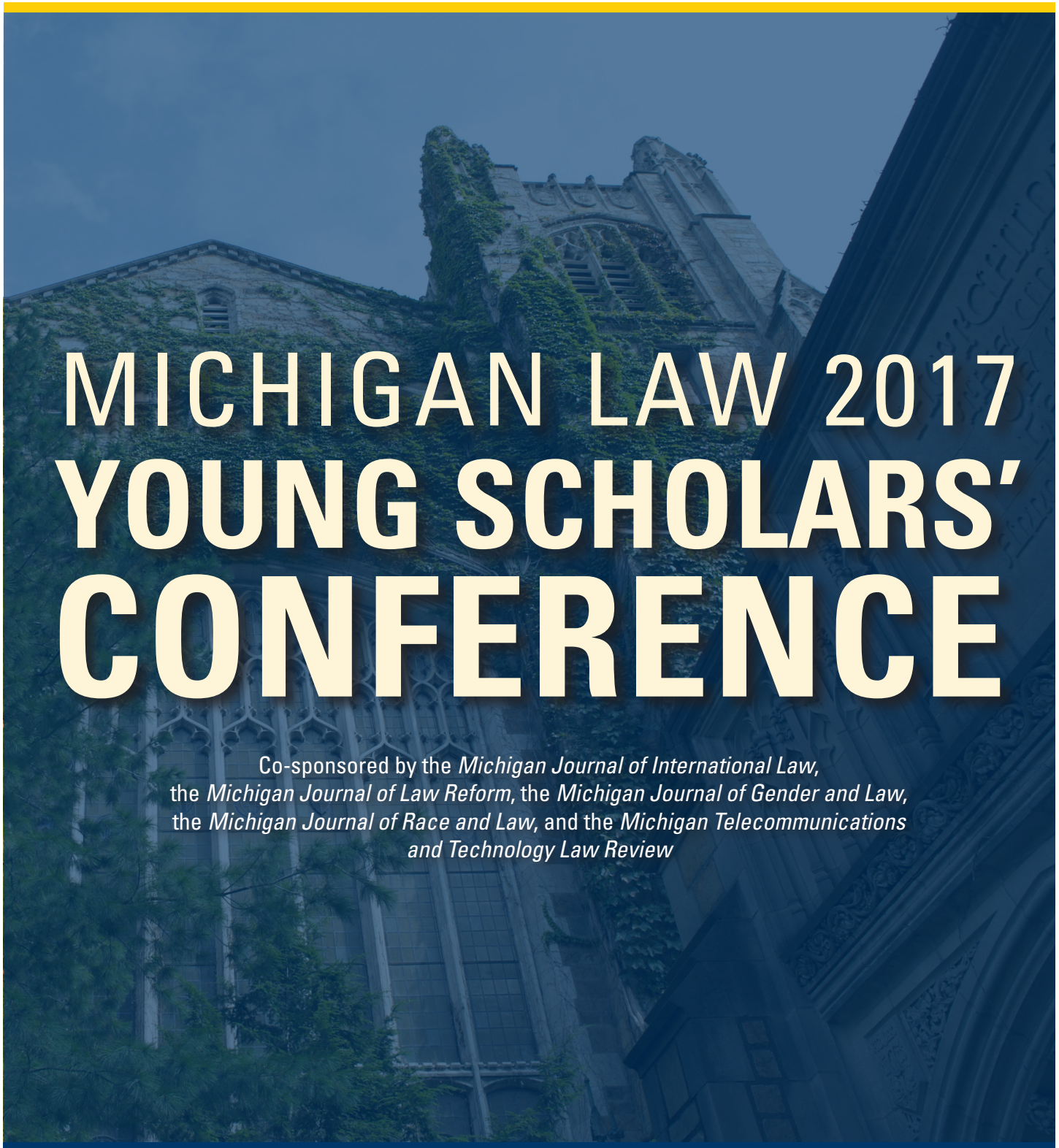
2017

Michigan Law 2017 Young Scholars' Conference

University of Michigan Law School

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

SJD/RS PROGRAM



MICHIGAN LAW 2017 YOUNG SCHOLARS' CONFERENCE

Co-sponsored by the *Michigan Journal of International Law*, the *Michigan Journal of Law Reform*, the *Michigan Journal of Gender and Law*, the *Michigan Journal of Race and Law*, and the *Michigan Telecommunications and Technology Law Review*

MARCH 31–APRIL 1, 2017

FRIDAY, MARCH 31, 2017 (120 Hutchins Hall)

7:45 – 8:30 AM **Registration and Continental Breakfast**

8:30 – 8:40 AM **Greetings** (Professor Daniel Halberstam, Associate Dean for Faculty and Research, UM Law School)

8:40 – 9:00 AM **Keynote speaker** (Professor Mathias Reimann, Hessel E. Yntema Professor of Law, UM Law School)

09:00 – 10:30 AM **Panel I – Between the Public and the Private**

Faculty Discussant: Professor Daniel Crane (UM Law School)
Moderator: Nir Fishbien (SJD Candidate, UM Law School)

- William J. Moon (NYU): "Private Ordering of Public Law"
- Deepa Das Acevedo (The University of Pennsylvania Law School): "We the Working People"

10:30 – 10:40 AM **Coffee Break**

10:40 – 12:10 PM **Panel II – Public Law**

Faculty Discussant: Professor Julian Davis Mortenson (UM Law School)
Moderator: Aviram Shahal (SJD Candidate, UM Law School)

- Noah Rosenblum (Columbia University): "Making Presidential Democracy: Revisiting the Executive Reorganization Act of 1937"
- Sarah Light (The Wharton School, University of Pennsylvania): "Advisory Preemption"
- Andrew Keane Woods (University of Kentucky, Visiting professor - University of Texas): "The Transperency Tax"

12:10 – 1:30 PM **Lunch** (Lawyers' Club)

1:30 – 1:45 PM **Short Tour** (leaves from Lawyers' Club)

1:45 – 3:15 PM **Panel III – International and European Law**

Faculty Discussant: Professor Donald Regan (UM Law School)
Moderator: Jing Geng (Grotius Research Scholar, UM Law School)

- Thomas Verellen (University of Leuven, Michigan Law School): "Federalism and Foreign Relations in the United States and the European Union: Hierarchy versus Pluralism"

- Giacomo Tagiuri (Bocconi University, NYU): “The Cultural Implications of Market Regulation: Does the EU Destroy the Texture of National Life?"
- Vera Shikhelman (NYU): “Access to Justice in the United Nations Human Rights Committee”

3:15 – 3:30 PM **Coffee Break**

3:30 – 5:00 PM **Panel IV – Law and Society**

Faculty Discussant: Professor Sherman Clark (UM Law School)
Moderator: Tami Groswald Ozery (SJD Candidate, UM Law School)

- Andrea Freeman (University of Hawai'i, UC Berkeley - visiting professor): " Unmothering Black Women: Formula Feeding and the Legacy of Slavery”
- Doron Dorfman (Stanford): “The Fear of 'Disability Con': Backlash and Mistrust in the Shadow of the Law”
- Karin Carmit Yefet (University of Haifa): “Divorce as a Gender Equality Right”

7:30 PM **Dinner** (Mélange Bistro – 312 South Main St.)

SATURDAY, APRIL 1, 2017 (1225 South Hall)

8:30 – 9:00 AM **Continental Breakfast**

9:00 – 10:30 AM **Panel V – Empirical Legal Research**

Faculty Discussant: Professor J J Prescott (UM Law School)
Moderator: Orli Oren-Kolbinger (Grotius Research Scholar, UM Law School)

- Monika Leszczyńska (NYU): "Think Twice Before you Sign! An Experiment on the Cautionary Function of Contractual Formalities"
- Emily Satterthwaite (University of Toronto): "Eentrepreneurs' Legal Status Choices and the C Corporation Survival Penalty"
- Greg Buchak (University of Chicago): "Does Competition Reduce Racial Discrimination in Lending?"

10:30 – 10:45 AM **Coffee Break**

10:45 – 12:15 PM **Panel VI – Law and Technology**

Faculty Discussant: Professor Margo Schlanger (UM Law School)
Moderator: Stavros Makris (Grotius Research Scholar, UM Law School)

- Emily Berman (University of Houston): "When Database Queries are Fourth Amendment Searches"
- Asaf Lubin (Yale Law School): "'We only Spy on Foreigners': The Myth of a Universal Right to Privacy and the Practice of Mass Extraterritorial Surveillance"
- Yoni Har Carmel (Haifa University): "Reshaping Ability Grouping Through Big Data"

12:15 – 1:00 PM **Lunch**

1:00 – 2:30 PM **Panel VII – International Law**

Faculty Discussant: Professor Steven Ratner (UM Law School)
Moderator: Yahli Shereshevsky (Grotius Research Scholar, UM Law School)

- David Hughes (Osgood Hall Law School): "The Development and Use of Informal Complementarity"
- Chris O'Meara (UCL): "The Relationship Between National, Unit and Personal Self-Defence in International Law: Bridging the Disconnect"
- Michael Da Silva (University of Toronto): "The International Right to Health Care: A Legal and Moral Defense"

2:30 – 3:00 PM **Closing Remarks**

Sherman J. Clark
Kirkland & Ellis Professor of Law

Sherman J. Clark, the Kirkland & Ellis Professor of Law, joined the Michigan Law faculty in 1995 and teaches courses on torts, evidence, and sports law. His current research focuses on the ways in which legal rules and institutions may have an impact on character, and thus on the extent to which we thrive. Law and politics, Professor Clark believes, can have an impact—often indirect and inadvertent, but real—on the kind of people we become; and that, in turn, can have an impact—difficult to describe and quantify, but potentially profound—on how well and fully we are able to live. In this vein, drawing on classical philosophy, modern positive psychology, political theory, literature, and law, he has written about institutions and practices ranging from direct democracy to the jury to criminal procedure. Professor Clark is also interested in legal education, and seeks to reject the false dichotomy between practical and theoretical ways of approaching the study of law—between pragmatic professional training and humane liberal education. He has argued that being a good lawyer and being thoughtful about the law are not opposites, or even things to be balanced, but are rather things that can and ought to go hand in hand. In addition to his teaching and research interests, Professor Clark served as an adviser to lawyers for Wayne County, Michigan, and the City of Detroit in their efforts to hold gun manufacturers liable for allegedly negligent distribution practices. The legal theory he articulated, known as willful blindness, focused on the manufacturers' alleged knowing exploitation of a thriving secondary market in the indirect sale of firearms to felons and minors. He is a graduate of Towson State University and Harvard Law School, and practiced in Washington, D.C., with the law firm of Kirkland & Ellis.

Daniel Crane
Frederick Paul Furth Sr. Professor of Law

Daniel Crane is the Frederick Paul Furth Sr. Professor of Law. He served as the associate dean for faculty and research from 2013 to 2016. He teaches Contracts, Antitrust, Antitrust and Intellectual Property, and Legislation and Regulation. He previously was a professor of law at Yeshiva University's Benjamin N. Cardozo School of Law and a visiting professor at New York University School of Law and the University of Chicago Law School. In spring 2009, he taught antitrust law on a Fulbright Scholarship at the Universidade Católica Portuguesa in Lisbon. Professor Crane's work has appeared in the University of Chicago Law Review, the California Law Review, the Michigan Law Review, the Georgetown Law Journal, and the Cornell Law Review, among other journals. He is the author of several books on antitrust law, including Antitrust (Aspen, 2014), The Making of Competition Policy: Legal and Economic Sources (Oxford University Press, 2013), and The Institutional Structure of Antitrust Enforcement (Oxford University Press, 2011).

Daniel Halberstam
Associate Dean for Faculty and Research
Eric Stein Collegiate Professor of Law
Director, European Legal Studies Program

Daniel Halberstam, the Eric Stein Collegiate Professor of Law and associate dean for faculty and research, teaches and writes about U.S. constitutional law, European Union law, comparative constitutional law, and global governance. An internationally recognized expert on constitutional law and federalism, and one of the principal architects of the theory of constitutional pluralism, he writes more generally about comparative public law and legal theory.

Professor Halberstam was founding director of the University's EU Center in 2000, and continues to serve as director of the Law School's European Legal Studies Program. He lectures regularly throughout Europe, holding a position as external professor in the European Law Department at the College of Europe, Bruges. Professor Halberstam was a fellow at the Institute for Advanced Study (Wissenschaftskolleg), Berlin, and now serves on the Institute's advisory board. He also serves on several advisory editorial boards, including the Common Market Law Review.

