THE UNIVERSITY OF SYDNEY

Australasian Society of Legal Philosophy Conference

Program

14 and 15 July 2022

Location: Sydney Law School, Common Room, Level 4, New Law Building (F10), Eastern Avenue, Camperdown

Online: Zoom links will be provided closer to the day of the conference

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Thursday 14 July 2022

9am – 12pm	**PhD Workshop** *(Invitation only)*		
12 – 1pm	***Conference registration and lunch***		
1 – 2.30pm	**WELCOME AND FIRST KEYNOTE** **Claudio Michelon** (University of Edinburgh) *"The Uses of Precedent in Legal Argument"*		
2.30 – 3.00pm	*Afternoon tea*		
3.00 – 4.30pm	**PARALLEL SESSION 1A** **David Frydrych** (Monash University) *"Bennett and Hofri-Winogradow on the Use of Trusts"* **Jane Norton** (University of Auckland) *"Charities and Politics: Where Did We Go Wrong?"* (with Matthew Harding) **Steven Stern** (Victoria University) *"The High Court and Taxation: The Relevance of Professor Julius Stone's Jurisprudence"*	**PARALLEL SESSION 1B** **Mangesh Patwardhan** (National Insurance Academy) *"Reasoning Legally and Mathematically: Insights from Contemporary Philosophy of Set Theory"* **Dale Smith** (University of Melbourne) *"Grounding a Theory of Legal Interpretation"* **Meir Yarom** (New York University) *"Coherence & Consistency: An Investigation"*	**PARALLEL SESSION 1C** **Paul Burgess** (Monash University) *"Artificial Intelligence and the Necessary Evolution of the Rule of Law"* **Holli Edwards** (Bond University) *"The Rule of Law as a Contextually-Based Concept: Evolution in Australia"* **Nicole Roughan** (University of Auckland) "TBA"
4.45 – 5.45pm	**PARALLEL SESSION 2A** **Vito Breda** (University of Southern Queensland) *"The Loyalty of Constitutional Patriots: Procedural versus Civic Allegiances"* **Eric Ghosh** (University of New England) *"The Republican Revival and Administrative Law"*	**PARALLEL SESSION 2B** **David Tan** (Deakin University) *"Legislative Intent: A Rational Unity Account"* (with Stephanie Collins) **Xi Zhang** (New York University) *"Valuing, Valuable, Reason"* (Winner of ASLP Essay Competition 2021)	**PARALLEL SESSION 2C** **William MacNeil** (Southern Cross University) *"A Wilderness of Monkeys: Value, Love and the Law of the Father's Will in The Merchant of Venice"* **Patrick Lenta** (UTS) *"Law's Forgiveness"*
5.45 – 6.45pm	*Drinks*		
7-9pm	*Conference dinner at Forum Restaurant* *Corner of City Road and Eastern Avenue Level 1, F23 The Michael Spence Building, Camperdown*		

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Friday 15 July 2022

9 – 10am	**PARALLEL SESSION 3A** **Katherine Biber, Eloise Chandler, Sara Dehm & Ana Vrdoljak** (UTS) *"Lawful Networks: European Émigrés' Impact on Legal Philosophy in Australia"* **Jessica Schaffer** (Bond University) *"Feminist Perspectives on Rape's Criminalisation as the Basis for Law Reform"*	**PARALLEL SESSION 3B** **Guy Baldwin** (University of Cambridge) *"The Justification and Limits of Liberty of Conscience"* **Arie Rosen** (University of Auckland) *"The Constitutional Role of Contract Law"*	**PARALLEL SESSION 3C** **David Winterton** (University of Sydney) *"Lawful Act Duress"* **David Wood** (University of Melbourne) *"A Model Assisted Dying Bill"*
10 – 10.30am	*Morning tea*		
10.30am – 12pm	**PARALLEL SESSION 4A** **Jonathan Crowe** (Bond University) *"Naturalistic Realism about the Nature of Law"* **Ben Golder** (UNSW) *"Human Rights: Political, Philosophical, or Postfoundational?"* **Eamon MacDougall** (University of Windsor) *"Epistemic Consequences of Legal Positivism and Foucault's Panoptic Machinery"*	**PARALLEL SESSION 4B** **Gunoo Kim** (Gwangju Institute of Science and Technology) *"AI and Legal Personhood"* **Allan McCay** (University of Sydney) *"Brain-Computer Interfaces, Intimate Image Abuse and Sentencing"* **Tarisa Yasin** (Bond University) *"Building a Concept of Effective Human Control over Lethal Autonomous Weapon Systems"*	**PARALLEL SESSION 4C** **Madeleine Hale** (Deakin University) *"Social Media, Free Speech, and Democracy"* **Coel Kirkby** (University of Sydney) *"Recovering Harold Laski's Legal Realism"* **Lael Weis** (University of Melbourne) *"Re-Making Constitutional Theory: Theorising a Green Constitutionalism"*
12 – 1pm	*Lunch*		
1 – 1.45pm	**ANNUAL GENERAL MEETING**		
1.45 – 3pm	**SECOND KEYNOTE** **Kirsty Gover** (University of Melbourne) *"Uncertain Relationships: Indigenous-Settler Legal Pluralism at the Australian Border"*		
3 – 3.30pm	*Afternoon tea*		
3.30 – 5.30pm	**BOOK SYMPOSIUM** **Joel Colón-Ríos** (Victoria University of Wellington) *"Constituent Power and the Law"* **Commentators:** • Rosalind Dixon and Ayesha Wijayalath (UNSW) • Yarran Hominh (Dartmouth College) • Ron Levy (ANU)		

