Inaugural Conference for Junior Researches 2014
Stanford Program in Law and Society

PAPER ABSTRACTS

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PANEL 1A: Dispute Resolution – from Courts to ADR and to Courts again?

Discussant: Professor Deborah Hensler, Stanford Law School

Chair: Jeff Goldenhersh, J.D. '16, Stanford Law School

Rachel Ran, Research Assistant, Faculty of Law, University of Haifa, Israel

Members Only?: Online Dispute Resolution in the Kibbutz Society

The rise and fall of The Kibbutz Society in Israel provides an unusual opportunity for examining the application of technology to dispute resolution in a non-traditional setting. The internal dynamics of a small, closed community in an ideological crisis reflect technology's role not only in undermining existing social order, but also in developing new norms, building consensus and resolving disputes.

The Kibbutz Society is a unique feature of Israel's social fabric. Rooted in early 20th-century Zionist idealism, and based on the social values of socialism, these communal settlements created a "society within a society", relying on independent social norms. Within this framework, the article attempts to review the specific legal and sociological characteristics of disputes in The Kibbutz Society, identify the particular struggles and challenges of relationships in this society, and create a roadmap of the dispute landscape.

The article describes the nature of disputes in small, close-knit Kibbutz communities, which is influenced greatly by the ongoing relationships between the parties, as the lines between co-workers, neighbors, friends and authority figures are blurred. Enforcement is often carried by members of the community themselves, not by financial or legal sanctions, but rather by social sanctions. Additionally, over the past decades, The Kibbutz Society suffered deep economic and ideological crisis, resulting in a legal and organizational reform, including privatization of property rights. This rude awakening has led to an influx of internal disputes, disrupting the delicate social equilibrium. Using this map, the article examines the existing dispute resolutions mechanisms, their formation, their advantages in relation to existing the social norms and their shortcomings.

With this in mind, the article introduces the concept of Online Dispute Resolution (ODR). The emergence of ODR has enabled practitioners to utilize the advantages of technology for designing new systems and overcoming past challenges in traditional dispute resolution. Originating in e-commerce, ODR has become the new frontier of dispute resolution, offering solutions to many of the obstacles faced by traditional systems and litigation, such as speed and efficiency, anonymity, privacy, behavioral biases, costs and representation and more.

Finally, this article attempts to apply the advantages of ODR in the traditional, closed-community setting, and propose potential opportunities for meeting the unique challenges of disputes in The Kibbutz Society. This merger plays a double role, as it challenges common perception of community disputes, while introducing new and unexpected avenues for the development of ODR.

Shishir Bail, Graduate Fellow, Law, Governance and Development Initiative, Azim Premji University, India

From *Nyaya Panchayats* to *Gram Nyayalayas*: The Indian State and Informal Rural Justice

Characteristic of many post-colonial states, India displays highly plural structures of dispute resolution across its numerous territories. At the same time the Indian formal legal system has, almost since its inception, suffered from mounting problems of delay and quality. A major strand of the Indian state's response to these problems has been to turn to informal, ostensibly 'traditional' models of dispute resolution. The earliest examples of these were the *Nyaya Panchayats* introduced by various Indian States a little prior to Indian independence. These now defunct forums were notable for their attempt to mirror idealised structures of popular justice at the village level. Their failure in the 1980s appeared to warn Indian policy makers against attempting to recreate traditional modes of dispute redressal as means to mitigate the burdens on the formal system. However, in 2008 the Parliament of India enacted the *Gram Nyayalayas Act* to provide for the creation of new rural forums to adjudicate certain classes of civil and criminal disputes, accompanied by a wave of celebration at the prospect of a new model of rural justice. This paper compares both these institutions from the perspective of legal pluralism, as different attempts by the Indian State to engage with informal, non-state structures of dispute resolution in its rural regions.

First, I undertake a comprehensive survey of the secondary literature on Nyaya Panchayats in order to get a sense of their structure and functioning. Thereafter I describe the results of extensive field research on the little-studied Gram Nyayalayas, in the three Indian states of Rajasthan, Maharashtra and Madhya Pradesh undertaken during the months of June and July 2013. Through the observation of proceedings, the parties involved, and the manner of disputes heard in these forums, I provide a statement of their nature in relation to Nyaya Panchayats, as well as to non-state structures of dispute resolution. From this examination and comparison of Nyaya Panchayats and Gram Nyayalayas, I construct a narrative of legal system reform in India that pays attention to the changing desire of the Indian state to engage with non-state structures of dispute resolution. From this perspective, I suggest that notwithstanding the discourse at the time of their creation, Gram Nyayalayas represent a clear shift towards a more 'legal-centralist' position that pays substantially less attention to idealised 'traditional' or indigenous modes of informal dispute resolution than earlier witnessed.