In 2012, Professor Halberstam delivered the General Course on the European Union at the European University Institute in Florence, Italy. In 2013, he was named chair of the faculty advisory board of the Max Planck Institute for Comparative Public and International Law, Heidelberg. In 2014, Professor Halberstam co-organized and chaired substantive discussions at a joint meeting in Luxembourg of the Court of Justice of the European Union and the U.S. Supreme Court. In 2015, he co-organized and chaired a closed-door working group in Berlin of high-level European policymakers and officials on EU accession to the European Convention on Human Rights.

Professor Halberstam joined the Michigan Law faculty from the U.S. Department of Justice, where he served in the Office of Legal Counsel during the Clinton administration. He holds a BA (mathematics and psychology), summa cum laude and Phi Beta Kappa, from Columbia College, and a JD from Yale Law School, where he was a Coker Fellow for Constitutional Law and articles editor of the Yale Law Journal. Professor Halberstam served as attorney-adviser to Federal Trade Commission Chairman Robert Pitofsky, and clerked for the Hon. Patricia Wald of the U.S. Court of Appeals, District of Columbia Circuit, and for U.S. Supreme Court Justice David H. Souter. He also was a judicial fellow for Judge Peter Jann at the European Court of Justice.

Julian Davis Mortenson
Professor of Law

An engaged scholar and award-winning teacher, Julian Davis Mortenson specializes in constitutional and transnational law. His research focuses on the allocation of public authority in both international and domestic governance, frequently from a historical perspective. He currently serves as coauthor of the Contemporary Practice of the United States section of the American Journal of International Law.

Professor Mortenson is active in both international arbitration and domestic constitutional litigation. He was lead counsel on a team that recently secured a permanent injunction requiring Michigan to recognize the marriages of more than 300 same-sex couples. He also has served as arbitrator, counsel, and expert witness in commercial and investor-state disputes under the ICC, ICSID, UNCITRAL, and VIAC rules, and has litigated complex transnational matters in the U.S. courts, including actions involving the enforcement of foreign law and foreign judgments. Other representative matters include his work as one of the principal drafters of the merits briefs in the landmark case Boumediene v. Bush, which secured the right of Guantanamo detainees to challenge their incarceration, and his representation of discharged military service members challenging the "Don't Ask, Don't Tell" law prior to its congressional repeal.

Before joining the faculty, Professor Mortenson worked at the law firm WilmerHale, in the President's Office of the International Criminal Tribunal for the former Yugoslavia, and as a law clerk for both Justice David H. Souter of the U.S. Supreme Court and the Hon. J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit. Prior to law school, he was a management consultant with a client portfolio spanning the finance, manufacturing, oil and gas, and information technology industries. Professor Mortenson was salutatorian of his class at Stanford Law School and received an AB in history, summa cum laude, from Harvard College. He is a Life Member of Clare Hall, Cambridge.

J.J. Prescott
Professor of Law
Codirector, Empirical Legal Studies Center
Codirector, Program in Law and Economics

J.J. Prescott's research interests revolve around criminal law, sentencing law and reform, employment law, and the dynamics of civil litigation, particularly settlement. Much of his work is empirical in focus. Current projects include an examination of the ramifications of post-release sex offender laws, a study of the socio-economic consequences of criminal record expungement, an evaluation of the effects of prosecutorial discretion and decision-making on short- and long-term defendant outcomes, and an investigation into the nature and repercussions of partial settlements in civil litigation. In addition, Professor Prescott is the principal investigator of the U-M Online Court Project, which uses technology to help people facing warrants, fines, and minor charges resolve their disputes with the government and courts online and without the need to hire an attorney. Professor Prescott earned his JD, magna cum laude, in 2002 from Harvard Law School, where he was the treasurer (Vol. 115) and an editor of the Harvard Law Review. After clerking for the Hon. Merrick B. Garland on the U.S. Court of Appeals, District of Columbia Circuit, he went on to earn a PhD in economics from the Massachusetts Institute of Technology in 2006.

Steven R. Ratner
Bruno Simma Collegiate Professor of Law

Steven R. Ratner, the Bruno Simma Collegiate Professor of Law, came to Michigan Law in 2004 from the University of Texas School of Law. His teaching and research focus on public international law and on a range of challenges facing governments and international institutions since the Cold War, including territorial disputes, counter-terrorism strategies, ethnic conflict, state and corporate duties regarding foreign investment, and accountability for human rights violations. Professor Ratner has written and lectured extensively on the law of war, and also is interested in the intersection of international law and moral philosophy and other theoretical issues. A member of the board of editors of the American Journal of International Law from 1998 to 2008, he began his legal career as an attorney-adviser in the Office of the Legal Adviser at the U.S. State Department. In 1998–1999, he was appointed by the UN secretary-general to a three-person group of experts to consider options for bringing the Khmer Rouge to justice, and he has since advised governments, NGOs, and international organizations on a range of international law issues. In 2008–2009, he served in the legal division of the International Committee of the Red Cross in Geneva. Since 2009, he has served on the State Department's Advisory Committee on International Law and since 2013, he has been an adviser to the American Law Institute for the Restatement (Fourth) of the Foreign Relations Law of the United States. In 2010–2011, he was a member of the UN's three-person Panel of Experts on Accountability in Sri Lanka, which advised Secretary-General Ban Ki-moon on human rights violations related to the end of the Sri Lankan civil war. He also has served as an expert on international investment law in various arbitrations. He established and directs the Law School's externship program in Geneva. Professor Ratner holds a JD from Yale, an MA (diplôme) from the Institut Universitaire de Hautes Études Internationales (Geneva), and an AB from Princeton.

Donald H. Regan
William W. Bishop Jr. Collegiate Professor of Law

Donald H. Regan, the William W. Bishop Jr. Collegiate Professor of Law, is also a professor of philosophy at the University of Michigan. He teaches and writes about international trade law, particularly the impact of trade law on national health, safety, and environmental regulation; on moral and political philosophy, with a special interest in the theory of the good; and on constitutional law, concentrating on federalism issues. Professor Regan has been a member of the American Academy of Arts and Sciences since 1998, and has been a Guggenheim Fellow, a fellow at the National Center for the Humanities, and a visiting fellow at All Souls College, Oxford. His book, Utilitarianism and Co-operation, shared the Franklin J. Matchette Prize of the American Philosophical Association for 1979–1980. Professor Regan is a graduate of Harvard and the University of Virginia Law School. He was also a Rhodes Scholar at Oxford University, where he earned a degree in economics, and he has a PhD in philosophy from the University of Michigan. Professor Regan began his academic teaching career at Michigan in 1968. He has visited at the University of California, Berkeley, the University of Virginia, and the University of Zagreb. Currently, he teaches a seminar on the philosophy of free trade in the master's program in Law in a European and Global Context at the Catholic University of Portugal (Lisbon).

Mathias W. Reimann
Hessel E. Yntema Professor of Law

Mathias W. Reimann, the Hessel E. Yntema Professor of Law, received his basic legal education in Germany (Referendar, 1978; Assessor, 1981). He is a graduate of and holds a doctorate (Dr. iur. Utr., 1982) from the University of Freiburg Law School, where he taught for several years. He is also a graduate of the University of Michigan Law School (LLM, 1983). He publishes widely both in the United States and abroad in the areas of comparative law, private international law, and legal history. He has held visiting appointments in many countries around the world, including France, Italy, Japan, Israel, Germany, and Austria.

Margo Schlanger
Henry M. Butzel Professor of Law

Margo Schlanger, the Henry M. Butzel Professor of Law, is a leading authority on civil rights issues and civil and criminal detention. She joined the Law School faculty in fall 2009; her teaching and research deal with civil rights, prison reform, torts, and surveillance. She also founded and heads the Civil Rights Litigation Clearinghouse. She is the court-appointed settlement monitor for Adams v. Kentucky Department of Corrections, a statewide civil rights lawsuit dealing with conditions of confinement for Kentucky's deaf prisoners. Before starting at Michigan, she was a professor at Washington University in St. Louis and an assistant professor at Harvard Law School.

In 2010 and 2011, Professor Schlanger was on leave, serving as the presidentially appointed Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security (DHS). As the head of civil rights and civil liberties for DHS, she was the secretary's lead adviser on civil rights and civil liberties issues. In that capacity, she testified before Congress; chaired the Privacy, Civil Rights, and Civil Liberties Subcommittee of the federal Information Sharing Environment's Information Sharing and Access Interagency Policy Committee; chaired the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities; served on the first U.S. delegation to the UN Universal Periodic Review; and met with community leaders and groups across America to ensure that their perspectives regarding civil rights and homeland security were considered in the Department's policy process.

Professor Schlanger earned her JD from Yale in 1993. While there, she served as book reviews editor of the Yale Law Journal and received the Vinson Prize for excellence in clinical casework. She then served as a law clerk for Justice Ruth Bader Ginsburg of the U.S. Supreme Court from 1993 to 1995. From 1995 to 1998, she was a trial attorney in the U.S. Department of Justice Civil Rights Division, where she worked to remedy civil rights abuses by prison and police departments and earned two Division Special Achievement awards.

Professor Schlanger served on the Vera Institute's blue-ribbon Commission on Safety and Abuse in America's Prisons, worked as an adviser on the development of proposed national standards implementing the Prison Rape Elimination Act, and testified before the Prison Rape Elimination Commission. She served as the reporter for the American Bar Association's revision of its Standards Governing the Legal Treatment of Prisoners. She has been the chair of the Association of American Law Schools sections on Remedies and on Law and the Social Sciences.

PANEL I
Between the Public and the Private

Faculty Discussant: Professor Daniel Crane (UM Law School)
Moderator: Nir Fishbien (SJD Candidate, UM Law School)

- **William J. Moon (NYU)**: "Private Ordering of Public Law"

- **Deepa Das Acevedo (The University of Pennsylvania Law School)**: "We the Working People"

Will Moon

Will Moon is an Acting Assistant Professor of Lawyering at NYU School of Law. Prior to joining NYU in 2016, Will worked as a litigation associate at Boies, Schiller & Flexner, LLP in New York City, where he specialized in cross-border commercial disputes. From 2013-14, Will served as a law clerk to Judge Joseph A. Greenaway, Jr. of the United States Court of Appeals for the Third Circuit. Will holds a J.D. from the Yale Law School, where he served as a Senior Editor of the *Yale Law Journal* and a Coker Fellow in Constitutional Law. At Yale, Will directed the *Yale Law Journal*'s Legal Scholarship Workshop Reading Group and was awarded the Ambrose Gherini Prize for Best Paper in International Law. He received a B.B.A. from the Stephen M. Ross School of Business at the University of Michigan, where he was the founding Editor-in-Chief of the *Michigan Journal of Business*.

Private Ordering of Public Law

Party autonomy is a doctrine in private international law emphasizing the inherent freedom of contracting parties to select the terms of their agreement, including the law governing their engagements. Reflecting the doctrine's intellectual ascendance over the past fifty years, a significant number of cross-border commercial transactions today operate pursuant to contracts specifying a particular national or state law as the exclusive source of law governing the parties.

This Article excavates the subtle but important ways that private entities accrete influence over domestic regulatory law through a growing number of private commercial agreements mandating the application of "foreign law" with little or no connection to the parties. To date, this phenomenon has been widely celebrated as promoting efficiency and jurisdictional competition, but relatively unexamined from a broader regulatory structure or a political legitimacy standpoint. While a growing body of academic literature is exposing the erosion of substantive rights that can be expected in the context of unequal bargaining power between contracting parties, mainstream academics today largely embrace the private entities' ability to bargain for the law governing commercial transactions, so long as the choice was not a byproduct of fraud or lopsided bargaining power.

