNY)	<a href="mailto:robson@law.cuny.edu">robson@law.cuny.edu</a>
Augusta Rohrbach	Washington State University	<a href="mailto:augustarohrbach@gmail.com">augustarohrbach@gmail.com</a>
Darren Rosenblum	Pace Law School	<a href="mailto:drosenblum@law.pace.edu">drosenblum@law.pace.edu</a>
Clifford Rosky	University of Utah	<a href="mailto:clifford.rosky@law.utah.edu">clifford.rosky@law.utah.edu</a>
Josephine Ross	Howard University	<a href="mailto:jross.howardlaw@gmail.com">jross.howardlaw@gmail.com</a>
Jack Sammons	Mercer University	<a href="mailto:jlsjr@aol.com">jlsjr@aol.com</a>
Alvaro Santos	Georgetown Law	<a href="mailto:asantos@law.georgetown.edu">asantos@law.georgetown.edu</a>
Eric Sapp	Stanford University	<a href="mailto:eric.sapp@aya.yale.edu">eric.sapp@aya.yale.edu</a>
Anne Sappington	Trinity College Dublin, Ireland	<a href="mailto:sappina@tcd.ie">sappina@tcd.ie</a>
Austin Sarat	Amherst College	<a href="mailto:adsarat@amherst.edu">adsarat@amherst.edu</a>
Shalini Satkunanandan	UC Davis	<a href="mailto:ssatkunanandan@ucdavis.edu">ssatkunanandan@ucdavis.edu</a>
Donna Scheidt	High Point University	<a href="mailto:dscheidt@highpoint.edu">dscheidt@highpoint.edu</a>
Susan Schmeiser	University of Connecticut	<a href="mailto:susan.schmeiser@law.uconn.edu">susan.schmeiser@law.uconn.edu</a>
Peter Schneck	University of Osnabrueck, Germany	<a href="mailto:peter.schneck@uos.de">peter.schneck@uos.de</a>
Jeannette Sedgwick	Independent	<a href="mailto:jps01915@gmail.com">jps01915@gmail.com</a>
Florence Seow	Kanagawa University, Japan	<a href="mailto:florence.seow@gmail.com">florence.seow@gmail.com</a>
Erin Sheley	George Washington University	<a href="mailto:esheley@law.gwu.edu">esheley@law.gwu.edu</a>

Richard Sherwin	New York Law School	<a href="mailto:rsherwin@nyls.edu">rsherwin@nyls.edu</a>
Lisa Siraganian	Southern Methodist University	<a href="mailto:lisa.siraganian@gmail.com">lisa.siraganian@gmail.com</a>
Mark Spottswood	Florida State University	<a href="mailto:mospottsw@law.fsu.edu">mospottsw@law.fsu.edu</a>
William F. Stafford Jr.	UC Berkeley	<a href="mailto:wstafford.jr@gmail.com">wstafford.jr@gmail.com</a>
Jill Stauffer	Haverford College	<a href="mailto:jstauffe@haverford.edu">jstauffe@haverford.edu</a>
Susan Sterett	University of Denver	<a href="mailto:susan.sterett@du.edu">susan.sterett@du.edu</a>
John Stinneford	University of Florida	<a href="mailto:jstinneford@law.ufl.edu">jstinneford@law.ufl.edu</a>
Daniel H. Strait	Asbury University	<a href="mailto:daniel.strait@asbury.edu">daniel.strait@asbury.edu</a>
John Strawson	University of East London, UK	<a href="mailto:j.strawson@uel.ac.uk">j.strawson@uel.ac.uk</a>
Cheryl Suzack	University of Toronto, Canada	<a href="mailto:cheryl.suzack@utoronto.ca">cheryl.suzack@utoronto.ca</a>
Sarah Swan	Columbia University	<a href="mailto:ss3602@columbia.edu">ss3602@columbia.edu</a>
Peter Swan	Carleton University, Canada	<a href="mailto:peter.swan@carleton.ca">peter.swan@carleton.ca</a>
Susan Tanner	Carnegie Mellon University	<a href="mailto:stanner@andrew.cmu.edu">stanner@andrew.cmu.edu</a>
Pavithra Tantrigoda	Carnegie Mellon University	<a href="mailto:pavithra.tantrigoda@gmail.com">pavithra.tantrigoda@gmail.com</a>
Kathryn Temple	Georgetown University	<a href="mailto:templek@georgetown.edu">templek@georgetown.edu</a>
Jennifer Terrell	American University In Cairo, Egypt	<a href="mailto:jyt360@gmail.com">jyt360@gmail.com</a>
Tania Tetlow	Tulane University	<a href="mailto:ttetlow@tulane.edu">ttetlow@tulane.edu</a>
Marilyn Terzic	Université du Québec à Montréal, Canada	<a href="mailto:mte@sympatico.ca">mte@sympatico.ca</a>
Jeffrey Thomas	University of Missouri, Kansas City	<a href="mailto:thomasje@umkc.edu">thomasje@umkc.edu</a>
Kendall Thomas	Columbia Law School	<a href="mailto:kthomas@law.columbia.edu">kthomas@law.columbia.edu</a>
Adam Thurschwell	Independent	<a href="mailto:athurschwell@gmail.com">athurschwell@gmail.com</a>
Paul Tiensuu	University of Helsinki, Finland	<a href="mailto:paul.tiensuu@helsinki.fi">paul.tiensuu@helsinki.fi</a>
Esperanza Tineo	University of Buenos Aires, Argentina	<a href="mailto:rtineo@derecho.uba.ar">rtineo@derecho.uba.ar</a>
Allison Tirres	Depaul University	<a href="mailto:atirres@depaul.edu">atirres@depaul.edu</a>
Philomila Tsoukala	Georgetown Law	<a href="mailto:pt96@law.georgetown.edu">pt96@law.georgetown.edu</a>
Martha Umphrey	Amherst College	<a href="mailto:mmumphrey@amherst.edu">mmumphrey@amherst.edu</a>
Karin Van Marle	University of Pretoria, South Africa	<a href="mailto:karin.vanmarle@up.ac.za">karin.vanmarle@up.ac.za</a>
Rosa Vila	University of Buenos Aires, Argentina	<a href="mailto:rosipivila@yahoo.com.ar">rosipivila@yahoo.com.ar</a>
Anders Walker	St. Louis University Law	<a href="mailto:awalke16@slu.edu">awalke16@slu.edu</a>
Marianne Wesson	University of Colorado	<a href="mailto:wesson@colorado.edu">wesson@colorado.edu</a>
Jouni Westling	University of Helsinki, Finland	
Mark D. White	College of Staten Island/CUNY	<a href="mailto:profmdwhite@hotmail.com">profmdwhite@hotmail.com</a>
Sandra Wierzba	University of Buenos Aires, Argentina	<a href="mailto:sandra.wierzba@estudiocwc.com.ar">sandra.wierzba@estudiocwc.com.ar</a>
Steven Winter	Wayne State University	<a href="mailto:swinter@wayne.edu">swinter@wayne.edu</a>
Reginald Wisenbaker	Savannah Law School	<a href="mailto:rcwisenbaker@savannah.lawschool.org">rcwisenbaker@savannah.lawschool.org</a>
Diana Young	Carleton University, Canada	<a href="mailto:diana_young@carleton.ca">diana_young@carleton.ca</a>