Dr. Quach Thuy Quynh, Lecturer of Law, Centre of Commerce and Management, RMIT International University, Vietnam

Rethinking of Aversion to Litigation and Seeking Answer for Asian Litigation Pattern - Evidence from Business Disputes in Vietnam

In recent years, Vietnamese courts have been facing increasing caseload at a median of ten to twelve percent annually. A trend of increasing numbers of business-related cases has been recorded regardless of the common notion about Asian aversion to litigation. Hence, one may question whether such increase of caseload is an evidence for defect of theory of aversion to litigation in Asia? Whether it demonstrates or refutes arguments that institutional arrangement in

Asia and transition economies affects their pattern of litigation? Does it demonstrate that informal institutions are no longer overwhelming in Vietnam? Or are there any other factors at work to explain this situation? These are questions that this article would seek to answer.

Using data from 2003 to 2012, the study demonstrates that upward trend of business cases in Vietnam would be attributed to the development of some institutions in the country as well as development of the enterprise sector. Cultural factors show no affect to litigation trend. However, aversion of litigation still persists. This aversion may be formed by low performance of court system rather by adherence to Asian cultural value of maintaining harmony and face saving. Findings of the research re-examine relevance of other studies of litigation culture in Asian countries in the context of Vietnam. The findings also enrich literature of institutions in transition economies, by identifying them as determinants of the people's choice of enforcement device. Given that enforcement choice is a hot debate in the realm of company law, the article would shed more light on debate by providing more evidence from both an Asian country and a transition economy. The research findings may also inform current legal reform in countries which have been allured by enforcement model of strong private enforcement in the US.

PANEL 1B: On the Relationship between Institutional and Communal Law Enforcement

Discussant: Professor Yifat Holtzman-Gazit, School of Law, College of Management, Israel

Chair: Louise Reilly, J.S.M. Candidate '14, Stanford Law School

Ather Zia, Ph.D. Candidate, Department of Anthropology, U.C. Irvine, USA

The Work of Mourning: Affective Law and the Search for Disappeared in Kashmir

Since 1989 in the Indian controlled Kashmir approximately 8,000 to 10,000 men have disappeared in the Indian counter-insurgency actions. Kashmiri women have organized to search for those who have been subjected to enforced disappearance after being arrested by the Indian army. These women mainly Muslim mothers and wives of the disappeared men have become tireless human rights activists, a form of gendered civic engagement unprecedented in a conservative, majority Muslim society. The activist women of mobilize demonstrations, pursue court cases, and collect documentation. They seek audiences with army or government officials, and scour prisons and morgues. In this paper I ethnographically illustrate the performative politics of mourning as a hauntological interiorization which I conceptualize as an "affective law." I trace the paradigm of "affective law" as an edict of continuous commemoration, a claim for a modicum of control and of agency when law ceases to be an ideal of justice and exists only to create a state of exception. I trace how affective law manifests in modes of counter-memory which appear as a nuanced version of instinctive as well as deliberate resistance to the powerlessness induced by state terror. I put the affective law in conversation with Kafka's parable "Before the Law" (1915) in order to explore the paradoxical and deferred relation to law (Derrida 1994) and how affective law becomes the substrate for counter-memory, and resistance. Thus, the affective law emerges as against the institutionalized narratives and not necessarily to dismantle them but provide "memory-alternatives" or alternate forms of resistance and agency. Affective law manifests resistance as relational to power and pinpoints a psychic contestation to the over-encompassing nature of power as well. As an analytical tool it enables tracing the unlikely forms of resistance and subversions rather than large-scale collective resistance which may not challenge the state systems. The category of gender as pivotal in the paradigm of affective law draws attention to another layer of subalterity, that of women within the social setup. It becomes a mode of agency which often remains unrecognized in the broader conceptualization of female agency, where scholars might be looking for brazen acts of politics. It further illustrates how gendered processes exist in everyday life in context as opposed to the stereotypically stable and passive gender roles attributed to women.