A closer examination, however, reveals a more complicated picture. When disputes arise out of commercial agreements that implicate domestic regulatory statutes (as they often do), the interests of non-contracting parties are at stake — namely, the general public that stands to benefit when private litigants activate statutes that serve the society in general. This is because public regulatory law is designed not only to provide private remedy, but also intended to help effectuate particular legislative goals. For instance, by over-compensating injured plaintiffs, treble damages provided under the RICO Act and the Sherman Act are designed to discourage *non*-litigants from violating antitrust and anti-racketeering laws. Unlike traditional private law remedies, which is generally understood as the state's minimum effort to ensure that private agreements are respected, treble damages are in place for penal and deterrence purposes. When coupled with the standing doctrine, which keeps out plaintiffs from seeking remedy in courts when the injury is too remote from statutory violations, private commercial agreements may erode domestic regulatory law by systematically precluding potential litigants from activating otherwise applicable domestic statutes. This is particularly unsettling because both Congress and state legislatures rely heavily (to a unique degree) on private litigants to effectuate statutory goals. At minimum, this theoretical defect displays a serious need to re-think how we have understood the rise of private contractual ordering.

To be sure, there is nothing inherently pernicious about borderless private bargaining. Private entities typically specify the law governing contracts in order to enhance predictability as to what law would apply to the wide array of legal claims that can arise in complex commercial transactions. The system of private governance mechanisms that transcend territorially-configured rules, however, does not take place agnostic to the structure of existing regulatory law. To that end, this Article begins a normative discussion centered on remedying the legitimacy deficit associated with private agreements that can systematically undermine the enforcement of public law.

Deepa Das Acevedo

Deepa Das Acevedo is a Sharswood Fellow at the University of Pennsylvania Law School. She previously received her JD and her PhD in Anthropology, both from the University of Chicago. Her work uses qualitative social science methods like ethnographic fieldwork to study how legal rules and concepts operate on the ground and to explore the relationships between individuals and society as well as between citizens and the state. This interest in law, personhood, and liberal democratic politics drives both her research on employment and the sharing economy in the United States and her work on religion and constitutional law in India. Her publications have appeared or are forthcoming in *Boston College International & Comparative Law Review*, *University of Chicago Legal Forum*, *Law & Social Inquiry*, the *American Journal of Comparative Law*, *Modern Asian Studies*, *Notre Dame Law Review Online*, and *Employee Rights & Employment Policy Journal*.

We the Working People

The sharing economy was supposed to bring Americans greater freedom at work, but critics are increasingly pointing out that platform companies exercise significant and largely unregulated control over workers. Are these two positions mutually exclusive? This paper uses ethnographic fieldwork across a range of platforms to argue that they are not. Instead, debates over employment in the sharing economy—especially over the issue of how to classify platform workers—reflect an underlying tension in both law and popular perception about what it means to be free at work. On the one hand, freedom at work relies on a classically "negative" conception of liberty as simple non-interference or the absence of employer control. The scheduling flexibility and entrepreneurial aspects of sharing economy labor speak to this view. On the other hand, freedom at work draws on a conception of liberty that is often called "republican," according to which freedom lies in not being vulnerable to the potential, arbitrarily exercised power of another. The invisible and indirect authority exercised by platforms over their workers clashes with this view. Not only does the tension between these conceptions of freedom make it difficult to understand what "control" means in the sharing economy and thus whether platform workers ought to be employees rather than independent contractors, it also lies at the heart of long running debates over classification and work regulation more broadly.

Panel II
Public Law

Faculty Discussant: Professor Julian Davis Mortenson (UM Law School)
Moderator: Aviram Shahal (SJD Candidate, UM Law School)

- **Noah Rosenblum (Columbia University)**: "Making Presidential Democracy: Revisiting the Executive Reorganization Act of 1937"

- **Sarah Light (The Wharton School, University of Pennsylvania)**: "Advisory Preemption"

- **Andrew Keane Woods (University of Kentucky, Visiting professor - University of Texas)**: "The Transperency Tax"

Noah Rosenblum

Noah Rosenblum is a J.D./Ph.D. candidate, pursuing his law degree at Yale Law School and his doctorate in legal and intellectual history at Columbia University. His research focuses on the history of democratic ideas and institutions in the 19th and 20th century. His dissertation, "The Tribe of the Eagle: Presidential Democracy in Thought and Practice, 1927-1952," explores the legal and institutional development of the modern American executive. His academic writing, on topics in legal history and the history of democratic thought, has appeared in H-Law, The Yale Law Journal, and at the blog of the Society for U.S. Intellectual History, among other places. His doctoral studies have been supported by a Javits Fellowship from the U.S. Department of Education. In 2015, he was a Legal History Fellow at the Yale Law School. In 2017 and 2018, he will serve judicial clerkships with Judge Jenny Rivera of the New York Court of Appeals and Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit.

Making Presidential Democracy:
Revisiting the Executive Reorganization Act of 1937

We live in an age of presidential democracy. As even a casual observer can see, the contemporary United States channels much of its putatively democratic rule through the office of the national executive. This is surprising. It is not how the Constitution was supposed to work. It also flies in the face of strong anti-executive traditions in American political thought, institutional design, and public law. Remarkably, American state builders empowered the president despite all this, and successfully grounded the expanded executive in argument and law.

This paper reconstructs and analyzes a key part of that story: the development of the institutional and intellectual underpinnings of the modern presidency through the Executive Reorganization Act of 1937. It argues that the Act and its accompanying report sketched the blueprint for the presidential democracy of today. Although the 1937 bill failed to pass, its vision was largely realized over the next fifty years anyway. The rise of modern presidential democracy was not haphazard or accidental. It constituted the culmination of a longstanding, theoretically sophisticated movement to make mass representative democracy work.

I begin by tracing the emergence of that 1937 vision from earlier efforts at reform. I argue that it was the product of a New Deal reimagining of an older Progressive tradition centered on "responsible government." At the turn of the twentieth century, thinker-reformers like Woodrow Wilson and Frank Goodnow championed fundamental state reorganization to make elected officials more accountable to their constituents and create a closer connection between voters and policy. At the heart of their proposals were plans to empower the executive branch through administrative centralization, civil service professionalization, and the development of an executive-led budgeting process. These reforms, they believed, would help overcome the single greatest obstacle to responsible government: the separation of powers, which frustrated the state's ability to achieve its ends while obscuring responsibility for its failures.

The members of the President's Committee on Administrative Management, which formulated the 1937 Act, adapted and transformed Wilson and Goodnow's ideas. Students of Progressive Era reform and veterans of the movements for state and local government reorganization, they shared many of their teachers concerns. Unsurprisingly, they followed their key recommendations. However, the emergence of fascism in Europe in the 1930s inflected their thought decisively. It pushed them to distinguish their envisioned American regime from its European counterparts, even while advocating for not-dissimilar government reforms, such as greatly strengthening the national executive. This was no easy distinction to make, particularly since Progressive Era reform thought could be a close cousin of outright proto-fascism. The President's Committee's solution involved embracing the doctrine of separation of powers. So doing, they rejected their teachers. But this created new possibilities for legitimating their proposed reforms and harmonizing emergent presidential democracy with American law.

Although my argument is novel, it builds on and revises an existing and growing literature on the Reorganization Act. In the last decade, scholars of administrative and constitutional law have begun to appreciate the importance of the 1937 bill and the Report of the President's Committee. However, this scholarship has so far remained narrowly focused on technical questions such as

the pedigree of “internal administrative law” or the history of the theory of the “unitary executive.” It has not sought a broader understanding of the Act and its significance, and does not engage deeply with the prior historiography or make much use of primary sources. The recent scholarly interest in the Act is best interpreted as a welcome invitation to further research. My paper takes it up.

The argument advances through an analysis of published and archival sources. It sits at the intersection of intellectual history, legal history, and American Political Development, and makes use of methods distinctive to each. Throughout, it pays particular attention to the transnational dimension of intellectual debate and institutional development that was characteristic of the late nineteenth and early twentieth century. Its primary aim is to revisit the Executive Reorganization Act of 1937 in its original context to uncover the unsettling foundations of the presidential democracy Americans live with today.

Sarah Light

Sarah E. Light is an Assistant Professor of Legal Studies and Business Ethics at the Wharton School of Business at the University of Pennsylvania, where she teaches Environmental Management, Law, and Policy. In the spring of 2017, Light is teaching Environmental Law at the University of Pennsylvania Law School, and she has previously taught Environmental Management, Law, and Policy at Columbia University.

Professor Light's research examines issues at the intersection of environmental law and business and technological innovation. Her articles have addressed the regulatory implications of the rise of transportation platforms like Uber and Lyft; the federalism implications of the development of new technologies like autonomous vehicles; how business innovation, such as Microsoft's adoption of a private carbon fee, can be a form of private environmental governance; and the U.S. military's role in stimulating private technological innovation to reduce fossil fuel use in what Light has called *The Military-Environmental Complex*. Her articles have appeared in and are forthcoming in the *Yale Law Journal*, the *UCLA Law Review*, the *Vanderbilt Law Review*, the *Emory Law Journal* and the *Stanford Environmental Law Journal*, among others.

Prior to entering academia, Professor Light served for ten years as an Assistant United States Attorney for the Southern District of New York, Civil Division, and for four years as the Chief of the Office's Environmental Protection Unit. In that capacity, Light represented federal agencies, including the Environmental Protection Agency, the Department of Defense, the U.S. Army Corps of Engineers, and others in affirmative and defensive environmental litigation. She has also served as a *pro bono* mediator in the United States District Court for the Southern District of New York.

Light earned her J.D. from Yale Law School, an M. Phil in Politics from Oxford University where she was a Rhodes Scholar, and an A.B. in Social Studies *magna cum laude* from Harvard College.

Advisory Preemption

We are living in an era of dramatic and unpredictable innovation. Federal agencies have been at the forefront of updating substantive legal rules to meet new challenges not originally contemplated by Congress. Yet some of these innovations – for example, the emergence of new technologies like autonomous vehicles, smart homes, and drones, or business innovations like the rise of the sharing economy – upset longstanding legislative equilibria not only for substantive legal rules, but also for *federalism*. For example, for the past fifty years, the federal statute regulating motor vehicle safety in the United States has delegated authority to the federal government to regulate the safety of the "vehicle," but left it up to the states to regulate "driver" behavior through insurance, licensing, and tort rules. The rise of autonomous vehicles erodes the bright line between vehicles and drivers, as vehicle hardware and software can now operate functions once exclusively in the control of humans behind the wheel.

Innovation gives rise to innovation uncertainty – the many unknowns that arise temporarily as a result of technological or business innovation, including what the most significant risks and benefits of the activity are, how those risks and benefits will be distributed, what path the innovation may take in its development, and the timing of that development, among others. Will "local" or "national" concerns predominate? This innovation uncertainty raises important questions both about which level of government should decide how to govern *now* in the current state of uncertainty, and who should decide *in the future*. Significant uncertainty about the unpredictable path that innovation may take requires flexibility to shift beyond an initial or longstanding allocation of regulatory authority among the federal, state, and local governments.

This Article identifies a new method that federal agencies can use to achieve this time-limited flexibility, what I call a *suggestion of preemption*, and defends its use as a normative matter, using autonomous vehicle technology safety regulation as a case study. Ordinary preemption, by Congress, courts, or agencies, can shift the balance of power from the states to the federal government. In contrast, a *suggestion of preemption* has the opposite effect. In a suggestion of preemption, an agency recommends in published policy guidance, but does not mandate, that states limit their legislative and rulemaking actions, and sets a timetable for revisiting the allocation of authority. Suggestions of preemption thus serve multiple salutary purposes. First, they clarify the agency's current view of its regulatory authority both for the states and for regulated industry. Second, they offer flexibility in the allocation of regulatory authority if innovation takes an unpredictable path. And they are "suggestions" rather than "threats," because while the federal agency believes it may hold a supremacy trump card, the circumstances are sufficiently uncertain that technological development may undermine that trump card, or the agency may choose not to use it at all. Thus, a suggestion of preemption can open a dialogue with states and industry; it does not shut the door. Although suggestions of preemption impose costs in regulatory uncertainty, they promote normative values such as innovation and precaution about the risks of innovation. And while they lack the procedural protections of notice-and-comment rulemaking that are designed to promote democratic legitimacy, suggestions of preemption, by not freezing for all time the policy preferences of past regulators, promote a different kind of democratic legitimacy – legitimacy in time. Most significantly, suggestions of preemption can temporarily insert *de facto* dynamic, overlapping jurisdiction under conditions of innovation uncertainty, even into a dual federalism scheme.

Andrew Keane Woods

Andrew Keane Woods is an assistant professor of law at the University of Kentucky College of Law and in the Spring 2017, a visiting professor at the University of Texas School of Law, where he is teaching a class on law and policy in the technology sector.