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ASLP Conference 2022: Abstracts

(in alphabetical order)

Guy Baldwin (University of Cambridge)

"The Justification and Limits of Liberty of Conscience"

Liberty of conscience has long been a contentious idea, and it seems to be becoming even more so as claims of conscience on the basis of religious belief clash with various social policies, ranging from public health measures in a pandemic to the rights of same-sex couples to non-discrimination. This article seeks to develop a philosophical justification for liberty of conscience in order to determine its limits. Drawing on Rawls's concept of moral powers, the article contends that recognition respect for the moral personality of human beings entails some degree of protection for their liberty of conscience. One implication of this account is that liberty of conscience extends equally to religious and non-religious sincere belief that involves the exercise and development of the moral powers. Objections to this understanding of the need to protect liberty of conscience, such as that it is disruptive, productive of intolerance, or merely a choice, are considered and dismissed. A further implication of this account of liberty of conscience as deriving from recognition respect for moral personality is that the liberty may be limited either by its compatibility with the liberties of others that are also so derivable (including such rights as bodily integrity and non-discrimination), or the necessity of the limitation in the common interest which underpins the exercise and development of the moral powers. In setting forth this approach, Dworkin's concept of rights as trumps and Vermuele's concept of rights as delimited by the common good are distinguished.

Katherine Biber, Eloise Chandler, Sara Dehm & Ana Vrdoljak (UTS)

"Lawful Networks: European Émigrés' Impact on Legal Philosophy in Australia"

During and immediately after World War II, Australian law schools experienced a significant transformation in legal pedagogy and research prompted in part by the arrival of European émigrés. While Australian universities overwhelmingly did not become shelters for scholars fleeing fascism and persecution in Europe, some European jurists did manage to gain positions at Australian law schools, and used their legal training to reshape their discipline's orientations, teaching and scholarship. Using the case study of a network of jurists based at the University of Sydney, this paper inaugurates a new collaborative project investigating the impact of migration on Australian legal institutions, education and practice. Mark Lunney has remarked that the influence of European émigré scholars on Australian law is a "forgotten history". As an entry point to this larger history, this paper details the contributions of émigré scholars in the Department of International Law and Jurisprudence at the University of Sydney under Julius Stone's leadership. Building upon the existing scholarship on Stone's influence in Australia, this paper examines other individuals within Stone's network including Ilmar Tammelo, Otto Bondy and Charles Alexandrowicz. We explore how these émigrés together impacted upon the evolution of critical theoretical and philosophical engagement in public international law, comparative law and legal philosophy, including the establishment of the Australian Society of Legal Philosophy. In doing so we look to evidence of traditions, materials, ideas, displacement, translation, tensions and relationships within the evolving Australian legal scholarly community. This project will introduce a wider cohort of characters that have influenced the development of Australian jurisprudence and legal education. In particular, it will allow for a richer understanding the aftermath of the Second World War as a key moment of transformation in the legal institutions and cultures in Australia.

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Vito Breda (University of Southern Queensland)

"The Loyalty of Constitutional Patriots: Procedural versus Civic Allegiances"

Three decades after its conception the plausibility of Habermas's constitutional patriotism struggled to dislodge the sense of loyalty to a nation state as the primary political glue within European states. In this essay, I will argue that constitutional patriotism provides a theoretical model for the loyalty between fellow citizens that might work in a imagined homogenous community. However, it does not explain the relation between the protection of minorities and the deliberative activity of parliaments which operates under the assumption that group follow identity based loyalties. The essay is divided in two parts, preceded by an introduction and followed by a conclusion. The first part explains the distinctive loyalty generated by constitutional patriotism. The second part shows the explicative and democratic limits of the theory.

Paul Burgess (Monash University)

"Artificial Intelligence and the Necessary Evolution of the Rule of Law"

Artificial Intelligence ('AI') and the Rule of Law are frequently discussed; yet they are infrequently discussed together. They each play vital roles in various societies around the world. The increasing use of AI promises huge speed and efficiency benefits in all forms of decision-making. For this reason, the role AI plays in the exercise of power through its greater involvement in legislative and administrative decision-making seems certain to increase. The Rule of Law has, for centuries, constrained the arbitrary exercise of power. However, it has only ever been deployed in order to constrain *human* decision-making. The intersection of the increasing use of AI in the exercise of power and the ability of the Rule of Law to provide a protection from that exercise is, and will increasingly be, crucial. In this book I consider the ways in which the concept of the Rule of Law – and our conceptions of the same – will need to evolve in order to ensure that the exercise of power by AIs does not become arbitrary and does not proceed unchecked.