Laurel Eckhouse, Ph.D. Candidate, Department of Political Science, U.C. Berkeley, USA

The Feedback Effects of Police Strategy

Forty years after the beginning of the War on Drugs and the accompanying increase in incarceration, policymakers and scholars are increasingly concerned about the political origins and collateral effects of mass criminal justice contact, and especially about the racial and

geographic disparities in criminal justice interventions. My project explores how police repertoires shape citizen attitudes and behaviors related to law-following by affecting social integration and willingness to engage with government. I argue that the modern increase in policing damages informal mechanisms of social control, thus increasing the ostensible need for policing and incarceration. This occurs via three primary mechanisms:

Damage to social integration
First, intensive policing reduces informal social control by creating practical obstacles to social integration. When warrants are extremely common, any stable routine becomes risky (Goffman). Work, relationships, and civic participation — primary sources of social integration — can both lead to arrest. Police efforts to increase arrests and convictions lead them to pressure individuals to inform on one another, damaging the social relationships through which co-parents, romantic partners, family members, and friends rely on one another. When steady employment puts individuals at risk of arrest due to warrants and lack of identification, they are pushed into informal, sometimes illegal, means of providing for themselves. In turn, this puts them at increased risk of arrest and incarceration.

Disengagement from government
Second, intensive policing creates adversarial relationships between police and neighborhoods. This weakens the mutually reinforcing connection between formal and informal social control in two ways: by changing citizens' sympathies and norms in ways that prevent them from cooperating with police, and by changing citizens' interpretive conception of the role of government. Neighborhoods come to view police as an occupying force (Lerman and Weaver, Goffman), reducing citizens' trust in police fairness, government as a whole, and the political process. In the context of highly conflictual relationships between citizens and the police — the primary street-level representatives of government — individuals develop bonding social capital norms that opposes cooperation with government agents (Lerman, Putnam). This creates sympathy for those who are violating the law, reducing informal interest in controlling at least some illegal behaviors and reducing neighborhood assistance for formal social control. In addition, both legitimate fear of arrest when in contact with government agencies and affective disengagement from government reduce citizens' willingness to engage in government contact by obtaining identification, applying for marriage licenses, or voting. This de facto excludes citizens from government benefits.

Alternative informal social control
Finally, groups and networks engaged in illegal activity create alternative systems of informal social control which interfere with integrative social control. Within communities where illegal economic activity is high, there are local strategies to avoid excessive attention from police. Media and ethnographic evidence (Goffman) suggests that economically motivated individuals target those who will be least able to invoke police assistance. In addition, ethnographic evidence suggests that informal social control allows individuals to threaten or buy off neighbors who participate in formal social control. Punitive policies directly increase individuals' risk for violence and victimization by making it difficult for them to enlist formal resources for resolving conflict, and force the development of alternative norms for dispute resolution which further damage the integration between formal and informal mechanisms for social control.

My project investigates the effect of intensive policing on neighborhood-level informal social control: both the extent and direction of neighborhood-level informal social control. Fagan and Meares, I argue that intensive enforcement per se — not merely income inequality, lack of opportunity, and the reduced stigma of a criminal record — damage social integration in heavily policed neighborhoods. I merge data on police repertoires with measures of social integration and engagement with government, including employment, voting, and survey data, to identify the relationship between policing strategy and social integration. By matching adjacent blocks with substantially identical demographic factors that are located in different police precincts and experience different police repertoires, I obtain an estimate of the effects of police repertoires on social integration and government engagement.

Pedro Rubim Borges Fortes, Law Professor, FGV Law School, Brazil; DPhil Candidate at the CSLS, Faculty of Law, University of Oxford, England; J.S.M. '08, Stanford Law School, USA

Law and (In)formality at Ipanema Beach

This paper explores the interplay of formal and informal normative arrangements and provides an ethnographical analysis of socio-legal norms at Ipanema beach. For Brazilian society, beaches are so important that even constitutional norms regulate their operation and guarantee free access for everyone. Likewise, Brazilians usually refer to beaches as 'democratic spaces' and this paper discusses the exotic association between a geographical area and governmental structure. Is equal participation and symmetrical power for all beach goers in Brazil realistic, or is this notion of a democratic beach just a myth? This paper also focuses on the existence of an informal food market at Ipanema beach and analyzes its regulation, informal arrangements of antitrust (anticompetitive market prices), as well as issues of environmental and consumer protection. In addition, this paper assesses informal land regimes and discusses which norms are available to regulate the occupation of the space by beach goers. In this context, tent managers and informal parking space finders provide informal arrangements that guarantee parking, tents, and chairs for beach goers. The state is also present at Ipanema beach by way of municipal guards, police officers and lifeguards, who are expected to enforce law and order. However, there are many examples of resistance to legal regulations and to criminal law enforcement. For instance, marijuana smokers tend to frequent a particular area of the beach and they make noise to alert others of police officers in an effort to prevent arrests. Further, frescobol players are not fined for playing the game at certain times, but at non-designated times their sanction consists of warnings, threats to report them to authorities, and eventually the apprehension of the ball. Dogs are also prohibited, but are tolerated in an isolated corner of the beach. In summary, a range of (in)formal normative arrangements characterize law and society at Ipanema beach.