Professor Woods's teaching and research interests include cybersecurity and the regulation of technology, contract law, international law (both public and private), and empirical legal studies. His scholarship has appeared in the Stanford Law Review, the Harvard International Law Journal, the Virginia Journal of International Law, and the Chicago Journal of International Law. His scholarship has been cited in the Economist, the Wall Street Journal, the Washington Post, Bloomberg, and NPR. Professor Woods is a contributing editor of the LAWFARE blog, and has written for the NEW YORK TIMES, the INTERNATIONAL HERALD TRIBUNE, the FINANCIAL TIMES, and SLATE.

Before joining the faculty of the University of Kentucky, Professor Woods was a postdoctoral fellow at Stanford University (at the Center for International Security and Cooperation and at the Center on Philanthropy and Civil Society) and before that a Climenko Fellow at Harvard Law School. He holds an A.B. from Brown University, *magna cum laude,* a J.D. from Harvard Law School, *cum laude*, and a Ph.D. in Politics from the University of Cambridge, where he was a Gates Scholar.

The Transparency Tax

Transparency is critical to good governance, but it also imposes significant governance costs. Beyond a certain point, excess transparency acts as a kind of tax on the legal system. Others have noted the burdens of maximalist transparency policies on both budgets and regulatory efficiency, but they have largely ignored the deeper cost that transparency imposes: it constrains one's ability to support the law while telling a self-serving story about what that support means. Transparency's true tax on the law is the loss of expressive ambiguity.

In order to understand this tax, this Article develops a taxonomy of transparency types. Typically, transparency means something like openness. But openness about what—the law's obligations? The reasons for the obligations? The actors behind the law? And open to whom? These are different aspects of what we typically lump together and call "transparency," and they present different tradeoffs. With these tradeoffs in mind, we can begin to make more informed choices about how to draw the line between maximal and minimal transparency. Of particular note is the finding that we can demand maximal transparency about the law's obligations without incurring much of the transparency tax. This runs contrary to the soft law literature, which suggests that vagueness about obligation is less costly than the alternative. The Article concludes with a guide for thinking through future transparency tradeoffs.

Panel III
International and European Law

Faculty Discussant: Professor Donald Regan (UM Law School)
Moderator: Jing Geng (Grotius Research Scholar, UM Law School)

- **Thomas Verellen (University of Leuven, Michigan Law School)**: "Federalism and Foreign Relations in the United States and the European Union: Hierarchy versus Pluralism"

- **Giacomo Tagiuri (Bocconi University, NYU)**: "The Cultural Implications of Market Regulation: Does the EU Destroy the Texture of National Life?"

- **Vera Shikhelman (NYU)**: "Access to Justice in the United Nations Human Rights Committee"

Thomas Verellen

Thomas Verellen is a PhD Candidate at the Institute for European Law, University of Leuven, and is currently a Michigan Grotius Research Scholar at the University of Michigan Law School. Thomas holds an MSc in Global Politics from the London School of Economics and an MA in Law from the University of Leuven. His research focusses on the constitutional rules and principles governing the conduct of foreign relations in federal-type polities.

Federalism and Foreign Relations in the United States and the European Union: Hierarchy versus Pluralism

Over the last twenty five years, a paradox has manifested itself at the heart of the European integration project. On the one hand, the EU has been charged with ever greater responsibilities. From a narrowly defined project of market integration, the framers of the EU Treaties have transformed the EU into a polity active in a broad range of policy-making areas, including environmental protection, energy policy, police and judicial cooperation in criminal and private law matters, and so forth. On the other hand, Member States have become increasingly reluctant to share let alone surrender powers to the EU level of governance. The result, political scientists have argued, has been the emergence of a 'New Intergovernmentalism', i.e. a modus of integration in which the scope of the European integration project has expanded in parallel with an increasing grip of Member States on EU decision-making processes (see e.g. Bickerton e.a. 2015).

This paper explores this paradox in one particular area of EU policy- and law-making action: the area of foreign relations or 'external action.' The paper aims to foster a better understanding of the constitutional relationship between the EU level of governance and the Member States in the undertaking of action on the international scene. In particular, it tackles the question of how the EU Treaties, which in a functional sense can be understood as the constitutional charter of a compound EU polity, strive to reconcile unity and diversity in the sphere of EU foreign relations. Further operationalising this objective, the paper examines, firstly, how 'foreign affairs powers' are divided between the EU and its Member States and, secondly, how conflicts between the EU and its Member States in the undertaking of international action are prevented or resolved.

The paper adopts a comparative methodology. By comparing and contrasting the balance between unity and diversity in the sphere of foreign relations in Europe and the United States, the paper firstly examines the constitutional landscape in the EU from an external vantage point, thereby creating a potential for critical assessment. Secondly, the paper explores whether lessons can be drawn from the experience of the United States in this area. The paper advances a two-fold argument. First, in historical terms, it argues that in both polities the relationship between the centre and the member units has undergone a transformation from a paradigm of exclusively federal or EU powers to a paradigm in which powers are shared in principle. Second, in normative terms, and drawing on the US experience, the paper argues that much is to be gained from understanding shared EU powers as concurrent powers. Under this understanding, the existence of constraints ought to be recognised on the exercise of shared powers by the Member States, in particular when the EU itself has undertaken international action. It follows that 'mixed' or joint EU-Member State action should be considered the exception rather than the general rule.

Giacomo Tagiuri

Giacomo Tagiuri is a third year Ph.D. Candidate in Legal Studies at Bocconi University in Milan (expected Spring 2018) and a Visiting Doctoral Researcher at NYU School of Law (September 2016-June 2017). His dissertation, under the supervision of professor Yane Svetiev, investigates the impact of EU Law in specific areas of market regulation that have a cultural (or way of life) dimension.

Giacomo holds a Law degree from the University of Bologna (cum laude) (2011) and a Master of Arts in European Studies and International Economics (with distinction) (2013) from the Johns Hopkins School of Advanced International Studies in Washington DC, where he worked as a research assistant for prof. David P. Calleo. Giacomo is a research fellow at the Center for Constitutional Studies and Democratic Development (CCSDD) in Bologna, collaborates with the ASK (*Arts, Science and Knowledge)* Research Center at Bocconi and assists the editorial team of the Italian journal *Aedon, Online Journal for Law and the Arts*. At Bocconi, Giacomo worked as a teaching assistant for courses in International Law, EU Law and Comparative Public Law.

He previously has researched and published (in English and Italian) in the areas of comparative public law (e.g. J. Frosini, G. Tagiuri, *Il referendum del 1975: quando i britannici decisero di rimanere nella Comunità economica europea*, in *Democrazia rappresentativa e referendum. Il caso del Regno Unito*, Maggioli, 2012), as well as international relations and public policy (*Forging Identity: The EU and European Culture*, Survival: Global Politics and Strategy, 1/2014; *Letter from Italy*, Survival: Global Politics and Strategy, 1/2013). Parts of his dissertation have been presented at the EUI; University of Michigan School of Law Young Scholars Conference (2016); New York University JSD Forum, as well as the Italian Association of Sociology of Law.

The Cultural Implications of Market Regulation: Does the EU Destroy the Texture of National Life?

A persistent set of arguments, both in the academic and the general debate, denounces EU integration not only because of its adverse economic, social or political consequences, but also because of its cultural ones. As markets grow more homogenous and limitless, everyday life looses its national character and citizens are left with a weakened sense of community and identity. In legal scholarship, this argument takes the shape of a denunciation of the free movement decisions of the Court of Justice of the EU and the Commission's competition interventions as they are said to destroy forms of market regulation that have been part of the national fabric for decades and have taken on a certain cultural significance. As a consequence, the argument goes, Europe grows not only more homogeneous but also more illegitimate.

Through three case studies (book pricing rules; forms of entry regulation affecting retail distribution; certain regulated professions) and by employing socio-legal methodologies, my dissertation tries to challenge this narrative, which I label the *culturalist narrative*, by providing a more nuanced account of the relationship between market regulation and culture and a thinner grained description of the impact of EU interventions in certain markets. My empirical claim is that EU law is sufficiently permissive to allow member states to retain and even upgrade their preferred market arrangements: it encourages reflection over the real motivations of national market regulation, sometimes forces amendments, but its impact is rarely purely deregulatory or homogenizing.

In this article – which serves as the first chapter and theoretical framework of my dissertation, I draw from material collected for my case studies as well as contributions coming from various disciplines, to better describe the implications of these forms of market regulation. The question I try to answer is: what are the real concerns that *the culturalist narrative* tries to voice? Or, in other words, what do member states really protect through these rules that the EU supposedly destroys? The rules at stake are about "*how to buy and sell things*" – they regulate who can sell what, where, at what prices and in which places. Beyond their immediate functional import, these rules affect the shape of markets and protect a distinctive dimension of the retail experience. Through them, the State articulates that distinctive experience as an element of local culture, which is offered protection as a democratic response to the demands of citizens. The structure of the chapter is as follows. In the first section, I introduce *the culturalist narrative* and point at its main ambiguities. In the second section, I explore theoretical possibilities on how the law in general and market regulation in particular interact with variously defined notions of culture. In the third section, I define the rules I am studying, I justify why I choose them and try to offer a preliminary conceptualization by isolating the various interests at stake and linking them to the previous discussion. In particular I try to develop conceptual categories about the interests involved that will guide me in the case studies (*Producerist Law; Smallness; the Comforts of Home; Consumer Identities; Moral Limits of the Market; etc.).* Finally I sketch some conclusions by anticipating few findings from the further chapters.

Vera Shikhelman

Vera Shikhelman is an Emile Noël Research Fellow at NYU School of Law, The Jean Monnet Center for International and Regional Economic Law and Justice. Vera is also in the final stages of completing her JSD degree at the University of Chicago Law School. Her research interests include international law, international institutions, decision making, judicial behavior, human rights, courts and procedure. The topic of her JSD dissertation is Decision-Making and Access to Justice in the United Nations Human Rights Committee. Vera applies empirical methodology in her research, and uses both quantitative and qualitative research methods.

Vera has earned her LL.B. degree (magna cum laude) from the Hebrew University in Jerusalem, and her LL.M. (Harlan Fiske Stone Scholar) from Columbia University in the City of New York. During her JSD studies at the University of Chicago she was awarded the JSD fellowship and a research grant from the Pozen Family Center for Human Rights.

Access to Justice in the United Nations Human Rights Committee

Individual access to international institutions is seen as one of the most important developments in international human rights law since World War II. Granting individuals the ability to access international institutions to file complaints against their countries was considered to be especially innovative since it took human rights from the domestic jurisdiction to the international level. Moreover, it recognized individual people, and not only countries, as the possessing certain rights under international law, thus breaking the classical model of international law as solely regulating relations between states.

Even though with time there seems to be an increase in the number of international institutions granting individuals rights to access them, there is a gap in the empirical literature regarding the actual usage of this right. For instance, much more empirical research is needed regarding the questions - who are the main beneficiaries of this right in practice, what are the main difficulties individuals face with accessing international justice, and what can be done in order to make international institutions more accessible to people from all over the world.

This paper uses the individual petitions system under the First Optional Protocol ("OP") to the International Covenant on Civil and Political Rights ("ICCPR") as a case study in order to shed some light on the actual practice of the right to access international justice. The United Nations Human Rights Committee ("HRC"), the treaty body responsible for overseeing the implementation of the ICCPR, is of special interest to researchers since it is a quasi-judicial tribunal that can receive individual communications against 115 states. Although over a billion people have been under the jurisdiction of the HRC since 1977, as of March 2014, only 2,371 individual communications had been brought by petitioners. This single piece of data can in itself pose a grave doubt on the success of the idea of access to international justice in the context of the HRC, or at least trigger further research into this question.

The current paper has two main purposes. The first purpose is to describe and evaluate empirically the right of individuals to access the HRC under the OP, in light of the special goals of this procedure as perceived by the different stakeholders. The second purpose is to make recommendations on ways to improve the access of individuals to the HRC, and to international justice in general. In order to address the first question, the paper uses an empirical mixed methods approach. For the quantitative part of the research, I have constructed an original dataset of the number of the communications brought against different countries in a given year. Additionally, I coded the various political and socio-economic characteristics of those countries. This gives us a picture of who most often uses the individual communications mechanism, and what might be the main obstacles with filing communications to the HRC. Second, I conducted interviews with 32 applicants, lawyers and NGOs that brought (or helped to bring) communications to the HRC. The interviewees were asked questions about their experiences with the process, their difficulties with it, and how they thought that the process could be made more accessible. The combination of the two methods can help us to evaluate the success of the process. In order to address the second purpose and make recommendations about the accessibility of the HRC, I rely both on the empirical findings, and on general literature about access to justice.