Jonathan Crowe (Bond University)

"Naturalistic Realism about the Nature of Law"

Realism about the nature of law holds that law is a real metaphysical category, akin to a natural kind, which exists as part of the structure of the natural world. Anti-realism about law holds that law is a purely conventional category dependent on human beliefs and attitudes. Anti-realism about law is a widely held view in contemporary jurisprudence, strongly associated with both legal positivism and (confusingly) legal realism. One prominent line of thought, developed by Brian Leiter, contends that anti-realism about law is entailed by methodological naturalism in jurisprudence, understood as the view that jurisprudential enquiry should be continuous with the natural sciences. This paper, by contrast, develops a realist account of the nature of law grounded in methodological naturalism. It does so by reference to Richard Boyd's analysis of natural kinds as homeostatic property clusters (HPCs). HPCs are entities whose properties are contingently clustered in nature due to self-regulating causal processes. I argue that law is plausibly understood as an HPC. This entails that law has characteristic (and perhaps essential) properties that exist as stable clusters in the natural world.

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Holli Edwards (Bond University)

"The Rule of Law as a Contextually-Based Concept: Evolution in Australia"

Paradoxically, while the rule of law is recognised around the world as an ideal worthy of pursuit, there remains no universally accepted definition of the concept. Despite strongly divergent views as to what principles constitute the rule of law, scholars accept the flexibility in meaning allowed by the lack of a universal definition contributes to the popularity of the concept. That is, the success of the rule of law as a globally acknowledged ideal is, at least in part, due to its capacity to be nativized by counties in their own context. This paper argues that the rule of law is therefore best understood as a concept affected by the cultural, social, and political context in which it develops. Although some core themes may emerge across countries, the meaning attributed to and perceptions of the rule of law remain subtly and importantly varied between places and historical periods. Indeed, this evolutionary development of the rule of law is highlighted by the Australian experience, explored in this paper, from the importation of the concept during the colonial period to the contemporary era. Understood as a concept influenced by context, the rule of law may be more meaningfully pursued with practical effect.

David Frydrych (Monash University)

"Bennett and Hofri-Winogradow on the Use of Trusts"

In a recent article (OJLS 2021), Mark Bennett and Adam Hofri-Winogradow claim that subversion of property and tax law is a 'characteristic use' of trusts. This is mistaken. For one thing, their account misconstrues property and tax rules by presenting them independently of trusts law. Determining the law's stance, however, requires understanding how all the relevant rules from the various categories operate in the aggregate (e.g., to determine what the government's tax law 'really is'). Second, their account misrepresents the equitable and remedial facets of trust law's development, which have served as means for improving the law. Third, it treats the laws of different jurisdictions as if they serve one legal system, and so ignores the possibility of competition.

Eric Ghosh (University of New England)

"The Republican Revival and Administrative Law"

The republican revival in political and constitutional theory has been a significant development over the last few decades, but its implications for administrative law have received less attention. This paper first outlines the implications for administrative law generated by the positive-liberty and the non-positive liberty strands of the revival. Secondly, the paper illuminates these strands by contrasting them with a new interpretation of the conception of liberty articulated by one of the major historical figures in the republican revival: Richard Price. Thirdly, attention is drawn to sortition as a republican device. Fourthly, it is argued that Priceian liberty and sortition can provide attractive normative guidance in relation to administrative law.

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Ben Golder (UNSW)

"Human Rights: Political, Philosophical, or Postfoundational?"

The debate within human rights theory between proponents of political conceptions and those of philosophical (or, moral, orthodox) conceptions of human rights is an old but an ongoing one. This paper is drawn from Chapter 3 of my current book manuscript, entitled "Human Rights After Humanism: The Politics of Postfoundationalism". In the book as a whole, I argue that we need to attend to the variety of postfoundational approaches to human rights (by which I mean those approaches which dispense with or actively forsake any strong form claim about what it means to be a human being as entitling one to human rights). An example of such a postfoundational approach to human rights might be a genealogical or a performative approach. But I argue that we need to attend to these approaches in a particular way, namely as manuals of human rights subjectivity. We need to ask of these different approaches not whether they are true or false but what work they do as political narratives. How do they encourage us to think and act in respect of human rights? What message do they reveal about the world and its possibilities? How do they figure us and equip us as political and legal actors in respect of human rights? This paper will address one such approach - the performative approach. I draw on the work of Hannah Arendt and Judith Butler to exemplify this approach and my discussion of it will explore the following themes: a (productive) tension between political and legal understandings of performativity; a democratic and egalitarian concern with the future; and, the necessity of cultural translation.

Kirsty Gover (University of Melbourne)

"Uncertain Relationships: Indigenous-Settler Legal Pluralism at the Australian Border"