PANEL 2: Traditional Legal Concepts and Socio-legal Reconstructions

Discussant: Professor Michele Dauber, Stanford Law School

Chair: Swethaa Ballakrishnen, Ph.D. Candidate, Department of Sociology, Stanford University

Katharina Isabel Schmidt, Visiting Researcher, Yale Law School, USA

Sir Henry Maine's 'Modern Law': From Status to Contract and Back Again?

In his seminal treatise *Ancient Law*, Sir Henry Maine stated that 'the movement of progressive societies has hitherto been a movement from Status to Contract'. What Maine meant by 'Status' were the various relational and often hierarchical networks that determined the rights and obligations of a person in pre-modern society. In particular, pre-modern societies, according to Maine, were characterized by a wealth of tribal, kinship and family relationships, which specified a person's place in society, including his or her prospects of trade. While Maine's aphorism has been criticized for being over-simplistic, unsupported by anthropological evidence and motivated by misguided Victorian beliefs in the linear progress of socio-cultural evolution, its truth-value in relation to 20th century contract law cannot be denied. As such, contract law has come to be characterized by liberty of contract and the capacity of individuals to create rights and obligations with one another, regardless of who they are.

At the same time, phenomena such as the rise of standardization and relational contract theory have cast doubts upon Maine's substantive claim. In particular, it seems legitimate to suggest that, in modern society, people's rights and obligations are—more so than ever—determined by reference to personal or status-based attributes. Consumers are increasingly limited in their ability to determine the content of their contracts with businesses and other commercial actors *because* they are consumers. Similarly, sociological inquiry into contractual relations has shown that parties' rights and obligations are frequently determined by noncontractual factors such as the personal relationship between the parties as well as their respective hierarchical standing based on social, political and economic factors. It is against this background that I would like to conduct a long overdue assessment of the value of Maine's claim for modern private law.

Drawing on 19th century legal history, classical sociological and anthropological literature, contemporary contract law theory as well as recent works in the field of (behavioral) law and economics, I will first alleviate some of the conceptual confusion that has in recent years developed around Maine's claim. In addition, I will show that the argument that modern private law is currently witnessing a reverse movement 'from Contract to Status' lacks merit. I will then consider to what extent it is possible to rely on a combination of the conceptually distinct notions of status and contract for the purpose of better making sense of phenomena like contract standardization and relational contracting. In light of the conference's focus on the relationship between law and informality, particular attention will in this context be paid to the increasingly complex interplay between formal and informal contracting mechanisms; a recent trend, which arguably calls for an updating of the terminological toolbox of modern private law.

Andrew Brighten, Ph.D. Candidate, School of Law, U.C. Berkeley, USA

Law in Crisis: Beyond Preservative Jurisprudence

This paper argues that legal theorists should re-conceptualize law's role during public crises, such as the past decade's financial crisis that continues to reverberate socially and politically. Leading theorists in the humanities and social sciences share a consensus that crises present opportunities for societal progress. For example, the global recession triggered social movements and discourses that, to many commentators, signaled aspirations to revitalize democracy and evoked the welfare's state's solidification after the Great Depression. This paper argues that the manner by which law interprets and responds to such events influences their transformative potential. A normative implication is that law should strive to facilitate rather than impede societal progress during public crises.

Yet jurisprudential thought has resisted the prospect of such a transformative role for law. While legal scholars have rapidly become interested in crisis governance, emergency jurisprudence continues to define itself through mistrust of law's politically generative capacity. The central problematic of crisis governance is taken to be status quo preservation, an objective endorsed by Schmittians and liberals alike. This paper traces how such a disjuncture between political and legal theory emerged, from its origins in Roman constitutionalism to its amplification in World-War-II-era scholarship haunted by the notorious case of Weimar. The paper then warns against the practical dangers of such a narrow conception of law's role, explaining how a preservative orientation often regresses into a violent shadow of legality that suppresses dialogue and reinforces injustice.