The paper finds that there is a significant global inequality in accessing the HRC, since communications are much more likely to be filed against democratic countries with high socio-economic characteristics. Also, there seems to be a problem with the awareness to the possibility of filing individual communications. Another problem with the accessibility of the system is state intimidation of applicants who filed communications to the HRC, and also many procedural problems that stem from the fact that the UN Secretariat (and the HRC itself) is very much under-funded. However, the system is widely perceived as fair, and most of the applicants would recommend others to file communications to the HRC.

Panel IV
Law and Society

Faculty Discussant: Professor Sherman Clark (UM Law School)
Moderator: Tami Groswald Ozery (SJD Candidate, UM Law School)

- **Andrea Freeman (University of Hawai'i, UC Berkeley - visiting professor)**: "Unmothering Black Women: Formula Feeding and the Legacy of Slavery"

- **Doron Dorfman (Stanford)**: "The Fear of 'Disability Con': Backlash and Mistrust in the Shadow of the Law"

- **Karin Carmit Yefet (University of Haifa)**: "Divorce as a Gender Equality Right"

Andrea Freeman

Andrea Freeman is an Assistant Professor at the University of Hawaii William S. Richardson School of Law and is currently visiting at UC Berkeley School of Law. She teaches Constitutional Law, Federal Courts, and Race and Law. She writes in the areas of critical race and class theory, health, economics, and food policy, with a focus on her theory of food oppression. Her article, A Rehabilitative Reparations Approach to Racism Against Credit Card Consumers, was selected for presentation at the 2016 Yale/Harvard/Stanford Junior Faculty Forum. She is a member of the ACLU of Hawaii Litigation Committee, and received the Community Faculty of the Year award in 2015.

Unmothering Black Women: Formula Feeding and the Legacy of Slavery

On May 23, 1946, in the rural southern town of Reidsville, North Carolina, a small miracle occurred. The woman responsible for this miracle was Annie Mae Fultz: a tall, beautiful Black-Cherokee woman who was the deaf and mute mother of six children. Beginning at 1:13am, Annie Mae gave birth, at three-minute intervals, to the world's first recorded identical quadruplets. Against the odds, each of these four strong, tiny girls survived their first few hours and began to grow steadily. Annie Mae's joy at her perfect new daughters was irrepressible, expressed in exuberant debates with friends and relatives at her hospital bedside about possible names for the girls. But Annie Mae's happiness was short-lived.

Fred Klenner, the White doctor who delivered the quads, began testing his controversial theories about Vitamin C on the girls from their birth. Klenner also named the girls himself, after his wife, sister, aunt, and great-aunt. Finally, Klenner negotiated with formula companies seeking to break into the untapped market of Black mothers by becoming the newly famous Fultz Quads' corporate godfather. St. Louis' Pet Milk Company won the honor. The deal Klenner made set in motion a series of events that would lead Annie Mae to lose, not just the right to name her girls, but her beloved girls themselves.

Catalyzed by Pet Milk's groundbreaking advertising campaign, formula marketing to Black women increased over the next few decades. Simultaneously, popular images of Black women breastfeeding decreased, both reflecting and encouraging the actual decline in the number of Black children who were breastfed. By 2008, only 59% of Black women ever tried breastfeeding, compared to 80% of Latina mothers and 75% of White mothers, with only 12% of Black mothers still breastfeeding at 6 months, compared to 26.3% of Latina mothers and 24.3% of White mothers. These disparities in breastfeeding rates correspond with a number of other racial health disparities among women and children, the most significant of which is infant mortality, which strikes three times as many Black babies as White babies.

Racial disparities in breastfeeding represent first food injustice, which is a form of food oppression. Food oppression is facially neutral food-related law, policy, or government practice that creates health disparities along race, gender, and class lines. Cultural myths about personal responsibility that ignore structural determinants of food choice, as well as racial stereotypes, make these disparities appear natural. Therefore, to reverse the effects of food oppression, attempts to reform law and policy must be accompanied by efforts to change societal perspectives on food and racial justice.

Building on my previous paper exploring the laws and policies that create and perpetuate first food injustice, this Article interrogates the problem of racial disparities in breastfeeding by looking at the history of infant feeding from a race and class perspective and engaging in an in-depth analysis of how marketing and racial stereotyping affect societal and cultural perceptions of who should be breastfeeding. The Article argues that formula marketing, popular culture, and racial stereotypes work together to discourage Black women from breastfeeding and create a climate of indifference to the laws and policies that support the formula industry and cause disproportionate racial harm.

The story of the Fultz Quads punctuates the Article, illustrating how the racial project of selling formula to Black women relies on the exploitation of Black women and girls, while bringing to light the extraordinary lives of these exceptional women. In its final part, the Article examines the extent and potential of constitutional protections of breastfeeding, and surveys international laws designed to address similar problems. The Article concludes by offering a blueprint for both social and legal reforms that could, in conjunction, reduce racial disparities in breastfeeding and their concomitant harms.

Doron Dorfman

Doron Dorfman had been a practicing attorney in Israeli law firms and NGOs for four years before completing his JSM (Masters in Law) and continuing as a JSD candidate at Stanford Law School. Doron's empirical research employs a mixed methods approach, combining quantitative and qualitative methods, to explore sociological and psychological processes related to law and policy; from procedural justice, to trust and mistrust, to social identity and reproduction. Doron has been a disability rights advocate for over a decade, gaining practical and academic experience in the field of disability studies. His award-winning scholarship has been published in such journals as Law & Social Inquiry and Columbia Journal of Gender & Law.

The Fear of "Disability Con": Backlash and Mistrust in the Shadow of the Law

According to the U.S. Census Bureau one in every five Americans has some kind of disability, making this group the largest minority in America. People with disabilities enjoy a robust body of legislation aimed at illustrating and protecting their rights, including the omnibus Americans with Disabilities Act, which adopted a "cross disability approach" and covers people with mental, physical, sensory and developmental disabilities (just to name a few). Nevertheless, disability studies scholars argue that there is something that occludes disabled individuals from participating fully in the labor market, education and society. This project helps to delineate and explain the invisible barriers confronted by Americans with disabilities when trying to obtain their accommodations and rights. These invisible barriers have to do with the public suspicion of malingering and abusing disability law.

I argue that this perceived abuse caused a "popular backlash" against disability rights, which mirrors in a lot of ways what was termed the "Supreme Court backlash" and the Court's "hostility towards disability-related suits," yet has not been fully addressed in the literature. This backlash manifests in suspicion and negative attitudes towards people with disabilities among courts, the media and consequently in public perceptions and interactions between disabled and non-disabled members of society.

This project examines everyday interactions with disability in places laypeople pass by almost daily: parking lots, office buildings, airport terminals, corridors of schools and universities and many more. It highlights tacit judgments about the authenticity of people claiming disabilities by passers by. Laypeople have unstated assumptions regarding the "true nature" of others' disabilities and the perceived motives and legality behind their actions in utilizing disability law. These situations fall under what I call the "public perception of disability con," i.e., the fear of people taking advantage of accommodations and disability-related rights by faking disabilities. This suspicion discourages people with disabilities from claiming and maintaining their legal rights. Thus it prevents their equal participation in social life.

Instances when non-disabled people pretend to have disabilities may occur in myriad everyday life situations. People may pretend to be disabled in order to get some kind of benefit or "perk" such as getting a favorable parking spot, having privileges with regard to their pets (which they present as service animals), getting on board flights faster, earning extra time on exams in educational settings, skipping lines at theme parks or at governmental offices, or claiming governmental assistance in the form of Social Security disability benefits. Similar concerns can also happen when persons with disabilities exaggerate their conditions in order to get benefits.

This is the first study that seeks to empirically assess the phenomenon of the public suspicion of disability con. It attempts to answer the following questions: (1) How widespread is the phenomenon of public perception of disability con among the American public and how does it manifest? (2) What everyday life situations and circumstances produce more suspicion? (3) How does the suspicion of disability con affect people with disabilities? (4) Does it prevent them from maintaining their legal rights?

I am using a mixed methods approach – collecting data via a survey of a representative sample of the U.S. population to answer the first two research questions, alongside one-on-one interviews conducted with people with disabilities, to answer the last two questions. The survey (conducted with a sample of 1,085 respondents) aims to reach the general public (disabled and non-disabled people) and assess their perceptions about the misuse of disability rights and their reactions to situations that are prone to the disability con. The interviews were conducted with a different research population, 43 disabled people who live independently in the SF Bay Area, in order to explore how the fear of disability con affects their lives and psychological strategies of claiming and negotiating rights. Ultimately, I offer policy recommendations to improve the lives of disabled Americans.

Karin Carmit Yefet

Dr. Karin Carmit Yefet is an Assistant Professor at University of Haifa Faculty of Law. She earned her LL.M. and J.S.D from Yale Law School, and completed the LL.B. & LL.M Honors program in Bar-Ilan University *summa cum laude*. She was recently nominated by the Israeli Government as a chief consultant to the Public Commission on international humanitarian law issues, clerked in the Israeli Supreme Court, and won several prestigious scholarships and awards, including the Israeli Parliament prize, the Cegla Prize for the "Best Article" of junior scholars in Israel, the Justice Cheshin Prize for the Best Junior Scholar in Israel, and the Fulbright fellowship. Her scholarship on feminist legal theory and family law has been published in leading journals and selected twice for the Harry Krause International Workshop for emerging family law scholars and for the Stanford-Penn International Junior Faculty Forum.

Divorce as a Gender Equality Right

The laws of marriage have long served as among the chief vehicles for cultivating women's social and economic dependency on men and inflicting status-harm on women as a class. The laws of divorce, especially the fault regime that has dominated marital dissolution laws for much of American history, have likewise functioned to maintain gender hierarchy and reify sex-role stereotypes. Even today, the egalitarian marriage is still more a myth than reality. American women in the twenty-first century routinely encounter – and struggle against – structural inequities in their marriages, which permeate all gender relations and impede women's full citizenship stature.

Because of the role marriage has played in fostering both private and public patriarchy, feminists have insisted that equality in education, politics, and the workplace cannot not be fully realized without corresponding changes in the gender hierarchy of the marital family. Accordingly, many liberal feminists have advocated egalitarian marriage, which would "encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor," as a crucial step towards rectifying women's continuing subordination and economic vulnerability. More radical feminist family theorists, led by Martha Fineman, have gone so far as to call for the abolition of marriage altogether.

Neither solution, however, is adequate. The first – egalitarian marriage – is a practical impossibility for the foreseeable future: it would require abolition of gender hierarchy where it is most entrenched. The second - abolition of marriage – is misguided: it would deprive individuals and society of the recognized benefits of marriage without guaranteeing women legal protection against subordination in intimate relationships.

Instead, I develop a modest, yet essential, legal innovative construct – a constitutional right to unilateral, no-fault divorce. The substance of this right is not purely negative. I capture its affirmative dimension with the appellation "marital freedom." The right to marital freedom is imperative to combat marital subordination, one that is derived from multiple interpretations of America's constitutional commitment to gender equality. I develop the sex equality argument for the right to divorce in three Parts.

Part I presents the constitutional edifice of gender equality. It begins with the Court's conceptualization of the Equal Protection Clause in formal terms, using the "antidiscrimination" principle, and then considers several competing, substantive visions of constitutional equality, most prominent among these theories is the "antisubordination" principle.

Parts II and III examine how the substantive and formal approaches to gender equality apply to the right to divorce. Part II employs the substantive theories of gender equality to the divorce context. It analyzes how laws that effectively compel wifehood by limiting exit injure women, showing that state action is implicated even when a husband's subordination of his wife appears to be "private." First, it opens with a historical account, examining how the common law of marital status fostered the unequal position of women in marriage, how divorce restrictions served to lock women in patriarchal relationships, and how leading feminists of the era recognized the right to divorce as a substantive gender equality imperative. Second, it documents the inequalities that plague modern marriages and continue to compromise women's full

citizenship, considering sociological evidence on the division of household labor, women's lesser economic power and decision-making authority, and their heightened physical vulnerability. Third, it analyzes women's divorce accounts to establish that most women who seek marital freedom do so to escape inegalitarian relationships they find demeaning and to expose divorce as an experience that enhances women's independence and capacities for personal self-government. I conclude that the right to divorce is an important antisubordination remedy that substantially enhances women's control over their own lives, and over their status, more generally, as equal citizens.

