

**2010 Midwest Law and Society Retreat
Participant List, Program Roles and Abstracts**

10/4/10

Deborah Anthony

University of Illinois Springfield (Legal Studies)

Participant

Sumudu Atapattu

University of Wisconsin (Law)

Using Human Rights Framework to Protect Environmental Rights My paper looks at the link between human rights and environmental issues as articulated by the Superior courts in South Asia, particularly, the Indian Supreme Court and also the role played by civil society groups and the legal profession in these cases. The trend set by this court in *Subhash Kumar v. State of Bihar* in 1991 where the court observed that the right to life enshrined in Article 21 (of the Indian Constitution) includes the right to enjoyment of pollution-free water and air for the full enjoyment of life has been followed by courts in South Asia. The paper will discuss some of these cases and discuss the influence that both international human rights law and international environmental law had in these cases.

Bernadette Atuahene

Chicago-Kent College of Law (Law)

Property and Transitional Justice Transitional justice is the study of those mechanisms employed by communities, states, and the international community to promote social reconstruction by dealing with the legacy of systematic human rights abuses and authoritarianism. The existing transitional justice literature that discusses how states can deal with past violations of civil and political rights through truth commissions and international and domestic prosecutions is well developed; but the transitional justice literature concerning the redress of past violations of property rights is significantly less developed. The goal of this essay is to begin an important conversation about how transitional states can deal with multiple layers of past land dispossession in order to promote social reconstruction. I discuss the strengths and weakness of a state's three main options: maintaining the present property status quo, fully or partially returning to a prior status quo, and creating a new property status quo altogether. I argue that a state should decide which option it will choose in the context of an inclusive public dialogue where participants are well-informed rather than through a process involving only elites, which despite being less time-consuming and less costly, will prove to be inadequate in the long run.

Liza Barry-Kessler

UW-Milwaukee (Information Studies)

Participant

Daniel Blocq

University of Wisconsin (Sociology)

Panel Chair: Documenting Youth

Suzanne Borland

University of Illinois Springfield (Legal Studies)

CSI v. Law & Order: Creating Diverse Evidentiary Expectations Among Jurors? This proposed study intends to build upon the work of, and answer a question posed by, the 2009 Journal of Criminal Justice article “Examining the ‘CSI-effect’ in the cases of circumstantial evidence and eyewitness testimony: Multivariate and path analyses,” by Kim, Barak & Shelton. The distinct question for analysis is whether “viewers of CSI programming and its spinoffs ‘versus’ viewers of Law and Order programming and its spin-offs ‘versus’ viewers who watch both types of programs develop different understandings of evidence or represent different types of viewers.” (Kim, 459). I plan to duplicate the Kim study, to verify its findings, while also exploring this new potential variable. My hypothesis is that the distinct stylistic differences of the two crime dramas cause viewers who serve as potential jurors to have diverse expectations about their impending courtroom experience.

Sandra Botero

University of Notre Dame (Political Science)

Legal Pluralism and Political Inclusion in Latin America Over the last two decades, a wave of constitutional reforms swept Latin America. Multicultural constitutions recognize the diversity of these societies and, in many cases, grant political, judicial and administrative autonomy to the historically excluded and marginalized indigenous population. Currently, Bolivia, Colombia, Ecuador, Chile, Nicaragua, Paraguay and Peru recognize minority rights that configure special citizenship regimes for these groups recognizing, in particular, their informal justice and governance systems. In the context of prevalent inequality and concomitant political exclusion, these reforms elicit competing expectations: some expected the emergence of a more multilayered conception of citizenship and the state, promoting inclusion and autonomy simultaneously. Others argued that by protecting inefficient institutions and creating illiberal enclaves would come the perpetuation or deepening of political and socioeconomic marginalization. We lack a comparative and empirically informed understanding of the effects, if any. What does the formal recognition of self-governance institutions mean, if anything, for political inclusion? This project studies the political implications of legal pluralism. It tries to theorize and analyze systematically, from a comparative perspective, the link between the formal recognition of informal institutions (and their exercise) and minorities’ ability to engage with and permeate the formal political system.

Elizabeth Boyle

University of Minnesota (Sociology & Law)

Leader: After dinner informal discussion on graduate student grants and funding.

Nancy Buenger

University of Wisconsin (Legal History)

Equity as Anti-Law The rule of law has been alternately dubbed a democratic bulwark against arbitrary governance and an imperialist enterprise. Missing from this debate is what might be called the anti-rule of law: equity. Fitting squarely within the western legal tradition, courts of equity are nonetheless vested with state authority to operate outside the law’s letter, and have been key to colonial/postcolonial administration. A Roman canonical legal heritage, juryless equitable courts may establish their own procedural rules and dispense discretionary justice according to the dictates of conscience and local custom. Equitable courts have often been decried in the United States, where they inspired constitutional due process protections. Yet equity proved critical for administering US populations with differential legal rights, including indigenous peoples, blacks, women, children, labor activists, and Filipinos. Since 1940, equity procedure has predominated in US civil and lower-level criminal courts. This presentation will explore the rule of law’s colonial/postcolonial context by focusing on early twentieth-century jurists who practiced in equitable US Philippine and extra-territorial Chinese courts. Engaging equitable Spanish, US, Asian, and international legal precedents, they debated the rule of law, and helped transform mainland US courts. Historicizing the

equitable co-evolution of US courts at home and abroad raises new questions concerning the rule of law. Does arbitrary governance facilitate the development of democratic states? Have equitable societies moved beyond law's rule?

Panel Chair: Human Rights I.

Brett Burkhardt

University of Wisconsin (Sociology)
Participant

Kathryn Burns-Howard

Northwestern University (History)

From Feme Covert to Ersatz Patriarch: Civil Status & the Law of Lunacy in the 19th-Century U.S. Historians have clearly established that in the United States, the Common Law tradition of married women's coverture declined over the course of the nineteenth century. Laws regarding married women's property and child custody underpin existing arguments about how and when this shift occurred. Not surprisingly, official and published accounts of lower court insanity cases have not been a site for analysis of this shift. The accepted interpretation that married women's lack of independent civil status made them uniquely vulnerable to involuntary asylum commitment by their husbands--with or without cause--has debarred further investigation into how some women deployed the law of lunacy for their own purposes. I will demonstrate that by mid-century, wives in many jurisdictions had the power to commit their husbands, sometimes by means of ambiguous evidence--a situation previously associated with female oppression. I will further argue that, following a man's civil death through a legal declaration of incompetence, the court could allow the feme covert to assume the powers of the paterfamilias, with authority over family property and all members of the household – including the husband. Judges were creating ersatz patriarchs because, in practice, they privileged the stability of the family as a social unit over the protection of the patriarchal order.