The possibility of constitutionalised Indigenous-settler legal pluralism was raised in the Australian High Court in two recent cases: *Love-Thoms* (2020) and *Montgomery* (on foot at the time of writing). In *Love-Thoms* the Court accepted that an 'Aboriginal Australian', even if a non-citizen, could not be an alien. In *Montgomery* the Morrison government sought to overturn the *Love-Thoms* precedent. The judges are asked in essence to decide whether it is traditional law and custom that makes a person an Aboriginal Australian, and if it does, whether this means that traditional law and custom determines a person's constitutional status as an Indigenous non-citizen non-alien. The Commonwealth says (inter alia) that endorsing the authority of traditional law and custom in this way would: 1. Amount to an unconstitutional recognition of Indigenous sovereignty and 2. Require settler officials to determine the content of traditional laws and customs which vary between groups, and would accordingly generate unreasonable uncertainty and practical difficulty. What should we make of claims about 'uncertainty' and 'difficulty' in a legally plural settler-colonial state? Why is 'sovereignty' still, after all these years, operating as a dead weight on judicial recognition of legal pluralism in Australia? In this presentation I attempt a reframing of the problem, building in part on a joint research project underway with Mary Spiers Williams (ANU) and on work done with colleagues at the *Indigenous Law and Justice Hub* in support of Indigenous intervenors in *Montgomery*. I draw on what I have heard and read from Indigenous legal scholars and practitioners of Indigenous law about Indigenous legal traditions emphasising *relational* certainty and reciprocity. I propose that private international law provides workable settler law analogues. I suggest that taken together, these approaches better capture what is required of institutions and humans at the interface of settler and Indigenous law in Australia and could help us move through the current 'sovereignty impasse'.

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Madeleine Hale (Deakin University)

"Social Media, Free Speech, and Democracy"

Much has been written in the media, in academia and in the context of public policy about the tensions between social media, democracy and free speech, in light of a perceived crisis of free speech. However, little of this commentary is informed by a well-developed, sophisticated understanding of democracy. Overwhelmingly, conceptions of democracy used in these discussions are simplistic and based on unexamined assumptions about what constitutes a 'democracy'. Consequently, the resultant analysis of issues relating to free speech and democracy in social media is itself often arid and unsophisticated. A more detailed theoretical understanding of democracy is necessary to thoroughly identify and examine the potential challenges that social media may create for free speech and democracy. Using legal theory, this paper will therefore investigate free speech issues on social media in light of a well-developed understanding of democratic theory as it informs democracy as a rationale for free speech. I have selected mainstream democratic models that are particularly relevant to free speech – being representative, direct, pluralist, deliberative, procedural, substantive, libertarian and fighting models of democracy – and organised these models into two contrasting conceptions of democracy. This will act as a framework for the analysis of free speech issues on social media such as echo chambers and disinformation. In so doing, I aim to bridge the gap between democratic theory and free speech as it is recognisable to mainstream scholarship in both disciplines.

Gunoo Kim (Gwangju Institute of Science and Technology)

"AI and Legal Personhood"

As artificial intelligence('AI') pervades and impacts human life, its moral and legal status becomes a fundamental issue. Indeed, many commentators tend to explore the possibility and legitimacy of conferring "legal personhood" to AI in terms of its "personhood" in a moral or metaphysical sense especially the substantive properties of the latter such as its reason and consciousness. This is just the way the commentators have done with other entities including natural persons, juridical persons, and animals, which is even the case with both the camps for and against legal personhood of AI.

In my view, however, this line of discussion can be defied through the following few facts and theses. (i) Indeed, 'personhood' is a multiple and complex concept in that it contains a variety of conceptions of it, including the metaphysical and empirical ones, depending on the times and thoughts. (ii) The account of 'legal personhood' is typically based on the rough traditional account of 'personhood.' (iii) As a consequence of (i) and (ii), the conceptual confusion and complexity as found in 'personhood' have transferred to 'legal personhood.' (iv) But the account of legal personhood does not necessarily rely on that of personhood in general. Therefore, we can legitimately consider AI's legal personhood on its own terms without relying on its personhood or the substantive properties it might be attributed to.

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Coel Kirkby (University of Sydney)

"Recovering Harold Laski's Legal Realism"

In the summer of 1934, Harold Laski went to Moscow. He was invited to give three lectures to the Institute of Soviet Law. His invitation was unprecedented: to defend the social democracy of the British Labour Party in the home of the Communist International. This paper uses his exchange with Evgeny Pashukanis, the leading Soviet jurist, as an entry-point to recovering Laski's legal realism. Laski is of course best known for his early work on pluralism, which argued that voluntaries communities (especially unions) could challenge the hegemonic claims of the Hobbesian state. Yet over the 1930s, Laski metamorphized into a legal realist committed to a materialist critique of the capitalist state and its alibi: legal positivism. Laski rooted his critique in the crises of the time from rocketing inflation and unemployment to violent new forms of mass politics. The state needed to be analysed in this context. Britain, moreover, was a capitalist state whose legal order naturalised and reproduced those particular relations of domination. Laski defined legal positivism as 'a self-consistent theory of pure law into which neither ethical nor sociological considerations could penetrate.' He conceded that on its own terms as as an ideal theory it was 'unanswerable'. Yet there was no need to accept this idealism. Laski looked instead to what law did to understand its normativity; namely its (i) usefulness, (ii) reasonableness, (iii) common good, all of which 'maximise the satisfaction of demand.' Thus, the normative of law was ultimately a political fact determined by popular democratic deliberation within the particular historical state-form one found oneself.