Finally, Part III constructs a constitutional argument for marital freedom under the Supreme Court's formal, antidiscrimination-oriented jurisprudence of the Equal Protection Clause. First, I show that divorce-restrictive regulations historically were animated by discriminatory purposes and that fault grounds to this day are judicially applied in ways that raise equal protection concerns. Second, I show that the contemporary movement to restrict divorce repeats history: its impetus is to shore up the traditional family structure based on constitutionally-proscribed views that subordinate women to the roles of wives and mothers.

This makes the access to unilateral no-fault divorce a fundamental right for women attempting to navigate in the world as equals and an imperative for a constitutional system committed to disestablishing gender hierarchy.

Panel V
Empirical Legal Research

Faculty Discussant: Professor J J Prescott (UM Law School)
Moderator: Orli Oren-Kolbinger (Grotius Research Scholar, UM Law School)

- **Monika Leszczyńska (NYU)**: "Think Twice Before you Sign! An Experiment on the Cautionary Function of Contractual Formalities"

- **Emily Satterthwaite (University of Toronto)**: "Entrepreneurs' Legal Status Choices and the C Corporation Survival Penalty"

- **Greg Buchak (University of Chicago)**: "Does Competition Reduce Racial Discrimination in Lending?"

Monika Leszczyńska

Monika Leszczyńska is a Post-Doctoral Global Fellow at the New York University School of Law and a Visiting Researcher at the Max Planck Institute for Research on Collective Goods in Bonn (Germany). She received a master's degree in law from the Adam Mickiewicz University in Poznan (Poland) and an LLM degree in international and European business law from the Ludwig Maximilian University in Munich (Germany). She earned her PhD degree in law (*summa cum laude*) from the University in Bonn for a doctoral thesis entitled "Behavioral effects of corporate governance reforms and their legal implications". During her doctoral studies, she was a member of the International Max Planck Research School "Uncertainty" and a Research Fellow at the Max Planck Institute for Research on Collective Goods. There she learned to design, program and conduct economic experiments as well as analyzed experimental data to answer legally motivated questions.

Monika combines her legal education and professional experience with experimental economics approach to provide evidence-based arguments to the ongoing legal debates. For instance, in her research on affirmative action and group dynamics she described behavioral consequences of a gender quota rule for cooperation between group members. She also investigated experimentally the impact of two types of contracts – fixed-term and open-ended – on individual behavior showing that seemingly equivalent contract types might differently influence a contractual relationship. In a most recent research project, Monika has examined the impact of contractual formalities, such as a handwritten signature, on impulsive behavior. Monika aspires to communicate her projects to the legal and experimental community. One example of this approach is her study on gender quotas, which have yielded one article for an experimental journal (published in the *Journal of Economic Psychology*), and another for a primarily legal audience (revised and resubmitted to the *European Business Organization Law Review*).

Think Twice Before You Sign! An Experiment on the Cautionary Function of Contractual Formalities

Every day, we provide our consent to a large number of online agreements. The widespread use of the internet not only made already existing services and goods more accessible but also created many new ones. This digital contractual environment poses challenges to both consumers and legal scholars. For instance, it is easier for companies offering their products and services online to distract consumers or to exploit their impatience (Tasker and Pakcyk 2008). These properties of online contracting raise many legal dilemmas. One very important concern is to which extent, *if at all*, digital contract formation fulfills the cautionary function of acting "as a check against inconsiderate action" (Fuller 1941, p. 800). This purpose has been traditionally believed to be served by contractual formalities (e.g., having a contract in writing with a handwritten signature). The issue of the cautionary function is of a great importance to legal scholars for at least three reasons. First, if consumers deliberate so little and are prone to make hasty decisions when entering into online agreements, should that be taken into consideration by courts when evaluating abusive contractual practices? Second, it is unclear whether a contractual formality in the form of a paper contract actually does fulfill its cautionary function. Since certain contract types are still required to be signed on paper in some legal systems (e.g., consumer credit contracts in Germany), it is important to investigate whether the additional costs of a paper form are justified by its effectiveness in preventing impulsive decisions. Finally, if a handwritten signature indeed leads people to consider their actions more carefully than when clicking on the "I agree" button, could we then design the online form in a manner that would make it equivalent to the paper form in terms of its cautionary function?

Scholars have claimed that a mouse click does not create a similar "psychological barrier" (Einsele 2015) or signal the same importance of a decision as a handwritten signature (Hillman and Rachlinski 2002, Moringiello 2005). This assumption although fundamental has never been tested before. To resolve some of the legal dilemmas related to the cautionary function of online and paper contracting, I conducted experimental research to test whether signing on a dotted line leads people to make less impulsive contractual decisions compared to confirming with a mouse click. In a controlled laboratory experiment, I compared four forms of concluding a contract – clicking "OK", typing in one's name, entering a PIN code (which should reflect a qualified e-signature) and handwritten signing. I examined how these different forms of confirming a decision influence intertemporal choices. More specifically, I investigated whether handwritten signing indeed leads participants to choose more patiently. I found that individuals are more impulsive when making their decision by clicking on "OK" or by typing in one's name than when confirming their decision by a handwritten signature. No differences were observed between traditional written form and the one with a PIN code. Further investigation of underlying mechanisms of this observation might provide a basis for designing equivalent online forms of concluding a contract which would fulfill the cautionary function as effective as a written form but would be yet simpler than a qualified e-signature.

Emily Satterthwaite

Emily Satterthwaite is an Assistant Professor at the University of Toronto Faculty of Law. She focuses on tax law, and uses experimental, qualitative and quantitative empirical methods to study how the design of elective provisions in tax statutes and tax agency enforcement policies plays out "on the ground," with a particular focus on entry-level entrepreneurs and self-employed individuals. Her research has been published or is forthcoming in the Florida Tax Review, McGill Law Journal, Pittsburgh Tax Review, Public Finance Review, and Queen's Law Journal. Emily received a B.A. from Yale College, a J.D. from Stanford Law School, a LL.M. from the University of Toronto Faculty of Law, and a M.A. (Economics) from the University of Toronto. Prior to joining the Faculty of Law in 2014, she served as the Assistant Director of the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School, where she supervised upper-year law students in their representation of low-income entrepreneurs. Emily also worked for three years as a tax associate at Skadden, Arps, Slate, Meagher & Flom LLP in the New York and Chicago offices.

Entrepreneurs' Legal Status Choices and the C Corporation Survival Penalty

Over 800,000 enterprises are born in the United States each year, creating approximately four million new jobs. The ability to easily and rapidly start a new business is a foundation of the American Dream. However, a crucial step in forming an enterprise appears to have become more complicated in recent years: the process of choosing a legal status. In the aftermath of the limited liability company ("LLC") revolution of the late 1980s, a variety of exotic new business entity statutes were adopted by state legislatures. The choice became even more nuanced when the federal tax classification of the LLC became unrestrictedly elective. For entry-level entrepreneurs, the complexity of the legal status choice is frequently cited as a source of confusion and frustration.

The paper begins by identifying a fundamental tension between two stories about choice-of-legal-status in the theoretical business organizations literature. On the one hand, Larry Ribstein and others have offered an "efficient contracting" story: a robust range of legal statuses can be welfare-enhancing for smaller and larger businesses alike. In particular, more legal statuses means that entrepreneurs with limited resources can customize their business relationships at lower cost. This permits them to select away from entities that fit poorly with their business objectives. The efficient contracting story predicts that, on average, legal status should not affect firm survival outcomes when entrepreneurs are choosing rationally among competing legal statuses.

On the other hand is a "regressive complexity" story. Scholars critical of "entity proliferation" are skeptical that the benefits of contractual customization can outweigh the aggregate costs of legal complexity. They express concern that entrepreneurs at the bottom of the sophistication and resource spectrum will be disproportionately harmed. The harm may come in the form of confusion and stress, but also through costly mismatches between an entrepreneur's objectives and her chosen legal status for her business. Contrary to the efficient contracting story, the regressive complexity story predicts that legal status may affect firm survival outcomes for a particular cohort of entrepreneurs: the under-resourced.

What is at stake in assessing these two competing stories about expanded choice of business legal status? This paper answers that question by focusing on an overlooked issue in the context of new firm formation: distributive justice. As a legacy of having few sources of reliable data, the empirical literature on entrepreneurs' choice of legal status is still in its infancy. In particular, how entrepreneurs with varying measures of financial, social, or informational resources fare in choosing a legal status for their enterprise is an open question.

To begin to fill this gap, the paper exploits a large and recently-released data set on entrepreneurs and their firms' performances over time. The Kauffman Firm Survey ("KFS") collects legal status, owner, financing, sector, employment and other firm-specific data from a national panel of nearly five thousand enterprises that were formed in 2004 and followed through 2011. The paper uses the KFS to evaluate the predictions of the efficient contracting and regressive complexity stories, and presents four key results. First, controlling for a range of entrepreneur and firm characteristics, enterprises organized as C corporations are approximately 11 percent more likely to fail by their eighth year than enterprises with other legal status classifications. Second, this C corporation survival penalty is concentrated exclusively on a subset of less-

sophisticated C corporations characterized by the absence of both (a) venture capital investors and (b) contingent equity compensation (stock option) plans for their employees. Third, being non-white or foreign-born is significantly associated with an entrepreneur's choice to form a less-sophisticated C corporation. Fourth, there is a high degree of correlation (0.93) between less-sophisticated C corporations and C corporations that met the eligibility criteria for electing into tax-advantaged S corporation status, suggesting that they may have intended but failed to file the paperwork to make the election. Taken together, these results cast doubt on the efficient contracting story about legal status choice and provide evidence that the complexity costs of organizing a new business can be distributionally regressive. The paper concludes by discussing possible policy implications, including a proposal to level the playing field for less-sophisticated entrepreneurs by switching the default tax classification for corporations from subchapter C to subchapter S.

Greg Buchak

Greg Buchak is a JD/PhD student, getting his PhD in Financial Economics from the University of Chicago Economics Department and the Booth School of Business. His research interests focus on the financial system and how its legal institutions can impact outcomes in the real economy, particularly in the context of consumer and household finance. Recent projects include studying whether banking regulations that increased competition led to less mortgage lending discrimination, and whether regulatory enforcement actions against banks following the financial crisis led to increased entry of non-bank lenders outside the traditional regulatory apparatus. He is originally from Philadelphia. As an undergraduate, he studied mathematics and finance at the University of Pennsylvania, and worked at Goldman Sachs before starting his JD/PhD.

Does Competition Reduce Racial Discrimination in Lending? (Joint work with Adam Jorring)

As recently as the mid-1990s, African American mortgage applicants were roughly 40% more likely to have their applications rejected than comparable white applicants. This gap exists despite the fact that the Fair Housing Act was passed more than 25 years earlier specifically to combat race-based lending discrimination. Yet by the early-2000s, this gap shrank by nearly one half. While there is still much to improve, this rapid change between the mid-1990s and early-2000s shows remarkable progress in reducing discrimination. This paper seeks to root out the reason for this change and explore the extent to which it might be further replicated to reduce discrimination in mortgage lending and in other markets.

Using data from nearly five million mortgage applications, this paper shows that congressional action was indeed responsible for the decrease in mortgage lending discrimination, but interestingly, it was not through the enactment of a new anti-discrimination law. Rather, in 1994, congress passed the Interstate Banking and Branching Efficiency Act (IBBEA). The IBBEA, implemented by states over the mid-1990s and early-2000s, allowed out of state banks to open branches across state lines. As banks opened new branches across state lines, local lending competition increased. Non-economic discrimination is costly, and so in the face of more competition, lenders will tend to lose market share or alter their behavior to discriminate less.