Ursula Castellano

Center for Law, Justice and Culture, Ohio University (Sociology and Anthropology)

Judges' Use of Treatment Narratives and Motivational Strategies in Mental Health Courts This paper reports on findings from an ethnographic study of four Midwest mental health courts and focuses on how judges motivate, reprimand, and question offenders during weekly status hearings. Mental health courts bear little resemblance to traditional workgroup models. These programs are staffed by legal and treatment professionals who work collaboratively towards addressing the complex problems in offenders' lives that contribute to their cycle of arrests. This study informs prior research on the innovative role of judges as team leaders in alternative courts. I investigate judges' use of rhetorical strategies to gain willful compliance from justice-involved offenders. I found that judges purposefully adopted metaphorical discourses to encourage struggling offenders and prosecutorial tactics to test their commitment to the program. The paper contributes to our understanding of judges' participation in team-based approaches for improving offenders' reintegration into the community. I conclude that judges' courtroom personas are conditioned by the organizational norms of the mental health court as well as their professional orientations.

Eric Chaffee

University of Dayton (Law)

Building Legal Norms from Society's Intuitions About Justice: The Role of Ethical Intuitionism in Legal Compliance in the Business World Although the law is expansive, it is not comprehensive. Often, clarifying the law comes at the risk of a client's interests, and lawyers are called upon to be odds makers in addition to competent researchers, communicators, and advocates. In many circumstances, clients' and colleagues' hopes about what the law might be are in direct conflict with a lawyer's intuitions about what the law likely is.

To put the issue another way, in the 1973 movie adaptation of John Jay Osborn Jr.'s novel *The Paper Chase*, Professor Charles W. Kingsfield Jr. informs his contracts class during their first session: "You teach yourselves the law. I train your minds. You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer." Professor Kingsfield's statement and his behavior throughout the remainder of *The Paper Chase* demonstrate his view that "thinking like a lawyer" chiefly consists of engaging in analytic reasoning, a view that is held by many in the legal academy and in practice today. I suggest that some of the things contained within one's "skull full of mush" may be useful in the practice of law. In fact, considering one's ethical intuitions about the law may be as reasonable and as useful as resorting to analytic reason.

My presentation highlights a growing acknowledgement by members of various disciplines of the role of intuition in moral decision making. Philosophers and religious scholars initially recognized the role of intuition in moral decision-making centuries ago. Within the past few decades, neuroscientists have validated these theories through the use of various brain scan technologies, which show that humans resort to intuition first when making moral decisions. Within the past decade, moral psychologists, behavioral economists, and other scholars have employed the work of neuroscientists to develop sophisticated models of moral decision-making that better reflect how people behave when making moral decisions.

My presentation explores what role a lawyer's ethical intuitions about the law should play in making decisions about legal compliance matters in the business world. Lawyers must choose between either helping clients minimally comply with the law or providing them with some ethical counsel in addition to legal advice. I suggest that a lawyer's ethical intuitions can provide useful information in helping a client comply with its legal and extra-legal duties.

Andrew Coan

University of Wisconsin (Law)

Panel Chair: Protest/Backlash.

Jason Cross

University of Michigan (Public Policy)

Metrics and Democratization I am turning my dissertation into a book manuscript on the role of monitoring procedures and techniques on democratic governance reform in El Salvador since the 1992 end of a 12-year civil war. The study looks at the development and implementation of monitoring and evaluation models for rule of law, citizen participation and accountability reforms, in order to understand the impact of monitoring techniques on the local adaptation and global circulation of democratic reform programs. In-depth qualitative study of the development and use of monitoring procedures reveals a formalization of ways of producing and contesting knowledge deemed crucial for political communities " be they rural hamlets or national economic sectors. Ethnographic accounts of how these procedures circulate and are used by governments, non-governmental organizations (NGOs), citizens and social movements illustrate their ubiquity, flexibility and dynamism " from municipal finance and state decentralization reforms, to human rights struggles over water privatization, mining and pharmaceuticals. Research conducted before, during and after the 2009 election of the leftist FMLN party to the presidency captures shifts in the use of monitoring procedures as social movement activists move into government.

John A. Duerk

Northern Illinois University (Political Science)

A Discussion of the Animal Enterprise Terrorism Act Radical animal and environmental activists in the United States have employed aggressive, and sometimes illegal, tactics in pursuit of their agenda for decades. In 1992, lawmakers passed the Animal Enterprise Protection Act (later revised on two occasions), but the militant actions continued. Then, members of Congress convened six public hearings between 1998 and 2006, leading to the passage of the Animal Enterprise Terrorism Act in the fall of 2006. The following paper examines witness testimony and statements from the

hearings as well as the AETA itself using Aaron Wildavsky's cultural theory. I argue that the distinctive value types offered by cultural theory explain why radical activists, i.e. egalitarians, behave as they do, and various private interests, i.e. individualists, and public interests, i.e. hierarchs, responded the way they have. Furthermore, while some individualists and hierarchs believe this new legislation will deter some of the militant activism, the strong worldview of these egalitarians indicates otherwise.

Mark A. Edwards

William Mitchell College of Law (Law)

Qualitative Legal Research in a Foreign Land: A Case Study The decision of a society to seize from one class of people their property rights, and the subsequent willingness of a society to restore them, usually depends upon a social determination of collective moral blameworthiness. In the Czech Republic in the 20th century, in quick succession, property was seized from Jews and Czech nationalists by the Nazis, then from the ethnic Germans by the restored Czech government, then from the bourgeoisie and landowners by the Communist government. Restitution is occurring with regard to categories of property, but not others. I spent a good deal of the summer of 2010 interviewing Czechs to understand why.

That process brought to the fore several overlapping difficulties in conducting qualitative legal research abroad: language barriers, delicate political sensitivities, mistrust, mixed motives, perspectives formed from different historical contexts, and class differences -- particularly important in this case, since I interviewed Austro-Hungarian royalty, among other subjects. The process also demonstrated the important roles of new communication technologies and dumb luck in conducting such research.

Panel Chair: Scholarship and Court Citation.