Patrick Lenta (UTS)

"Law's Forgiveness"

I enquire in this paper into whether law can forgive. Martha Minow claims in a recent book that law can enact forgiveness and furnishes a number of examples of law's forgiveness including discharges in bankruptcy, remission of federal tuition debt, cancellation of a debtor country's debt by a creditor country, executive pardons and amnesties. Having set out five objections to the claim that legal-governmental institutions and legal-governmental officials acting in their professional capacity and within the bounds of their authority can forgive, having called attention to the absence in Minow's book of an argument in support of law's being able to forgive, and having shown Minow's definition of forgiveness to be unsatisfactory, I side with Minow in claiming that law can indeed forgive. In support of this claim I distinguish the interpersonal, sentiment-based sense of forgiveness from a sense of forgiveness as sentiment-independent debt remission and punishment forbearance. I contend that law can forgive in the latter sense and that certain of the examples of law's forgiveness Minow provides count as forgiveness in that sense. I defend the view that law can forgive against the objection that forgiveness conceived of in a sentiment-independent sense is not genuine or authentic forgiveness, but a mere simulacrum thereof, as well as against the five objections referred to above.

Eamon MacDougall (University of Windsor)

"Epistemic Consequences of Legal Positivism and Foucault's Panoptic Machinery"

This paper takes the problematic concept of conflating morality with law and takes it a step further, arguing that legal positivism can lead to knowledge claims through legislative authority, which is rendered either true or false by giving priority to the law when it comes to making epistemic demarcations. The second caveat of this argument defends the claim that this phenomenon is enabled through the omnipresent panoptic machinery delineated in Foucault's "Discipline and Punish" and "History of Sexuality". I argue that examples of this can be found in the way in which categories of drugs are demarcated and understood to how Canadian Indigenous groups are prescribed an epistemic status derived from constitutional law. The third caveat of this argument defends the conclusion that the reason why epistemic identities/ knowledge claims are given, is to ensure that power can intervene if deemed necessary.

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William MacNeil (Southern Cross University)

"A Wilderness of Monkeys: Value, Love and the Law of the Father's Will in The Merchant of Venice"

'I would not have given it for a wilderness of monkeys': so says The Merchant of Venice's Shylock, referencing the turquoise ring, gifted to him by his late wife, Leah, now stolen by his errant daughter, Jessica. An odd pronouncement (as well as a striking image) for a character often read as a proto-finance capitalist, Shylock being seen traditionally as the exemplar of exchange values, for whom everyone, not to mention everything, has its price (the pound of flesh?). Excepting, of course, Leah's 'turquoise'. Which, in his adamant refusal to part with it, may reposition Shakespeare's most uncomfortable stereotype—Shylock as the Jewish usurer—as the principal spokesperson within the drama for values more closely associated with 'use' (affect, love) rather than 'exchange' (law, contract). Indeed, far from being global Capital's earliest literary avatar, Shylock may be a prescient instance of its critique, anticipating not only Marx, but Freud by several hundred years. For at stake in The Merchant of Venice—so this paper will claim—is nothing less than the surplus jouissance (or enjoyment) of nascent global Capital itself, here emblematised in Portia's Belmont. Hitherto seen an bower of erotic bliss, idyllic Belmont is outed, by way of contrast to Shylock's 'jewish-ssance', as a site of frenetic 'getting and spending', its desire as commodified as it is coital; and all mandated by the Law of the Father's Will. This paper will draw upon the insights of psychoanalysis (object petit a, phallus-as-semblant, the death drive), as well as those of political economy (reification, exchange, use) to examine the status of value, love and law in The Merchant of Venice, arguing that Shylock may be not only Capitalism's fiercest critic, but its most misunderstood psychotherapist.

Allan McCay (University of Sydney)

"Brain-Computer Interfaces, Intimate Image Abuse and Sentencing"

In an earlier paper (McCay 2020), I envisaged the possibility of a person committing an intimate image abuse (colloquially "revenge porn") offence by way of brain-computer interface. Whilst the aforementioned work addressed the issue of actus reus in the context of conduct which is neurotechnologically mediated, and canvassed a range of views of actus reus that might lead to a conviction, this paper will consider the sentencing of an offender who acted by way of an implanted form of such neurotechnology. It will be argued that such a sentencing decision might generate some unusual questions about the aims of punishment. More specifically the argument will be that sentencing submissions pertaining to neurobionic offending of the type envisaged might leave the sentencing decision-maker with some difficult issues to consider relating to the pursuit of retribution, rehabilitation, incapacitation and deterrence.

Claudio Michelon (University of Edinburgh)

"The Uses of Precedent in Legal Argument"

This paper addresses attempts to demonstrate the importance of paying attention to the types of authoritative precedent-relying argument employed by courts for a theory of judicial precedent. It demonstrates that different argument types leave diverse argumentative footprints (i.e. rely on different assumptions, support different claims, offer different support to the argument's conclusion, etc) by discussing three types of precedent-relying arguments: the so-called "legal syllogism," legal analogies, and inferences to the best explanation. It argues that authoritative precedent performs different argumentative roles in each of these argument-types and concludes that a sufficiently complex theory of authoritative judicial precedent must take into account these different roles.