This paper takes advantage of the staggered implementation of IBBEA to estimate the causative impact that increased competition---particularly the competition increases coming from the IBBEA---had in reducing lending discrimination, and to test the channels through which it occurred. The paper finds that following the relaxation these laws, increases in local lending competition led to the narrowing of approval differentials between comparable white and African American borrowers by nearly one half. The reduction was driven partially by incumbent banks altering their lending policies, and partially by the entry of new banks that discriminated less than the incumbents. Moreover, the paper shows that discriminating banks faced greater costs than non-discriminating banks when competition increased: Incumbent banks that were less likely to lend to African American applicants lost more market share than other incumbents. While both entry and competitive pressures significant reduced racial discrimination in lending, the results suggest that neither force completely eliminates it, suggesting room for both market-based and direct approaches targeting discrimination.

The results here suggest that policy makers looking to combat racial discrimination in markets should view policies that increase competition as one of many tools at their disposal. Competition as a discrimination-reduction tool can be especially effective at filling in holes in direct regulation particularly where discrimination can be difficult to prove in court. A regulator may lack the statistical power to show conclusively that a small bank making only a few loans per year is engaged in discrimination even when it is in fact discriminating. The entry of a larger, well-monitored bank can put competitive pressure on the smaller, poorly monitored bank to discriminate less or lose market share. This economic punishment for discrimination is immune to the statistical proof problems that a regulator may face, and as shown in this paper, is indeed a potent force. This implies that a combination of market-based and direct regulatory interventions can go a long way to reduce discrimination.

Generalizing to other markets, regulators considering how to regulate new technologies like Uber and Airbnb should consider the anti-discriminatory role these competitors can play in their respective markets.

Panel VI
Law and Technology

Faculty Discussant: Professor Margo Schlanger (UM Law School)
Moderator: Stavros Makris (Grotius Research Scholar, UM Law School)

- **Emily Berman (University of Houston)**: "When Database Queries are Fourth Amendment Searches"

- **Asaf Lubin (Yale Law School)**: "'We only Spy on Foreigners': The Myth of a Universal Right to Privacy and the Practice of Mass Extraterritorial Surveillance"

- **Yoni Har Carmel (Haifa University)**: "Reshaping Ability Grouping Through Big Data"

Emily Berman

Emily Berman is in her third year as a tenure-track member of the faculty at the University of Houston Law Center, where she teaches and writes about Constitutional Law, National Security Law, and Foreign Affairs Law. Prior to joining the UHLC faculty, she spent two years as a Visiting Assistant Professor at Brooklyn Law School. Before entering academia, Berman clerked for the Hon. John M. Walker, Jr. of the Second Circuit Court of Appeal, spent four years as Counsel in the Liberty & National Security Program at the Brennan Center for Justice, and completed a one-year Furman Fellowship at New York University School of Law. She received both her J.D. and her LL.M. in International Law from New York University School of Law, and her A.B. from Duke University.

When Database Queries are Fourth Amendment Searches

The Fourth Amendment regulates the government's investigative activity by imposing limits on information collection. When that collection qualifies as a "search" or "seizure"—i.e., when it violates a "reasonable expectation of privacy"—the Fourth Amendment normally requires the government to secure a warrant from a neutral magistrate, based on probable cause, that identifies the places to be searched and the things to be seized with particularity. There are two circumstances, however, in which these restraints do not apply—warrant-requirement exceptions and what I call "Fourth Amendment exemptions." In the first set of cases, the government satisfies Fourth Amendment demands merely by demonstrating that the collection was "reasonable." In the second, the collection violates no reasonable expectation of privacy, so the Fourth Amendment simply does not apply. The combination of warrant-requirement exceptions and Fourth Amendment exemptions allows the government to collect an enormous volume of data with no demonstrated connection to crime or specific intelligence needs.

Both courts and commentators have recognized that the scope of the government's collection authority raises significant privacy concerns, the conventional response to which has been to suggest modifications to the Fourth Amendment's regulation of data collection. Collection, however, is only part of the problem. There are also ways to use this voluminous quantum of data that threaten individual privacy. Yet so long as information is collected lawfully, the Fourth Amendment currently has nothing to say about how it is employed.

This Article argues that Fourth Amendment doctrine must do more than heed commentators' calls for collection-focused reform; it must also abandon its laissez-faire approach to the use of information. Reform of collection rules—while important—cannot fully address privacy threats that emanate directly from the use of information. In particular, collection reform cannot eliminate what Professor Daniel Solove calls the "aggregation problem:" By aggregating many bits of information—each of which may come from a different source—the government is able to extract insights that it could not have gleaned from the isolated bits of information alone. In effect, the whole equals more than the sum of its parts. Yet because the Fourth Amendment fails to restrict information use, the government may extract insights from this data free from constitutional constraints.

To address the aggregation problem, I contend that some uses of data aggregation should be considered "searches" subject to constitutional limits. Specifically, this Article focuses on one such tool for extraction: database "queries" about particular U.S. persons. When such queries are reasonably likely to expose knowledge discoverable only by aggregating multiple pieces of data, they can represent an intrusion on individual privacy equally as problematic as any home search or wiretap. They should therefore be recognized as "searches" and regulated accordingly.

This Article will proceed in four parts. Part I will illustrate the breadth and volume of information that the government may lawfully collect. Part II turns to Fourth Amendment doctrine, first explaining how warrant-requirement exceptions and Fourth Amendment exemptions so often render inapplicable the constraints traditionally imposed on searches and seizures, and then exploring the powerful investigative tool this collection authority represents in light of the dearth of Fourth Amendment use restrictions. In Part III, I make the case for treating some queries as searches and explain how the Foreign Intelligence Surveillance Court's (FISC)

jurisprudence regulating government surveillance programs can provide a model for implementing this doctrinal shift. As I have argued elsewhere, the FISC has at times imposed limits on database queries that, while not explicitly based on constitutional foundations, were clearly motivated by Fourth Amendment-related concerns such as individual privacy and freedom from arbitrary government intrusions. In devising a means of imposing on database queries requirements for ex ante review, cause, and particularity in the surveillance context, the FISC has provided a blueprint for what a broader Fourth Amendment use-restriction regime might look like. Part IV then explains why the use restrictions I advocate must be constitutional requirements, rather than simply statutory or regulatory rules. The Article will then briefly conclude.

Asaf Lubin

Asaf Lubin is a J.S.D. Candidate at Yale Law School and a Visiting Fellow with the School's Information Society Project. His doctoral research focuses on the regulation of intelligence under international law, with particular emphasis on the effects that technological advancements have had on the practice of espionage and the right to privacy in an age of mass governmental surveillance. His work draws on his experiences as a former intelligence analyst, Sergeant Major (Res.), with Israeli Intelligence. as well as his current fellowship year at Privacy International (PI), a London-based NGO that works to advance domestic and international policies aimed at strengthening effective privacy protections and data regulations while curtailing illegal surveillance. Prior to his doctoral studies, Asaf completed a dual degree in Law and International Relations (LL.B./B.A) at Hebrew University of Jerusalem in Israel and a Master's Degree in Law (LL.M.) at Yale Law School. He additionally attended the Hague Academy of International Law, interned for the International Criminal Court for the former Yugoslavia, worked for the Turkel Public Commission of Inquiry, and served as an articled clerk for the International Law Division of the Israeli Ministry of Foreign Affairs.

We Only Spy on Foreigners: The Myth of a Universal Right to Privacy and the Practice of Mass Extraterritorial Surveillance

The digital age brought with it a new epoch in global political life, one neatly coined by Professor Howard as the "*Pax Technica*". In this new world order, Government and industry are "tightly bound" in technological and security arrangements which serve to push forward an information and cyber revolution of unparalleled magnitude. While the rise of information technologies tells a miraculous story of human triumph over the physical constraints that once shackled him, these very technologies are also the cause of grave concern. Intelligence agencies have been recently involved in the exercise of global indiscriminate surveillance, which purports to go beyond their limited territorial jurisdiction, and sweep in "the telephone, internet, and location records of whole populations". Today's political leaders and corporate elites are increasingly engaged in these kind of programs of bulk interception, collection, mining, analysis, dissemination, and exploitation of foreign communications data, that are easily susceptible to gross abuse and impropriety.

While the human rights community continues to adamantly uphold the myth system of a universal right to privacy, in actuality the *Pax Technica* has already erected a different operational code in which "our" right to privacy and "theirs" is routinely discerned. This distinction is a common feature in the wording of electronic communications surveillance laws and the practice of signals intelligence collection agencies, and it is further legitimized by the steadfast support of the laymen general public.

In this piece I will offer some push back to this human rights agenda, trying to justify, in a limited sense, certain legal differentiations in treatment between domestic and foreign surveillance. These justifications, as I will show, are grounded in practical limitations in the way foreign surveillance is conducted both generally, and in the digital age more specifically. I will further make a controversial claim, that in fighting this absolutist battle for universality, human rights defenders are losing the far bigger war over ensuring privacy protections for foreigners in the global mass surveillance context. Accepting that certain distinctions are in fact legitimate, would create an opportunity to step outside the bounded thinking of a one-size- fits-all European Court of Human Rights surveillance jurisprudence, and would allow a much needed conversation on what tailored human rights standards might look like for foreign surveillance activities.

My analysis proceeds in three parts. In the first section of my paper I examine the myth system and the operational code surrounding foreign surveillance. I compare the arguments raised by the vast majority of the international community and legal scholarship as they relate to privacy protections and the principle of non-discrimination, and compare them with the vast practice of States in the organization of their foreign surveillance apparatuses. I then present the way this debate is reflected in a ground-breaking case, currently pending, before the ECtHR surrounding GCHQ-NSA global mass surveillance programs.

In the second section of the paper, I shift the focus to various arguments that have been raised in the literature to justify a differentiation in legal treatment between surveillance at home, and surveillance abroad. I will first examine claims from the *political right* which seem to suggest that privacy in the digital age has no intrinsic value of its own, or that it should not be obligatorily applied in an extraterritorial setting. I will then address claims from the *political left*,

who have erroneously focused their attention solely on historical biases to discredit the differentiation. I will propose, instead, three new arguments in defence of the need for establishing different legal regimes for domestic and foreign surveillance: (1) disparity in the political-jurisdictional reach of State agencies; (2) disparity in the technological reach of State agencies; and (3) disparity in harms from a potential abuse of power.

Having established that setting different human rights regimes for domestic and foreign surveillance is something that States not only do, but something that they *ought to do*, the final section of the paper offers a preliminary proposal for a new human rights framework for extraterritorial mass surveillance programs, one which bridges the gap between the practice of the spooks and the of deep-seated commitments human rights organizations.

Yoni Har Carmel

Yoni Har Carmel is a PhD student at the Haifa Center for Law and Technology, writing his dissertation under the supervision of Prof. Niva Elkin-Koren (Haifa Faculty of Law) and Prof. Michal Yerushalmy (The Institute of Research and Development of Alternatives in Education). Yoni's research focuses on on the intersection of law, technology, and education, in the digital age from legal and pedagogical perspectives.

Reshaping Ability Grouping Through Big Data
(Joint Work with Tammy Harel Ben Shahar)

Ability grouping affects millions of students in the country daily. It shapes aspects of schooling that are crucially important for students: the curriculum they study, the resources they receive, the teachers who educate them, and the peers with whom they interact. Critics of ability grouping insist that ability grouping reinforces educational inequalities, directing students from racial and ethnic minorities or from poor families to lower tracks in which they receive inferior schooling. In light of the biases that persistently plague traditional ability grouping, the recent introduction of big data technologies in schools, and their utilization for ability grouping (Data Driven Ability Grouping: DDAG) offers significant promise. It can potentially remove prejudice from educational decisions, offsetting implicit biases that teachers may unknowingly hold. This Article examines the promises and challenges that DDAG holds in terms of equality in educational opportunity, and the ways in which law can intervene in order to ensure equal opportunity.

EVAAS (Education Value-Added Assessment System) is a data based system that uses algorithms for predicting students achievements and assigning them into different tracks in eighth grade mathematics. In a recent study, teachers using EVAAS reported that the algorithm assigned students to a high track that would otherwise not have been identified as suitable, and increased shares of children from racial minorities and low socioeconomic status in the program. Despite these encouraging findings, DDAG may also create unique challenges in terms of educational equality. Studies concerning predictive analytics in other domains (e.g. crime prevention) suggest that instead of eliminating biases, algorithms recreate them, because the biases are embedded in the historical datasets the algorithms use for training. Additionally, students from privileged backgrounds have better access to digital devises outside school, and are more digitally literate, and are therefore likely to have a better digital profile than their disadvantaged peers. Finally, DDAG may create new classes of children who are systematically unfairly disadvantaged.