The paper then explores how the law and society tradition can illuminate subtler and more productive ways in which law influences crisis episodes. Theoretical frameworks generated through law and society's cultural turn can usefully be extended to understand how law matters – or does not matter – to political actors during crises. To this end, the paper draws from sociological theory and proposes a typology of law's influence on crisis politics. First, law channels politics into spaces and processes, both formal and informal. Second, law focuses politics on particular constructions of events, actors, and issues. Different modalities of channeling and focusing contribute to political dynamics that vary in transformative potential and can be demonstrated by empirical case study. In some cases, law's influence is more repressive, channeling politics to extra-institutional, informal spaces and promoting radicalized postures that challenge state-based legality. In other cases, law's influence is more facilitative, channeling politics into structured spaces where socio-political questions are more formally pursued without undermining law's legitimacy.

Erlend M. Leonhardsen, Research Fellow, Faculty of Law, University of Oslo, Norway

How Independent is the International Court of Justice? Some answers from its provisional measures jurisprudence

In a recent paper I explored the puzzle of widespread non-compliance with provisional measures indicated by the International Court of Justice (ICJ). Scholars have noted that state compliance with the judgments of the ICJ is high. Others have observed, like me, that this does not appear to

hold true with respect to provisional measures, even though most factors, such as the parties, the context, the judges and the institution are largely identical. A common explanation for this difference was the uncertainty surrounding whether provisional measures indicated by the ICJ were legally binding or not. However, this question was resolved in the affirmative by the Court in the LaGrand case. My research strongly indicated that there seems to be no greater compliance with provisional measures after this finding. Consequently, whether these decisions are binding upon states as a matter of international law does not seem to affect state behavior very much, whereas the opposite is the case with the judgments of the Court. In my proposed paper for the SPLS conference I try to explain this difference.

I argue that compliance with international adjudicatory decisions has less to do with the formal legal character of norms than with the relationship between states and the courts. Here, I rely on recent research by students of international courts, such as Karen Alter, emphasizing a difference between trustee courts and courts that functions as agents for state principals. The former generally have higher independence, the latter higher compliance. However, this distinction often appears to explain too much and it is highly uncertain which courts should be considered as agents or trustees respectively.

Through careful analysis my paper shows how the ICJ in the indication of provisional measures gradually have taken the form of a trustee court to a much larger extent than when it is deciding on the merits. I argue that this follows from the Court's gradual jurisprudence rather than from state design, which may carry long term risks for the relationship between the Court and states.

In addition to providing an explanation for the compliance puzzle, my paper sheds light on the difference between courts as agents and courts as trustees. This has implications not only for institutional design and our understanding of how states use international courts. It also suggests that the importance of the distinction between binding and non-binding norms might be overstated in adjudicatory processes in international relations.

Georgios Dimitropoulos, LL.M. Candidate, Yale Law School, USA

Peer Review in International Law: Making Informality Work

1. From PIL to horizontal governance: The supposed dominance of customary and soft law, and, above all, the general absence of enforcement mechanisms have largely established international law as an "informal law." The formation of highly formalized domestic legal orders during the 19th century didn't leave any space for legal formality beyond the state. The paper contends that contemporary international law has found ways to change the conditions of the interplay between formality and informality, and make informality work.

The proposed paper understands the contemporary international legal order as a horizontal governance process that reframes the conditions of informality of traditional public international law.

2. Peer review in IL: Both a product and a promoter of horizontal governance are so called "peer reviews." Peer review in international law is a monitoring mechanism. The major difference of the peer review in comparison to formalized monitoring systems like judicial review and

hierarchical supervision is that the former is a continuous and ongoing largely informal process that involves the efforts of various actors. Peer review is an evaluation of a country's performance or practices in a particular field by a team composed of civil servants and officials from ministries and agencies in the relevant policy field from other countries. Most peer reviews were established in the Nineties, and have been very well received in international regulatory practice; the reasons for this evolution will be discussed in the paper.

Despite its expansion in different levels and fields, international peer review mechanisms may present some common features. Peer reviews in the frame of the International Atomic Energy Agency (IAEA), the Financial Action Task Force (FATF), the African Union and the Organization for Economic Cooperation and Development (OECD) will be presented.

3. Informality v. formality in peer review and IL: But, why do international regimes increasingly opt for this system of dispute prevention? The reason for its introduction is to achieve compliance of states with international rules. The compliance result is achieved through informal instruments. By creating a new type of horizontal accountability between the involved domestic actors, in the peer review process, *acceptability* replaces command, *peer pressure* replaces enforcement and *learning* replaces the sanctions that formal monitoring systems usually require and involve. It thus reverses the conditions of formality of international governance. The question becomes not whether there is a formal enforcement mechanism in the system, but how compliance has been promoted.