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Jane Norton (University of Auckland)

***"Charities and Politics: Where Did We Go Wrong?"* (with Matthew Harding)**

This paper examines a long-standing doctrine in charities law - that if an organisation's main purpose is political then it cannot be charitable. This doctrine is not without controversy because it has the potential to exclude many worthwhile organisations from charitable status, and fetter worthwhile advocacy by those that do have status. While no jurisdiction remains unwaveringly committed to the orthodox rule, none so far have confronted the public benefit – and detriment – of political advocacy adequately. This paper proposes a way of assessing the public benefit of political advocacy in liberal democratic societies. It starts by arguing that political advocacy can give rise to clear public benefit: it is an indirect or process benefit associated with advocacy itself regardless of the end advocated for. However, recognising political advocacy purposes as charitable should still be subject to constraints. This is because clear public detriments may be associated with political advocacy where the end advocated for offends liberal values such as non-discrimination. Moreover, recognizing political advocacy purposes as charitable should be constrained by the idea of altruism because this idea is consistent with the conditions for personal autonomy - it augments the range of options citizens have in respect of the modes in which they relate to one another.

Mangesh Patwardhan (National Insurance Academy)

"Reasoning Legally and Mathematically: Insights from Contemporary Philosophy of Set Theory"

Comparisons between legal and mathematical reasoning are not new. As commentators have noted, for Christopher Columbus Langdell, law could be studied and comprehended entirely from within, just as geometry can be. Oliver Wendell Holmes criticized this "logical theology" of law. This issue was discussed prominently in the context of Gödel's (First Incompleteness) Theorem. I address the implications of Gödel's Theorem for legal reasoning. Going beyond Gödel's Theorem, I draw on contemporary philosophy of set theory. I consider the purported contrast between the rigorous, inflexible axiomatic-deductive method in mathematics as against the need to retain flexibility in law to meet the ends of justice. I discuss how set-theoretic reasoning is rather analogous wherein the search for new set-theoretic axioms is motivated by the mathematical goals sought to be achieved. In particular, I discuss the shifting views on the celebrated Continuum Hypothesis in set theory. Next, I address the argument that legal indeterminacy is inherently conceptual, not merely formal. A legal proposition may be indeterminate because there is no single, definable thing called "the law". I examine the increasingly influential set-theoretic pluralist position to argue that a similar phenomenon of inherent conceptual indeterminacy seems to be at play in set theory as well. Given that set theory is widely regarded as a foundational framework for mathematics, I conclude that contemporary developments in the philosophy of set theory help illuminate deep similarities between legal and mathematical reasoning.

Arie Rosen (University of Auckland)

"The Constitutional Role of Contract Law"

In liberal democracies, democratic legislation plays a limited role in the development of contract law. In this talk, I will track the different ways democracy shaped the rules of modern contract law during the twentieth century and will identify areas in which this law remained immune from democratic influence. Reflecting on this descriptive account, I will consider two normative questions. First, what are the advantages and disadvantages of the emerging patterns of democratisation and professionalisation of contract law? Second, how should our understanding of these patterns inform our understanding of the relationship between constitutional law and private law? I will argue that constitutionally, twentieth-century law accorded special protection to private law rights, but the nature of this protection is different and more subtle than the one considered in the literature.

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Nicole Roughan (University of Auckland)

"TBA"

Jessica Schaffer (Bond University)

"Feminist Perspectives on Rape's Criminalisation as the Basis for Law Reform"

Despite consecutive waves of consent-based reforms, rape myths persist within societal and legal conceptions of rape. This paper employs a feminist perspective on the history of rape law to explain and contextualise the continued role of rape myths in legal and social narratives of rape. Traditionally, the crime of rape was thought to have emerged as a means of protecting women from sexual violation. When rape's criminalisation is viewed from this perspective, the impetus of law reform efforts become concerned with securing for women the right to consent to sex on the same basis as men. A feminist historical perspective, by contrast, situates the criminalisation of rape within the context of legal and social power structures that have entrenched male dominance over women. This historical counter narrative helps to explain the continuing influence of rape myths on current interpretations of consent based rape laws, providing an empirical basis to analyse current legal judgements and undertake rape law reform.

Dale Smith (University of Melbourne)

"Grounding a Theory of Legal Interpretation"

What makes it the case that a particular theory of legal interpretation, such as textualism or purposivism, is correct (or incorrect)? As some commentators have noted, participants in debates between different theories of legal interpretation appeal to a diverse range of considerations to support their preferred theory. Some of those considerations are moral in nature; some are not. Yet participants in these debates do not often say much to justify their use of some types of consideration and not others. One might think that the factors that ultimately matter are dictated, at least in part, by the correct account of the nature of law. And leading accounts of the nature of law do indeed have implications for the question of what makes it the case that a particular theory of legal interpretation is correct (or incorrect). However, in this paper, I explore how one might go about answering this question if one is inclined to reject leading versions of both positivism and anti-positivism.

Steven Stern (Victoria University)

"The High Court and Taxation: The Relevance of Professor Julius Stone's Jurisprudence"

Subsection 97(1) of the Income Tax Assessment Act 1936 (Cth) provides that where a beneficiary of a trust estate not under any legal disability is presently entitled to a share of the income of that trust estate, the beneficiary's assessable income includes so much of that share of the trust estate's net income as is attributable to when the beneficiary was an Australian "resident". The applicable trust deed provided that, if the trustee makes no effective determination to pay, apply, set aside or accumulate any part of the trust income in a given accounting period, that income is held on trust for the specified beneficiaries. The trustee failed to make any such determination. There was no dispute that shares of trust income in the income year had been held on trust for these beneficiaries. The Commissioner of Taxation assessed each specified beneficiary on the basis that these beneficiaries were "presently entitled" to a share of income of the trust estate within the meaning of subsection 97(1). The beneficiaries subsequently disclaimed any such interest. On 6 April 2022, in Commissioner of Taxation v Carter [2022] HCA 10, the High Court decided whether "present entitlement" under subsection 97(1) is determined immediately before the end of the income year and whether disclaimers operate retrospectively so as to disapply subsection 97(1) in respect of the income year. This paper examines the relevance of Professor Julius Stone's jurisprudence to judgments of this kind.