Howard Erlanger

University of Wisconsin (ILS, Law & Sociology)

Program Chair

Jordan Gans-Morse

UC Berkeley (Political Science)

Out of Chaos? Business Conflicts and Demand for Legal Institutions in Russia Many scholars argue that the business sector is an important political constituency in favor of secure property rights, and that private sector demand for law contributes to institutional development. Other analysts emphasize that in countries like Russia, businesspeople regularly subvert formal legal institutions and undermine property rights. I argue that debates over whether firms are supporters or opponents of law are misleading. Instead, firms' support is conditional. Legal institutions both enable business transactions and constrain firms' ability to use illicit strategies for acquiring and protecting assets. Based on in-depth interviews with Russian businesspeople, lawyers, and private security agencies, this paper develops a framework and formal model to analyze factors affecting private sector demand for law. The framework emphasizes (1) socioeconomic factors, such as levels of international economic integration and the sophistication of transactions on which an economy relies; (2) institutional factors, such as the quality of the court system and the effectiveness of tax and banking reforms; and (3) firm-level factors, such as firms' relative access vis-a-vis competitors to extra-legal resources for resolving disputes.

Melanie Getreuer

University of Wisconsin-Madison (Political Science)

Participant

Brian Gran

Case Western Reserve University (Sociology of Law)

“Death to Facebook”: Regulation of Social Networking Sites (with William Henry) This paper explores current public and private regulation of social networking sites. In less than a decade, social networking sites may have become the next printing press. The informal exchange of information on these sites (for example, Facebook, Twitter and MySpace) is unparalleled, and as they are based upon user-originated information, the communities become immensely useful sources of current information, epitomes of distributed knowledge.

Yet because in order to thrive, social networking sites require high numbers of individual users to provide user-originated content (including personal opinions and information), they have been targets of substantial discussion internationally with respect to regulating their usage, both at the governmental level and in the private sector. In this paper, we analyze the efforts of governments to regulate the use of social networking sites, with special attention to the European Union’s June 2009 proposal on social network regulation and Pakistan’s recent (joining other countries) banning of Facebook. Privately, we will address attempts made by businesses as well as those of social networking sites themselves to regulate content.

Catherine Grosso

Michigan State University (Law)

Reaching Around the Norm: State Movements to Abolish the Death Penalty and Their Impact on International Norms This project considers the contribution of recent state-level movements to abolish the death penalty to the horizontal reach of one set of human rights norms in the United States. The horizontal introduction of such norms has the potential to promote human rights, as manifest in a prohibition on the death penalty, without regard to the posture of the United States in this respect and without the use of vertical enforcement mechanisms, such as those associated with treaty enforcement. In this case, however, primary actors in state movements have chosen to avoid or, perhaps, “reach around,” the dominant human rights norm prohibiting the death penalty in order to advance a largely consistent agenda. This approach warrants new thinking about the impact of horizontality on the advancement of human rights.

Alicia Harden

University Of Kentucky (Law)

When Bad Parents Become the Worst Parents: States' Responses to the “Aggravated Circumstances” Exception under ASFA and the Waiver of Reasonable Efforts As part of the Adoption and Safe Families Act (ASFA), states are required to make reasonable reunification efforts prior to the termination of parental rights. These efforts can be waived, however, under a variety of statutory exceptions including the existence of "aggravated circumstances." ASFA explicitly left the definition of aggravated circumstances to the individual states and provided a short, non-exhaustive list of potential situations. By allowing states to individually define the circumstances permitting judicial bypass of reasonable efforts, however, ASFA introduces the potential for inconsistent applications of the reasonable efforts requirements and the termination of parental rights standards. Inconsistent treatment of children and families may result in needlessly broken families and may not be in the best interest of the child, an underlying assumption of the family law. My research examines the definitions of aggravated circumstances and appellate court reviews of grants of waiver in Kentucky, Texas, and Washington in an effort to identify inconsistencies resulting from these differences. Although there is no simple solution to this problem, the article briefly examines three possible solutions: (1) require uniform definitions of aggravated circumstances, (2) require partial reasonable efforts requirements for non-uniform aggravated circumstance, and (3) permit certain aggravated circumstances to operate as rebuttable presumptions.

Kathryn Hendley

University of Wisconsin (Law and Political Science)

Panel Chair: Mobilizing Law in Non-democratic Regimes: Case of Russia.

Session #2: Plenary Research Methods Roundtable

William M. Henry

Jones Day (Sociology of Law)

“Death to Facebook”: **Regulation of Social Networking Sites** (with Brian Gran) This paper explores current public and private regulation of social networking sites. In less than a decade, social networking sites may have become the next printing press. The informal exchange of information on these sites (for example, Facebook, Twitter and MySpace) is unparalleled, and as they are based upon user-originated information, the communities become immensely useful sources of current information, epitomes of distributed knowledge.

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Joseph Hinchliffe

University of Illinois at Urbana-Champaign (Political Science)

Participant

Elizabeth Hoffmann

Purdue University (Sociology)

Moms and Managers I recently received an NSF grant to examine a new Indiana law that mandates that mgrs. accommodate mom employees who wish to pump breast milk at work. This law is an excellent site for L&S research: it is both vague and has no enforcement mechanism. Moreover, it lies at the intersection of the public and private -- nursing babies and the employment context. I’m still at the data-collection stage, but I’d be happy to discuss my preliminary findings in Sept.

Panel Chair: Community Corrections and Prison Re-entry.

Thaddeus Hoffmeister

University of Dayton (Law School)

The Impact of the Digital Age on Jurors I would like to present my article, The Impact of the Digital Age on Jurors. The article begins by discussing the effect the Digital Age has had on juror: (1) research; (2) communications; and (3) privacy. The article then proceeds to analyze possible ways in which to limit the negative influences of new technology on these three areas. While there is no easy solution to this evolving problem, this article focuses on several reform measures that could reduce the detrimental effects of the Digital Age on jurors. The five proposed remedies are as follows: (1) improving juror instructions; (2) allowing jurors to ask questions; (3) imposing penalties; (4) requiring the disclosure of juror information to the opposing party; and (5) reconfiguring how juries are used.

As part of the research for this article, this author has conducted the first-ever Jury Survey on the impact of the Digital Age on jury service. The Jury Survey Questions went to federal judges, prosecutors, public defenders and trial consultants and focused primarily on juror research but briefly touched upon juror communications and privacy. The responses were very helpful in learning how this issue is understood by those involved in the legal system on a day-to-day basis. Of particular note, the Jury Survey Respondents were almost uniform in their belief that improved and updated jury

instructions are the best approach to combat online research by jurors. Interestingly, few were in favor of or saw the merit in allowing jurors to ask questions something this article strongly supports.