The fact that DDAG is believed to be scientific makes biases in it especially severe because it may be used justify inequality, and because it is almost impossible to challenge. In the educational context, this is especially troubling because in addition to assessing students' abilities, the algorithmic predictions also constitute her ability by affecting the quality of instruction she receives, the content of education, the level of peer effect, teachers' expectations of her and her own self-expectations.

After discussing the promises and challenges of DDAG, the Article argues that existing equal protection doctrines – intentional discrimination, disparate impact and rational basis test – cannot address the challenges of data driven ability grouping. Instead, the solution lies in integrating technological solutions and legal regulation, both of which must be performed when designing the algorithms.

The nature of algorithms, that enables designers to control the attributes taken into consideration, their weight, and the result (e.g. how many members of a certain category are accepted into the course) suggests that the involvement of legal and normative considerations at the stage of design can be effective in improving the outcomes in terms of equality. In traditional assignment

decisions performed by humans it is almost impossible to impose rules concerning which data to use (and which to disregard) and to assign specific weight to each piece of information, and biases are unavoidable. Thoughtful design of algorithms may be able to overcome these.

Information scientists have begun seeking technological solutions to algorithmic discrimination. These include removing suspect attributes (such as race or gender) from the datasets and manipulating historical datasets by removing biased decisions. Additionally, algorithms may be able to completely reshape grouping by replacing the traditional criterion of academic performance with other attributes that we were previously unable to ascertain, such as different learning styles. Grouping according to these attributes may achieve effective teaching without creating racial and class segregation.

The technological solutions, however, involve numerous normative decisions, that cannot be divorced from legal doctrine. Law determines which classes are protected; whether unequal outcomes constitute an actionable wrongdoing; and whether affirmative action is permissible. These normative decisions must inform the efforts of algorithmic design. The Article therefore offers a practicable framework for the integration of legal and technological solutions for ability grouping in the information era.

Panel VII
International Law

Faculty Discussant: Professor Steven Ratner (UM Law School)
Moderator: Yahli Shereshevsky (Grotius Research Scholar, UM Law School)

David Hughes (Osgood Hall Law School): "The Development and Use of Informal Complementarity"

Chris O'Meara (UCL): "The Relationship Between National, Unit and Personal Self-Defence in International Law: Bridging the Disconnect"

Michael Da Silva (University of Toronto): "The International Right to Health Care: A Legal and Moral Defense"

David Hughes

David Hughes is a Ph.D. candidate at Osgoode Hall Law School in Toronto, Canada. He holds a B.A. from Queen's University, a LL.B from the University of Leicester, and a LL.M from University College London. Before beginning his doctoral studies, David worked as a lawyer with the UN High Commission for Refugees and the Council of Europe as well as grassroots NGOs both in Europe and in Jerusalem. David's time in Jerusalem inspired his doctoral research which looks at how international law is used as a diplomatic tool or strategy within the Israeli-Palestinian conflict.

The Development and Use of Informal Complementarity

States that engage in the use of force often seek to legitimize their actions, both *jus ad bellum* and *jus in bello*, through appeals to international law. Uses of force are defined as constituting self-defence, they are held to be proportionate responses to an identified threat, targets are defined as legitimate military objectives, and the appropriateness and legality of a particular munition or means of attack is asserted. States have long appealed to the language, the prescriptions, and accommodating interpretations of international law – formally and rhetorically – as a means of self-endorsing the virtue of their actions within instances of international and non-international armed conflict.

Equally, non-state actors, opponents of a military action, and groups or non-governmental organizations who seek to hold a state that employs the use of force to account appeal to the legitimizing effect and political currency of international law. This has caused David Kennedy to remark that, "if law can increase friction by persuading relevant audiences of a campaign's illegitimacy, it can also grease the wheels of combat. Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate."

This proposed paper and presentation, titled *The Development and Use of Informal Complementarity: A Case Study of the 2008-2009 and 2014 Gaza Wars* explores how state actors are increasingly appealing to the principle of complementarity to insulate their actions from the formal jurisdiction of the International Criminal Court as well as from general international oversight. It introduces the notion of informal complementarity. This differs from formal understandings of complementarity as commonly associated with Article 17 of the Rome Statute and as used to assess the admissibility of a particular case that comes before the Court in The Hague. Instead, engagement with this notion of informal complementarity may be understood as occurring independent of ICC intervention, beyond the strictures of statutory requirements, and outside considerations of a particular case or referral. It draws upon complementarity's ordering of domestic jurisdiction to assert that a state that takes measures to investigate and redress alleged violations of international law has effectively and legitimately satisfied its international legal commitments.

In developing this understanding, the paper explores the ways in which this notion of complementary has been developed and engaged by Israeli and Palestinian actors in response to the 2008-2009 and 2014 Gaza wars. These engagements alongside the increased likelihood that the Office of the Prosecutor at the ICC will commence a formal investigation into "the situation in Palestine" raises a host of formal legal questions. These range from the legality of Israeli and Palestinian actions that occurred following the commencement of hostilities in Gaza to questions of admissibility and associated considerations regarding Palestinian statehood. This paper, however, assumes an agnostic approach to such associated legal questions. It is instead concerned with the ways by which actors are drawing upon the proposed understanding of complementarity and what the implications of these legal engagements, intended to legitimize, are for the role of international humanitarian law upon the use of force.

These may be significant. Engagement with this amended notion of complementarity can facilitate state efforts to forestall formalist measures. It often endeavours to nationalize

international scrutiny of state actions during instances of armed conflict and upon the use of force by demonstrating the appropriateness of domestic legal systems to ensure redress and prevent against impunity should an accused violation of international law become substantiated. Appeals to this pre-emptive, informal understanding of complementarity often focus on individual indiscretions and violations. Such a limited focus, while justified in many instances, promotes an understanding of international humanitarian law that favours redress of deviations from state or military policy while neglecting (or insulating) the policies and state actions that often drive such violations. Collectively, this threatens to promote a conception of international humanitarian law that understands breaches as occurrences requiring redress not prevention. A violation becomes something that must be rectified not avoided. This contributes towards an ordering of international humanitarian law which preferences the achievement of military objectives above the assurance of humanitarian obligations.

Chris O'Meara

Chris O’Meara is a PhD Candidate and Teaching Fellow at University College London (UCL). He is currently a Visiting Researcher at Harvard Law School. His thesis examines the right of self-defence in international law and the customary requirements that the exercise of defensive force is necessary and proportionate. He was awarded the UCL Faculty of Laws Research Scholarship to conduct his research.

Chris holds an LLM in International Law from UCL and an LLB in Law and European Law from the University of Nottingham. Prior to joining UCL, Chris practised as a lawyer at Linklaters and Latham & Watkins.

The Relationship Between National, Unit and Personal Self-Defence in International Law: Bridging the Disconnect

The issue of self-defence is one of the most contested areas of the *jus ad bellum* and of public international law more generally. In particular, heated debates continue over the meaning of an 'armed attack', which is the trigger for the right of self-defence recognised by Article 51 of the Charter of the United Nations (UN Charter). The well-known arguments highlight issues associated with whether a threshold of violence is required before a right of self-defence arises, the position of non-state actors in the equation and temporal issues pertaining to anticipatory self-defence. The overwhelming majority of this academic purview has taken place at the state level. That is to say the right of self-defence as it applies to states (national self-defence). This approach represents only part, albeit an essential part, of the self-defence picture however. Much less academic attention has been paid to how the right of national self-defence relates to, and interacts with, the right of military personnel and their units to defend themselves. The commentary that does exist is primarily provided by military and government lawyers in the United States. There is a notable absence of input from *jus ad bellum* scholars. The International Court of Justice has also provided little elucidation on this fundamental question. By focusing on the state level, the jurisprudence has contributed to a fracturing of the *jus ad bellum*. The result is an appreciation of the law that is far removed from those who face armed attacks on the ground, in the air or at sea.

The disconnect between the right of states to defend themselves and the right of individuals and units to do so, provides an incomplete picture of the right of self-defence. The purpose of the paper is to highlight some of the problems associated with the focus to date on national self-defence and to demonstrate how the right of personal and unit self-defence should and do fit into the analysis. It seeks to offer some unified thinking regarding the *jus ad bellum* that properly accounts for the position of the military. The hope is that this approach will contribute to clarifying some of the controversies that have persisted since the right of self-defence was expressly recognized by the UN Charter in 1945. The first part of the paper offers an overview of the right of self-defence at the state, unit and personal levels, before proceeding to the substantive issues where the disconnect is most apparent. These include whether the right of self-defence should be viewed in a unitary manner or separately at the state and personal/unit level. How attribution operates within this context is also reviewed, together with the gravity of violence required before a right of self-defence becomes available at these different levels. The difficulties posed by imminent armed attacks and the requirements of necessity and proportionality is then examined, together with specific considerations relating to armed attacks by non-state actors (NSAs).

What becomes clear when one considers these issues, is that much of the academic commentary and jurisprudence to date is missing a piece of the puzzle. They tend not to account for how legal norms operate on the ground and are then transmitted to the national level so that the right of self-defence of military personnel and units are treated as constituent elements of the right of national self-defence. To ensure therefore that there is no disconnect within international law, we must be clear that the *jus ad bellum* treats self-defence in a unitary manner. There is only national self-defence, although the legal rights of individual military personnel and units form part of it. It is then the customary requirements of necessity and proportionality that govern what the overall defensive response looks like. To avoid fragmentation within the *jus ad bellum*, and

in international law more generally, we should therefore consider the range of consequences of saying that a state has no right of self-defence against minor uses of force, or attacks by NSAs, or armed attacks that are imminent. What is required is a holistic approach that looks at self-defence in a consolidated fashion and considers how the different levels of self-defence work together. The present disconnect needs to be bridged.

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The International Right to Health Care: A Legal and Moral Defense

While it may seem obvious that the international right to health includes a right to health care as one of its constituent parts, recognition of an international human right to health care remains contentious. Proponents of an international right to health care face at least three issues. First, while the legal documents granting and specifying the content of the right to health refer to health care goods and services, the majority of the right's attendant duties relate to the social determinants of health. Health rights advocates in the international sphere likewise highlight the primary importance of social determinants. This suggests that any international right to health care will have limited scope at best. Second, the normativity of the international right to health is tied to the importance of certain benchmarks and indicators of health across populations, but both recognition of health rights and access to health care only weakly correlate with improved health outcomes. This suggests that the normativity of the international right to health may not justify an international right to health care. Third, very few international rights require states to create full systems to realize rights and the passages of international human rights law that support a right to health care seem to require states to create health care systems. The purported right to health care thus seems to fit uneasily with the structure of international rights. Stating that a broad right to health must include a narrower right to health care is an insufficient response to these concerns. In this work, I defend the international right to health care on textual and theoretical grounds. If successful, this defense will address all three of the issues with existing accounts.

My defense takes the form of two lines of argument. First, I argue that the plain text of the documents that create and interpret the right to health supports the idea of a right to health care. Contrary to critics' claims, the relevant provisions often highlight the importance of particular health care goods and services and create specific obligations for states to provide them. The provisions explaining these requirements are not tied only to a concern with improved health outcomes. They are also concerned with other foundational norms of international human rights law, such as dignity and equality, which require provision of basic health care and fair distribution of all health care resources. Second, in the alternative, I argue that even if the international right to health does not obviously include a right to health care as a matter of textual interpretation, such a right can be and should be developed from other international rights that share the right to health care's foundational concerns with dignity and equality. Interpretations of those rights support this argument. International law that is not concerned with human rights, including exceptions to the international intellectual property norms codified in TRIPS, likewise suggest that international law in general recognizes the primary importance of and right to health care.

These lines of argument explain how recognizing an international right to health care can avoid the first two concerns above. I then go on to explain how this approach avoids the third concern. While the international right to health care does require a minimally functioning health care system, international human rights law is generally agnostic as to the form that this system would take, allowing the right to coexist with the fundamental norms of state sovereignty undergirding international law more broadly. This agnosticism also highlights the way in which the health care system requirement is only a part of the broader right. The right is otherwise structurally identical to other economic, cultural, and social rights. There are, moreover, signs that other rights, such as the right to water, share the purportedly anomalous systemic duty element of the

international human right to health care and good reason to think that this feature should be a component of international rights. An outline of the argument for the content of the right, which I developed in a full-length article elsewhere and outline here, confirms this consistency.

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