THE UNIVERSITY OF SYDNEY

David Tan (Deakin University)

"Legislative Intent: A Rational Unity Account" **(with Stephanie Collins)**

Does the legislature have intentions concerning the effects of legislation? If so, how can that intent be gleaned? We propose that existing theories of legislative intent can be divided into three camps: skepticism, constructivism, and realism. This paper begins by outlining problems for existing accounts of realism. However, this does not imply a retreat into skepticism. Instead, the paper offers a new account of legislative intent: the rational unity account. The paper explains how this account avoids the problems with existing versions of realism and constructivism, while also capturing the sense in which the legislature is a rational group agent with intentions that can be distinguished from the intentions of individual legislators.

Lael Weis (University of Melbourne)

"Re-Making Constitutional Theory: Theorising a Green Constitutionalism"

Theories of constitutionalism provide an account of the structure and exercise of political power by the state and its institutions through law — including both how the exercise of political power is enabled and made effective, and how it is limited and subject to constraint. This paper considers the making of a green constitutionalism, where care for the natural environment and preservation of the earth's living systems for present and future generations are the foundational organising values. This inquiry involves examining whether there is scope to re-make the existing model of liberal constitutionalism — where individual freedom and human flourishing are the foundational organising values — with environmentalism as its animating concern. The paper proposes an agenda for theorising a green constitutionalism by identifying key challenges posed for constitutional theory and specific areas for future research. The paper's principal argument is that theorising a green constitutionalism requires more than simply adding environmental concerns into 'the mix' of constitutional issues — redeploying concepts and structures from the liberal constitutional canon for environmental purposes. A green constitutionalism rather requires re-making constitutional theory by interrogating existing concepts and structures. In this respect, the argument is analogous to arguments of feminist and critical race theorists: namely, that a just political ordering cannot be achieved by adding 'sex', 'gender' and 'race' among the concerns of liberalism, but requires questioning assumptions embedded in the very aims and orientation of theoretical enquiry guided by liberal principles. Scholarship to date has mainly focused on the promise of constitutionally enshrined environmental rights to promote environmental causes. This paper suggests that such scholarship, while valuable, is limited by the constraints of the liberal constitutional canon. It cannot address the deeper questions posed by the idea of a green constitutionalism which, the paper argues, must be tackled in order to address environmental demands. For example, a green ethic does not merely imply a narrowing of protected liberal rights but challenges the very idea of a rights-based constitutional order. It suggests that rights are an inappropriate way of both protecting human interests and protecting nature, as rights of nature reinforce the perceived antagonism between human interests and non-human others engendered by a liberal perspective. Similarly, a green ethic challenges the idea that the state is the exclusive locus of sovereignty by challenging liberal notions of membership. It suggests that the legitimate exercise of political power requires addressing the concerns not only of the people governed by the state, but of those in its sphere of influence: insiders and outsiders, present and future generations, non-human animals and the earth's living systems. The paper is at once both modest and ambitious. It is modest in that it does not prescribe a specific set of institutional structures. Indeed, it suggests that efforts to develop an ideal model of green constitutionalism are best avoided. At the same time, the paper is ambitious in outlining a roadmap for theorising a green constitutionalism, by identifying key concepts and features associated with liberal constitutionalism that require rethinking and re-making.

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David Winterton (University of Sydney)

"Lawful Act Duress"

It is well established that a contract may be voidable on the grounds of 'economic duress'. However, probably the most contentious issue regarding the scope of the doctrine is whether a threat to perform a lawful act may entitle the threatened party to avoid a contract on this basis. Recently, in *Pakistan International Airlines Corp v Times Travel (UK) Ltd*, the United Kingdom Supreme Court unanimously affirmed the existence of such a doctrine in English law but divided as to the appropriate test for identification of the relevant form of lawful act duress (potentially) raised by the facts. According to the majority the defining feature of lawful act duress in general is 'morally reprehensible behaviour' rendering contractual enforcement 'unconscionable'. For Lord Burrows, by contrast, the existence of a 'bad faith' demand by the threatening party in the particular sense that his Lordship identified was the defining characteristic of the doctrine. The doctrinal disagreement in *Times Travel* thus raises the deeper question of whether (and if so, precisely *when*) the state is justified in giving a threatened party the power to rescind a contract on the grounds of lawful act duress. The purpose of the paper is not to propose a general answer sufficient to cover all possible cases of lawful act duress but to consider whether either or both of the two alternative doctrines identified in *Times Travel* can be theoretically defended. It is argued that at least the version of lawful act duress identified by Lord Hodge for the majority – and perhaps also the alternative version of the doctrine identified by Lord Burrows – is consistent with Joseph Raz's account of the binding nature of contractual obligation.