Nate Holdren

University of Minnesota (History)

“The Compensation Law Put Us Out Of Work”: Workmen’s Compensation, Commodification, and Disability In the early 20th century United States workmen’s compensation legislation across the United States reallocated the risks of injuries concomitant with waged work. This re-allocation did not include people with disabilities in the same way as able-bodied people. Some states’ laws forced workers with disabilities to bear a greater share of workplace risk. The Minnesota Supreme Court ruled in 1915 that while John Garwin had lost his only eye in an accident, he would be compensated only for the loss of one eye and not for blindness. Other states required employers to compensate workers with disabilities more highly for their injuries, shifting risk onto employers. The Massachusetts Supreme Court ruled in 1916 that Eugene Branconnier ought to receive compensation for blindness, having lost his only eye in an accident. In response, many employers began to conduct pre-employment physical examinations, seeking to avoid hiring applicants who would suffer more grievous and costly injuries from accidents. For workers with disabilities, early workmen’s compensation laws either disproportionately allocated risk or produced an incentive for employers to not hire them. People with disabilities faced either a riskier transaction for their labor power compared to able-bodied people, or faced an exclusionary de-commodification of their labor power, in the form of being rendered unemployable.

Pamela S. Hollenhorst

University of Wisconsin (Institute for Legal Studies)
Retreat Coordinator

Trevor Hoppe

University of Michigan (Sociology & Women’s Studies)

HIV-Nondisclosure Laws as State-Sanctioned Heteronormativity According to recent studies, at least 24 states presently have some form of HIV disclosure law on the book. These laws vary in their specifics, but generally make it illegal for HIV-positive people to have sex with anyone without first disclosing their HIV-status. Public debates on the issue have tended to focus on extremely atypical cases, such as that of New Yorker Nushawn Williams, who was prosecuted in 1999 for allegedly infecting over a dozen women. In this original analysis of recent prosecutions, I will argue that these cases are narrated in the media by moralizing narratives of race, class, and sexuality “and, in particular, that these laws function as a kind of state-sanctioned heteronormativity. Cases prosecuted are archetypal in that they involve defendants engaged in various forms of stigmatized sexual practices (e.g. intergenerational or homosexual sex), or in some way represent failed heterosexuality (e.g. welfare queens). These moralistic undertones help reveal how and why prosecution comes to be understood as an appropriate intervention against HIV non-disclosure” a conclusion I contend is not necessarily “obvious” or pre-determined, but is rather only made conceivable within the cultural frameworks that allow us to understand it as such.

Alexandra Huneus

University of Wisconsin (Law)
Panel Chair: Governing Diversity in the Americas.

Camden Hutchison

University of Wisconsin (History)
Participant

Victor Jew

University of Wisconsin (Asian American Studies Program)

The Limits of Wartime Legal Liberalism The Japanese American internment during the Second World War continues to teach lessons about the fragilities of wartime civil liberties and the dilemmas of legal liberalism. For legal historians and constitutional scholars, the internment still lives because its deeper constitutional implications and ramifications were never fully addressed, either in 1943-1944 when cases challenging the program reached the U.S. Supreme Court, or since. In addition to these unresolved constitutional aspects, the Internment's legal history has paradoxes that have yet to be explored. One unstudied feature of the civilian War Relocation Authority (the entity that administered the internment camps) was its legal division and how WRA lawyers dealt with day-to-day legal matters in the camps. At all ten War Relocation Authority camps, a WRA staff attorney served the legal needs of WRA camp internees. Such needs included property disposition of homes and houses left behind on the West Coast and the drafting of various legal documents. That was one aspect of WRA lawyering, but it can be argued that WRA attorneys also labored to maintain as much Home Front normality as was possible for 110,000 Americans who were forcibly removed from their West Coast homes. Doing so would have two effects: it would assist Japanese Americans to "adjust" to internment but it would also serve to legitimate the "human conservation" that operated under the WRA's auspices. Drawing upon archival research in the U.S. National Archives and the Special Collections holdings at the University of Washington, the University of California, Los Angeles, and Northwestern University, this paper will present initial findings into the heretofore neglected daily work of the War Relocation Authority's legal arm. This paper will discuss these historical details as instances of the larger contradictions of U.S. wartime legal liberalism -- the ideological and governing regime that sought to make state generated racial discrimination as normal and manageable as possible.

Miranda Johnson

University of Wisconsin-Madison (History)

The New, Ancient Past: Historicizing the Rule of Law in Anglophone Settler States In this paper, I explore how, over the past four decades, indigenous claims to the Anglophone, Commonwealth settler states of New Zealand, Australia and Canada have challenged assumptions of the rule of law in these common law jurisdictions as an abstract, timeless, notion. The paper focuses on native title claims, in proof of which indigenous claimants must demonstrate their ancestral connection to the land or resource under claim as a right that pre-exists the settler state. I examine the double movement that the recognition of rights beyond the historical jurisdiction of settler law instantiates. In order to recognize indigenous peoples' native title claims, courts have had to historicize and localize the advent of settler law. In so doing, and they have come to define "indigenous society" as the new, ancient "past or indigenized time immemorial" of settler states.

Nicole Kaufman

University of Wisconsin (Sociology)

Political Teaching and Learning in Women's Prisoner Reentry Groups My dissertation research asks how voluntary and mandatory social service and correctional supervision groups teach women who are returning from prison about the kind of citizen or subject they should be. I ask, how do institutional actors activate different kinds of partial or incomplete citizenship among the users of groups? And when groups reckon with intersectionality in the populations they oversee, how do their responses relate to the groups' position in the wider discourses about women, punishment, and worthiness? I plan to engage in research of groups in Southern Wisconsin. As of summer and early fall, 2009, I began some preliminary data collection to familiarize myself with the issues facing women returning from prison and to begin to address feasibility issues. By the fall, I should have defended my dissertation proposal and begun data collection.

Cecelia Klingele

University of Wisconsin (Law)

Discretionary Decisionmaking by Community Corrections Agents This summer I am beginning to engage in field research in an effort to better understand how community corrections agents understand their legal authority (which is vast) and how they exercise their discretion as they make decisions around what supervision rules to promulgate, which to enforce, and when to revoke based on rule violations. I'm starting small by spending time with corrections agents in Madison and Milwaukee, and engaging in rather unstructured interviews as I gain a better sense of how their offices operate. I hope to expand on the project over the next year, and would be interested in spending time with agents in other jurisdictions as well. I'd love comments and suggestions on how best to structure the project (e.g. focus groups, more structured interviews, etc.).

Panel Chair: On Law Online.

Heinz Klug

University of Wisconsin (Law and Global Legal Studies)

Panel Chair: Human Rights II.

Jeff Kosbie

Northwestern University (Law and Sociology)

Courts as a Discursive Forum: Judicial Narratives of Sexuality Over Time This new research builds on questions generated by my present work. In an article I am just finishing, I argue that courts' implicit construction of sexuality may be more important than the actual legal decision in same-sex marriage cases. I identify five sets of assumptions that courts draw on in deciding these cases: sexuality only entails acts or behaviors; sexuality belongs to gays and lesbians; sexuality is a proper object of social - not individual - regulation; marriage properly contains sexuality; and sexuality may be embedded in broader identities and social context. Beginning from this argument, my new research will ask how and why these constructions change over time. Why do certain discourses gain more prominence over time? What can we learn from changing judicial constructions of sexuality? How is culture embedded in judicial opinions, independent of the legal doctrine? How are courts responding to broader social structures? This research will contribute to conceptualizing courts as a discursive field. It will investigate the process of constructing judicial narrative and its position in a broader social and political discourse. In particular, I will consider the role of litigants and their briefs, the role of amici and their briefs, public opinion, other laws relating to sexuality, citation patterns across same-sex marriage cases, and interactions between majority and dissenting opinions.

Herbert M. Kritzer

University of Minnesota (Law, Public Policy & Political Science)

Chair: Plenary Research Methods Roundtable

Leader: After dinner informal discussion on getting published.

Sandra Levitsky

University of Michigan (Sociology)

Negotiating the Job Market as a Law & Society Scholar As a recent veteran of the job market and new Assistant Professor, I'd be happy to participate/lead in a roundtable discussion on strategies for negotiating the job market as a law and society scholar. There are a number of strategic professional advantages to identifying early as a law and society scholar, ranging from access to unique grant/fellowship opportunities, to fabulous mentoring opportunities and satisfying conference experiences, to experience speaking to interdisciplinary audiences--all of which, I argue, can potentially make you a competitive candidate on the job market.

Panel Chair: Embodying the Workplace.

Leader: After dinner informal discussion of managing the dual career family.

Chih-Ming Liang

University of Wisconsin (Law)
Participant

June Liebert

John Marshall Law School (Law)

Specialized Citation Analysis in Supreme Court Cases (with Raizel Liebler) We will be presenting the preliminary data from our multi-part research on citation analysis of Supreme Court citations. In a 1976 article with William Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, Judge Richard Posner argued that citation practices are systematic and susceptible to empirical study, and can therefore be of great use (19 J.L. & Econ. 249). The first comparative analysis of Supreme Court citation practices of secondary sources was completed in Louis Sirico & Jeffrey Margulies, *Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986-1987). But there is still much to be done with understanding citation practices that has yet to be completed -- especially when it comes to non-traditional citations (beyond cases, articles, and books). Our work empirically analyzes a specific type of citation, website citations (urls). Within this context, we focus on the importance of citations, including reliability, permanence, accessibility, and authentication of sources. For example, our preliminary research has found that a third of the websites cited by the Supreme Court cannot be reached via citation of the url.

Raizel Liebler

John Marshall Law School (Law)

Specialized Citation Analysis in Supreme Court Cases (with June Liebert) We will be presenting the preliminary data from our multi-part research on citation analysis of Supreme Court citations. In a 1976 article with William Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, Judge Richard Posner argued that citation practices are systematic and susceptible to empirical study, and can therefore be of great use (19 J.L. & Econ. 249). The first comparative analysis of Supreme Court citation practices of secondary sources was completed in Louis Sirico & Jeffrey Margulies, *Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. Rev. 131 (1986-1987). But there is still much to be done with understanding citation practices that has yet to be completed -- especially when it comes to non-traditional citations (beyond cases, articles, and books). Our work empirically analyzes a specific type of citation, website citations (urls). Within this context, we focus on the importance of citations, including reliability, permanence, accessibility, and authentication of sources. For example, our preliminary research has found that a third of the websites cited by the Supreme Court cannot be reached via citation of the url.

Jamie Longazel

American Bar Foundation / University of Delaware (Sociology & Criminal Justice)

Pro-Immigrant Activism in an All-American City: Global Problems, Local Limitations This paper is part of a larger ethnographic study investigating Hazleton, Pennsylvania's response to drastic economic restructuring and subsequent Latino/a immigrant influx most visible in the passage of the Illegal Immigration Relief Act (IIRA) in 2006. It focuses on a group of local-level activists known as the Concerned Parents of Hazleton (CPH), a volunteer coalition of native born Hazleton residents and Latino/a immigrants, who preformed much-needed social justice work on the ground in the wake of the IIRA. By exploring the many difficulties faced by this group, the paper reveals much about the sentiments underlying the passage of this draconian ordinance; namely, that the local backlash should be understood not just as a response to more immediate local concerns (i.e., the presence of undocumented immigrants) as the prevailing discourse had suggested but also as a response to broader structural shifts that have adversely affected the local community. Also, it exposes a difficult paradox of rights: in local contexts which rely on mythical imaginings of community, rights claims made by those situated outside of the community (i.e., Latino/as) are seen as excessive while rights claims from within (i.e., the passage of the IIRA) are seen as legitimate only insofar as they are depicted as attempts to protect the community from "threatening" outsiders.

Zakiya Luna

University of Michigan-Ann Arbor (Sociology & Women's Studies)

Puppies and Rainbows and Human Rights: Perceptions of Human Rights in the Reproductive Justice Movement My paper examines perception of human rights among reproductive justice activists (n=55). This emerging movement is led by women of color and works to move narrow definitions of reproductive rights from a liberal concept of freedom toward a more inclusive reproductive justice. Using a human rights analysis, reproductive justice advocates challenge the dominant focus on law on the books and "choice" to expand advocacy for reproductive freedoms more broadly, including the right to not have a child, the right to have a child and the right to parent. This paper emerges from a larger multi-method project on how international human rights become domesticated – simultaneously made relevant and diluted within the US context.

Nancy Marder

Chicago-Kent College of Law (Law)

Judging the Television Judges "Judge Judy," an extraordinarily successful American television show, has inspired a television phenomenon in which viewers can watch television judge shows from morning until evening seven days a week. These judge shows adhere to the format made famous by "Judge Judy." They focus on a judge, whose personality dominates and defines the show, deciding a dispute between actual parties who might otherwise have gone to small claims court. The judge decides the case in a brief segment, during which there is drama and tension as each side struggles to tell its story in a sympathetic light.