David Wood (University of Melbourne)

"A Model Assisted Dying Bill"

Australian State jurisdictions – all of them – have recently passed assisted dying legislation. This series of Acts followed decades of failed Bills, over 60 of them, and has been hailed by its supporters as a political triumph – which it undoubtedly is, given the powerful forces arrayed against assisted dying, even if opinion polls consistently show that it has overwhelming public support. However, legally, and in terms of both human rights and common sense, these Acts, modelled to varying extents on the first of them, the Victorian Voluntary Assisted Dying Act 2017 (that is, except for that Act itself), are disasters. They are long and convoluted, and at times almost incomprehensible. (The Tasmanian End-of-Life Choices (Voluntary Assisted Dying) Act 2021, with its highly complicated system of cross-referencing, takes the cake.) They demonstrate an almost total inability to seriously think through the assisted dying process, and to draft a statute accordingly. They demonstrate in the case of what the Acts call self-administration (in contrast with practitioner administration) – note in particular the Victorian Act – an obsession with safe-guarding the 'voluntary assisted dying substance' at the expense of concern for the person's welfare and well-being. The Acts are ruthless in the categories they exclude from access to assisted dying: mature minors; those whose sole underlying medical condition is a mental disorder; and those for whom access to assisted dying depends on making an advance request. The Acts are primitive in the range of administration (i.e. killing) methods they offer. Numerous other failings can be identified. A fresh start is needed. The paper sets out the basic features of a model assisted dying bill that does much better.

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Meir Yarom (New York University)

"Coherence & Consistency: An Investigation"

Coherence is—again—in vogue. Recent years have seen a revived interest in the concept, with theorists, courts, and practitioners increasingly relying on it. Theoretically, it is used for explaining the nature of law and adjudication. Practically, courts—particularly international tribunals—frequently invoke it in their judgments. Coherence is widely considered a prerequisite for rationality, curbing what can legitimately be demanded from subjects and thus keeping officials in check. It therefore plays an important role in legal reasoning generally, and in the overseeing functions of apex courts specifically. Yet while the law should surely be coherent, existing scholarship struggles to explicate what coherence means, or whether and to what extent legal elements cohere. This inability undercuts our theoretical and practical reliance on coherence, and risks turning it into yet another value-judgment. Following Neil MacCormick, the jurisprudential response resorted to logical consistency, to the point that "the majority of scholars consider consistency a condition of coherence." This prevailing view fails to appreciate that coherence and consistency diverge conceptually inasmuch as the internal relations that each requirement envisages differ. It therefore reduces coherence to consistency, resting content with metaphoric definitions that turn out to obscure more than they reveal. This article offers three interventions. It exposes the deficiencies in our coherence-based discussions; it shows how these emanate from the prevailing view and its corollary—a purely logical vision of law; and it ventures at differentiating coherence from consistency, to establish an independent concept free from reductionist misgivings.

Tarisa Yasin (Bond University)

"Building a Concept of Effective Human Control over Lethal Autonomous Weapon Systems"

This paper addresses how effective human control over lethal autonomous weapon systems (LAWS) can be conceptualised to ensure that the development and use of such weapon systems can comply with international humanitarian law (IHL). There are three key factors that demonstrate the need for flexibility in regulating lethal autonomous weapon systems. These are 1) the various types of LAWS; 2) the varying levels of autonomy of the different types of LAWS; and 3) the varying forms of human control that can be exercised over LAWS throughout their lifecycle. These factors explain why autonomy should be viewed on a scale in terms of degrees of autonomy rather than a dichotomy in terms of whether a weapon system is or is not autonomous. This paper proposes a theoretical concept of effective human control that incorporates the three key factors and existing norms, rules and principles of IHL. Concepts of state responsibility under international law and individual responsibility under international criminal law also form part of the theoretical foundation. The paper will examine the benefits and limitations of the concept of effective human control through the lens of some of the underlying concerns raised during the informal meeting of experts and the Group of Governmental Experts on Lethal Autonomous Weapon Systems (GGE on LAWS).

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Xi Zhang (New York University)

***"Valuing, Valuable, Reason"* (Winner of ASLP Essay Competition 2021)**

This paper aims to scrutinize the interlock between valuing and valuable against the value-reason nexus with reference to T.M. Scanlon and Samuel Scheffler. In particular, it takes up the normative enterprise as of why we have reasons for valuing. For one thing, it argues that the Scanlonian buck-passing account of value eventually fails to explain the source of reason for action in a justifiable manner and how it could be attributed to other properties of the object being valued. Nor is it clear that how we shall distinguish the reason for action between true valuers and value-recognizers or value-acknowledgers, let alone non-valuers, in terms of its positional nature. For another thing, it argues that Scheffler's argument on issues related to the value-reason nexus, especially the reasons for valuing, may nonetheless contain some tension in the sense that he seems to be subscribed with the reason-based account of valuing and admitted into the valuing-prior-to-valuable standpoint on the one hand, and value-based account of reason and valuable-prior-to-valuing standpoint on the other hand. Along this vein, it puts forward a reconstructed version of the reason-based account of valuing. It is argued that it is the positional nature of valuing that embodies the reason-giving function for our action of valuing.