Why have these shows proven to be so popular with viewers and why are litigants willing to appear on them? What do these shows teach television viewers about the judicial system, and what do they teach them about justice? In addition, what lessons do these programs, with their surprisingly diverse group of judges, teach about race, gender, and sexual orientation and the role of the judge? Finally, what difference does it make that these shows are on television and that judges "appear" in people's homes everyday? One effect is that viewers can recognize Judge Judy but not a single U.S. Supreme Court Justice.

I intend to build upon the chapter on "Judge Judy" that I wrote for "Lawyers in Your Living Room! Law on Television" (Asimow ed., 2009) by providing a taxonomy of American television judge shows, examining the lessons they teach about judges, courts, and justice, and how they contribute to or detract from the national conversation about race, gender, and sexual orientation and its effects on the proper role of the judge.

Anna-Maria Marshall

University of Illinois, Urbana-Champaign (Sociology)

Interdisciplinarity and Methodological Pluralism I'm the head of a sociology department where faculty are still arguing about what constitutes "pure" sociology. These debates seem strange to someone like me who has been participating in Law and Society networks since graduate school. If there's a relevant panel, I'd like to discuss what Law and Society scholars can contribute to other disciplines by demystifying interdisciplinary research and by relying on a variety of methods.

Panel Chair: Research Methods (session 5).

Co-Leader: After dinner informal discussion on job market strategies.

Lauren McCarthy

University of Wisconsin (Political Science)

Mobilizing Old Laws to Prosecute New Crimes: The Case of Human Trafficking in Russia My paper looks at how Russian law enforcement personnel (police and prosecutors) have used older criminal code articles on prostitution, kidnapping and illegal imprisonment to prosecute human trafficking rather than new articles that specifically criminalize human trafficking. The inherent uncertainty that comes with new laws, combined with the structure of law enforcement agencies make it much more practical for them to stick with "the devil they know" rather than attempt to wrestle with the "devil they don't know".

Steve Munch

Northwestern University (Law and Sociology)
Participant

Hanif Nu'Man

University of Wisconsin-Madison (Sociology)
Participant

Peter B. Oh

University of Pittsburgh (Law)

What Constitutes Good Empirical Legal Scholarship? Research Method Description: Empirical legal scholarship is all the rage. Although hardly new, empirical analysis of legal issues has diversified and exploded of late. The robust potential of this analytical method, however, should be understood along with its severe perils. Now more than ever is a need to define what exactly constitutes "good" empirical legal scholarship.

This presentation engages this question with a concrete and focused examination of four empirical studies on the corporate law doctrine of veil-piercing. The first study, Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991), represents a pioneering use of content analysis of electronic reported decisions. That study has in turn spawned a set of recent empirical work. One study raises some basic methodological issues with Thompson's study and features more sophisticated statistical analysis: John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091 (2009). Another study raises additional methodological issues with Thompson's study, as well as concerns with some analysis in Matheson's study. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. (forthcoming 2010). And a final study seeks to utilize a relatively new form of analysis, based on dockets instead of opinions, and thereby raises new methodological concerns. The common subject and interrelated nature of these studies provides a unique, robust opportunity to examine strategies for research design, assess the quality of results, and ultimately ponder some broader questions about the future of empirical legal scholarship.

Jeffrey A. Parness

Northern Illinois University (Law)

Reforming Voluntary Paternity Acknowledgment Procedures Voluntary paternity acknowledgments are chiefly used in American states to establish legal paternity of nonmarital children as of and at the time of birth. Without them many nonmarital newborn children (estimated last year to be 500,000) will have no legal father. Acknowledgment standards are guided by both federal welfare laws and state statutes. Unfortunately they vary interstate for no good reason, seemingly in violation of both federal welfare laws and federal constitutional precedents on paternity opportunity interests. Reforms are urgently needed to meet federal mandates. Reforms are urgently needed so that fewer children are born fatherless under law.

Patrick Peel

Ohio University (Law)
Participant

Lee Petherbridge

Loyola Law School (Law)

Legal Scholarship and the United States Court of Appeals for the Federal Circuit: an Empirical Study It is now common for legal scholars to confidently claim that the United States Court of Appeals for the Federal Circuit is less likely than other courts to use legal scholarship in its decision making. But a review of the literature indicates that, in reality, relatively little is known about the use of legal scholarship by the federal circuit and perhaps even less is known about how the federal circuit's use of scholarship compares to that of other similarly situated courts. In the first significant study of the federal circuit's use of legal scholarship in a decade, this study contributes new

information about the federal circuit's use of legal scholarship, and provides a comparison of the federal circuit's use of legal scholarship to that of the regional circuit courts of appeals. Perhaps the most significant finding suggested by the collected empirical data is that the federal circuit's use of legal scholarship appears quite similar to the use of legal scholarship by the regional circuits, suggesting that the court is not the outlier that many presume.

Rachael Pierotti

University of Michigan (Sociology)

Legal Strategies of the Women's Movement in Tanzania During the summer of 2010, I will conduct preliminary interviews with women's movement leaders in Tanzania. Interviews will examine activists' perceptions of the social structure of gender and the goals of their efforts for social change. Activists will be asked to reflect on the usefulness of legal rights discourse and legal reform strategies for promoting changes in gender relations. Worldwide, international donors are promoting a discussion of women's rights as human rights and they are funding efforts in many countries to change the legal status of women. Tanzanian activists will be asked to describe how this strategy supports and/or undermines their efforts. My presentation at the Midwest Law & Society Retreat will include preliminary analysis of the interview transcripts and initial thoughts on how the data might contribute to the ongoing debate about law and social change.

Brian Ray

Cleveland-Marshall College of Law (Law)

Proceduralisation's Triumph and Engagement's Promise in Socioeconomic Rights Litigation

The South African Constitutional Court's three socioeconomic rights decisions of the 2009 term are the culmination of a strong trend towards the proceduralisation of socioeconomic rights that many commentators have argued fails to fulfill their original promise. This triumph of proceduralisation undeniably restricts the direct transformative potential of these rights. But there is another aspect to this trend—an aspect reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process. This essay considers what the triumph of proceduralisation means for future social and economic rights litigation and argues that, properly developed, the engagement remedy can give poor people and their advocates an important and powerful enforcement tool. At the same time, engagement can help strengthen and promote consistent attention to the constitutional values these rights protect. Tapping this potential, however, requires the Constitutional Court and lower courts to apply the remedy more consistently, to develop its requirements more fully and to apply those requirements robustly where government fails to engage meaningfully on social welfare policy. The courts are only the starting point, however. For engagement to truly succeed, government must develop comprehensive engagement policies and institutionalise those policies at all levels. Finally, civil society must expand its role beyond pressing for engagement in individual cases into advocating for such institutionalisation.

Margaret Raymond

University of Iowa (Law)

Participant

Alan Rubel

University of Wisconsin (Legal Studies, Library and Information Studies)

Panel Chair: Sexuality.

Daniel B. Rubin

University of Michigan (Law & Public Health)

Participant

Joanna K. Sax

California Western School of Law (Law)
Participant

Christopher W. Schmidt

Chicago-Kent College of Law (Law)

The Tea Party Constitution My paper explores the constitutional vision of the Tea Party movement. One of the distinctive characteristics of the Tea Party has been the way its leaders have staked a claim to the Constitution as the movement's foundational document. My exploration of the Tea Party Constitution proceeds in three parts. First, I examine the way in which the Constitution has become a symbolic rallying point for the Tea Party movement. Copies of the Constitution are handed out at Tea Party rallies, constitutional provisions cited with near-scriptural reverence, and leading figures define their governing philosophy as "constitutional conservatism." Second, I analyze the substantive constitutional commitments of Tea Party adherents. My primary focus here is on constitutional claims that are resonating in extrajudicial contexts"particularly those that diverge in significant ways from current constitutional doctrine. Finally, I consider the possible impact of this popular constitutional movement on the courts.

Judith Schmidt

University of Michigan (International Economic Law)
Participant

Dave Schwartz

Chicago-Kent College of Law (Law)

Citation to Legal Scholarship by the Federal Courts of Appeals: an Empirical Study In the early 1990's, Judge Harry Edwards blasted legal scholarship as having become largely unhelpful to judges and practitioners. Perhaps inspired by criticisms like those leveled by Judge Edwards, legal scholars have sought to investigate the relevance of legal scholarship to courts and practitioners using a variety of means. One form of investigation has relied on empirical research into courts' citation to legal scholarship, particularly as that scholarship is embodied in law review articles. Several studies, using different, and sometimes ambiguous, methodologies observe a decrease in citation to such legal scholarship, and interpret the observation to mean that legal scholarship has lost relevance to courts and practitioners. This study seeks to examine the hypothesis that legal scholarship has lost relevance to courts. Using empirical techniques it examines citation to legal scholarship by the United States Circuit Courts of Appeals for the last 59 years. It finds a rather surprising result: that over the last 59 years " and particularly over the last 20 years " there has been a marked increase in the frequency of citation to legal scholarship in the reported opinions of the circuit courts of appeals. Using empirical and theoretical means, the study also considers explanations for courts' increased used of legal scholarship.

Susan Shapiro

American Bar Foundation (Sociology)

Session #2: Plenary Research Methods Roundtable

Mitra Sharafi

University of Wisconsin (Law)

Separating the Rule of Law from Colonialism In speaking with elderly South Asians who lived under colonial rule, one often hears the statement: "at least the British brought the rule of law to India." It is easy to dismiss such comments as a reflection of false consciousness, or as statements made by elite groups that profited directly from colonialism. There is another explanation, though, that deserves our attention. In this talk, I argue that the rule of law and colonialism, while often overlapping, were not the same thing promoted by the same people for the same purposes. South Asia historian Joerg Fisch's model is thought-provoking: the rule of law and colonialism usually appeared to be part of the same project, but their silhouette was not identical. Frequently, the rule of law piggybacked upon colonialism, which was first and foremost an economic enterprise. Much of the time, each project benefited from the alliance. Sometimes, though, they pulled apart and opposed each other. Colonized populations recognized the distinction between colonial economic exploitation and the rule of law. As Latin Americanists Steve Stern and Brian Owensby have argued, colonized peoples took advantage of the space between these two agenda to further their own interests. The separate-strand reading also helps make sense of the oral history interviews. The rule of law usually bolstered colonial power, but at times "arguably, in its purest form--it acted as a limiting force.

Leader: after dinner informal discussion of tips and tricks for teachers.

Karl Shoemaker

University of Wisconsin (Law and History)

Panel Chair: Lunacy and Mental Health.

Mark Sidel

University of Iowa (Law)

Participant

Rashmee Singh

University of Toronto / ABF (Criminology)

Genealogy of "Ethno-specificity" as a Technique of Governance The governing of immigrant populations via a triumvirate of state, law and community organizations has been a longstanding practice in North America. In the Canadian context, relationships between community based settlement houses and the federal government first emerged in the post-war era to ensure the integration of newly arrived Eastern European immigrants in Toronto. In these early years, the community based "experts" delivering settlement services, were largely white and Canadian born. Since the 1970's, however, there has been a considerable shift in the imagined expert, largely due to the rise of discourses of ethno-specificity. Ethno-specificity assumes that newcomers are best served by workers who shared their ethno-racial backgrounds. As a result, most organizations serving immigrants now deliver services in accordance with this practice.

The emergence of ethno-specificity as a technique of governance in the areas of settlement and violence against women has led to the positioning of mostly racialized immigrants as leading figures in nation building, reproducing "Canadianess," "democratizing" families and translating official legal systems to newcomer populations in a white settler society. This chapter of my dissertation research seeks to trace the emergence of the language of ethno-specificity using recent shifts in the governing of violence against women in diasporic communities in Toronto as a case study. In so doing, I intend to generate wider insights regarding the interface of the nation, state, law and immigrant community organizations more generally.

Jamie Small

University of Michigan (Sociology and Women's Studies)

The Legality of Sexuality: Male Rape and the Construction of Heteronormativity Current social issues like same-sex marriage, pornography, and sexual trafficking reveal how law and sexuality are deeply enmeshed. Yet even as previous scholarship places law and sexuality in discussion with one another, it often conceives of law instrumentally, as either an obstacle or facilitator of sexual rights. I am interested in the ways that law and sexuality are mutually constituted, and specifically, I ask how legal processes produce sexualities. The empirical focus of my research examines the legal recognition of male rape victims in twentieth century United States. I explore the cultural meanings that emerge when sexual injury is articulated on the male subject in the legal field by showing how male rape victims challenge assumptions about the very category of sexual violence. I examine the ways that legal actors make sense of male sexual victimization, focusing on sexual identity, masculinity, and power. Data are three-pronged. I examine a sweep of national male rape trials to uncover the legal patterns they follow; I interview prosecutors to understand how they select and frame cases; and I conduct discourse analysis of a subset of trial transcripts to understand how this issue is framed at the micro level. This mixed-methods approach enables me to draw links between micro- and macro-level processes embedded in legal institutions. This project is my dissertation, which is in its early stages. I propose to present preliminary findings from my research, and I anticipate that it will contribute to conversations on the intersection of law and sexuality as well as the relationship between legal consciousness, ideology, and hegemony.

Brad Snyder

University of Wisconsin (Law)

Panel Chair: Lawyers and Judges.

Matilda Stubbs

Northwestern University (Anthropology)

Documenting Lives: The Role of the Case File in the U.S. Foster Care System Structured within the confines of legal categories of identity, foster youth in the United States continually negotiate the rhetorical strategies utilized by the foster care system and related professional agents to document their lives. This project attends specifically to how this discursive context is experienced through the circulation of legal documents and the management of the case file. I suggest that present and former foster youth experience an institutionalized and politicized markedness by participating in social welfare service case management and through the exchanges with assigned human service professionals and legal agents. In order to link the psychological role "the meaning" of material culture as well as the semiotic and particularly linguistic forms and processes to the interpretation of sociocultural practices, this project investigates critically how the case file interpolates marginalized subject positions resulting in the fabrication of particular cultural models of identity and self formation with foster youth who "age out" of the foster care system.

Mark Suchman

Brown University (Sociology & Law)

Speaker: Closing Session

Panel Chair: Negotiating the Boundaries of Law and Society.

Leader: After dinner informal discussion on getting grants.

Alexander Tahk

University of Wisconsin (Political Science)

Participant

Stephanie Tai

University of Wisconsin (Law)

Co-Leader: after dinner informal discussion on job market strategies.

John Thomson

University of Wisconsin (Journalism & Mass Communication)

Legal Consciousness, Copyright, Communication My current dissertation work looks at law as being constructed in part by communication through the lens of copyright. Rather than viewing law as completely and effectively transmitted to the public, I use mass communication research to show how we might understand the process of the communication of law. I plan to do online interviews with online groups working on the edges of copyright to discuss how their media diet impacts their personal legal knowledge.

Alexei Trochev

Indiana University (Law)

Seeking Redress from Wrongful Prosecution in Putin's Russia Russian courts have been handling tens of thousands cases of redress against wrongful prosecution and ruling against the prosecution. However, to date, no systematic analysis of this litigation and judicial decision-making in this area exists. This paper explores 1) why and how individuals and firms, which suffered from wrongful prosecution (detention, search and seizure, frozen assets, etc.) attempt to recover damages by suing Russian government; 2) why and how Russian judges treat these lawsuits; and 3) why and how Russian government takes part in this litigation at the trial and appeal stages, and enforces unfavorable judgments in these cases. Studying this helps us better understand how and why individuals decide to mobilize law in non-democratic settings and turn to courts, which are widely distrusted and perceived to be biased towards the government.

Jerry Van Hoy

The University of Toledo (Sociology / Law & Social Thought)

Teaching Law and Society Gateway and Capstone Courses I would like to give a talk about the obstacles to recruiting, teaching and retaining students into interdisciplinary law and society majors. As the co-director of the Law and Social Thought (LST) program at the University of Toledo, I have experience in these area. Each fall I teach our gateway course to a class of 40 new freshmen in the LST major. Student are introduced to an interdisciplinary literature and critical thinking in a writing intensive format.

In their senior year, LST majors are required to participate in a "massively team taught" capstone course. Both courses provide numerous examples of the difficulty of teaching multidisciplinary and interdisciplinary topics, student frustration and retention issues. I will discuss these problems and the strategies we use to overcome them, including peer mentoring, close working relationships with faculty, having college advisers screen freshmen for good writing skills before enrolling them in the gateway course, etc.

Session #2: Plenary Research Methods Roundtable

Panel Chair: Criminal Dramas.

Jill Weinberg

Northwestern University (Sociology)

Homonormalization of the Workplace: Law, Organizations and the Construction of Identity

Despite the advances in employment discrimination protections for gay, lesbian and transgender employees, various institutions and organizations "namely the law, workplaces, and social movement organizations" have created a narrowing effect in the viability of claims for those who wish to seek legal redress. This project examines "homonormalization" of the workplace in which the construction of homosexual and gender identity becomes so discrete and assimilationist that the law is rendered ineffective for many individuals who are victims of discrimination. Drawing on legal precedent and legislative history, organizational data of companies, and interviews with gay and lesbian social movement organizers, I argue that the legal, organizational, and social institutions are producing contested constructions of law and workplace identity that only hinders the advancement of workplace rights.

Barbara Young Welke

University of Minnesota (Law & History)

Plenary Presentation: *Owning Hazard in the Modern American Marketplace in Two Acts*

Session #2: Plenary Research Methods Roundtable

Corey Rayburn Yung

John Marshall Law School (Law)

Judged by the Company You Keep: An Empirical Study of the Ideologies of the Federal Judges

While there has been an explosion of empirical legal scholarship about the federal judiciary, with a particular focus on judicial ideology, the question remains: how do we know what the ideology of a judge actually is? For federal courts below the United States Supreme Court, legal academics and political scientists have offered only very crude proxies to identify the ideologies of judges. This article attempts to cure this deficiency in empirical research about the federal courts by introducing a new technique for measuring the ideology of judges based upon judicial behavior in the United States Courts of Appeals.

This study measures ideology, not by subjectively coding the ideological direction of case outcomes, but by determining the degree to which federal appellate judges agree and disagree with their liberal and conservative colleagues at both the appellate and district court levels. Further, as part of this unique multi-court-level measure, important inter-court factors such as standard of review are incorporated into the metric. The measure proposed and applied herein (the "Ideology Score") is based upon opinions derived from or leading to over 30,000 judicial votes issued in 2008 by eleven Courts of Appeals. Utilizing the Ideology Scores, this article includes a scale of the ideology of 138 federal appellate level judges.

Further, through linear and logistic regression analysis, several important findings related to the Ideology Scores emerged. First, the Ideology Scores in this article offer substantial improvements in predicting case outcomes over the leading measures of ideology. Second, there were very different levels and heterogeneity of ideology among the judges on the studied circuits. Third, while the data did support the conventional wisdom that President Ronald Reagan appointed uniquely ideological judges, it did not lend credence to the popular view that George W. Bush's appointees were similarly ideological. Fourth, in general judges appointed by Republican Presidents were more ideological than those appointed by Democratic Presidents. Fifth, attendance at a higher ranked law school was strongly correlated with liberalism on the bench for appointments of both Republican and Democratic Presidents. Sixth, prior work experience in the government (outside of the judiciary) indicated liberal judicial voting.

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