PANEL 3: Legal Transplantations and Historical Perspectives

Discussant: Professor Amalia Kessler, Stanford Law School

Chair: Emily Zhang, J.D. '15, Stanford Law School

Hannah Laqueur, Ph.D. Candidate, School of Law, U.C. Berkeley, USA

What We Can and Cannot Learn From Drug Decriminalization in Portugal

In 2001, Portugal decriminalized the acquisition, possession and use of small quantities of all psychoactive drugs. The significance of this legislation has been misunderstood. Decriminalization did not trigger dramatic changes in drug markets or use because, as an analysis of Portugal's pre-decriminalization laws and penal practices reveals, the reforms were far more modest than what is implied by the media attention they have received. Portugal illustrates the shortcomings of "before and after" analysis because in this case, as so often, *de jure* legal change largely codified *de facto* practice. The most dramatic change in Portugal after 2001 was not the legislation itself, nor any subsequent shifts in behavior with respect to drug use that followed. Instead, it was a marked decline in the number of drug *traffickers* convicted and imprisoned, despite the fact that such conduct remained criminal and arrests changed little. What may be most significant about the law is not its prescriptive content but what it says about the normative valences that it reflected and reinforced.

Bo-Shone Fu, S.J.D. Candidate, University of Wisconsin Law School, USA

The Legal Transplant from America to Taiwan: the Transplantation and Implementation of Workplace Sexual Harassment Law

In the country where a law originates, it is typically societal development that triggers the enactment of the law. In contrast, when a law is transplanted to another country, it is the law that often contributes to societal change. At the same time, the new country, in implementing the transplanted law, will reshape the transplanted law with its own domestic culture and norms. Just like planting a seed in an alien soil, the taste of the fruit will mix with local flavors, and the resulting product will not be the same. It is the purpose of this thesis to examine the interpretation, implementation and enforcement of Taiwan's Gender Equality Law that was adopted almost verbatim from U.S. law, and to explore how the law's development reflects the influence of Taiwan's culture and social norms.

This comparison vividly illustrates the extent to which Taiwan's sexual harassment law was transplanted directly from U.S. law. Taiwan's law adopts almost verbatim from U.S. court decisions the very comprehensive definition of the types of physical and verbal conducts that constitute sexual harassment under its anti-discrimination law. In addition, Taiwan's law, like the U.S. law, relies on victim complaints, and involves the employer in the early stages of the investigation of the complaint. Both systems provide for the early involvement of a government agency (although this involvement is not absolutely required by the Taiwan statute), and both laws provide an opportunity for independent review by the judicial branch. But, as explained in these chapters, there are significant differences in the mechanisms adopted by Taiwan for the implementation of its sexual harassment provisions. These mechanisms were necessary to fit

implementation and enforcement of the new law into Taiwan's own local enforcement system. The result is that the roles assigned to the employer, to the government agencies at the central and local level, and to the judiciary are somewhat different than in the U.S., and these differences affect the transformative promise of Taiwan's adoption of the U.S. rules prohibiting sexual harassment in the workplace.

Chapter 4 analyses how these differences in the mechanisms adopted for implementation and enforcement have affected outcome. One major difference is that Taiwan, by adopting a definition of prohibited behavior not from the text of U.S. statutory law, but from its most current case decisions, bypassed the evolutionary steps taken in the U.S., as both the administrators and the courts began to understand the adverse impact of workplace harassment on women's employment. This evolutionary development in the U.S. took over four decades. The time taken to move from a simple rule of non- discrimination against women, to the more subtle understanding of discrimination reflected in the development of rules against workplace harassment, allowed time in the U.S. for a dramatic change to have occurred in the social attitudes of employers and employees about the role of women at work. As discussed in this chapter, Taiwan's adoption of the broader understanding meant that there was an immediate gap between the transformative purposes of the new rule and the public understanding of what the new law required. The main goal of chapter 4 is to explore what different mechanisms Taiwan might adapt that would be more effective in achieving the law's objectives, while still respecting the different legal cultures of the two countries. As this chapter explains, it will be critical that any new mechanisms build on the local culture's traditional practices for resolving workplace disputes. At the same time, there could be an enhanced role for worker participation that would not violate traditional mores.

The thesis ends with an analysis in Chapter 5 as to how each of the institutions given a role in the implementation of the Gender Equality in Employment Act has performed, it is hoped that this analysis will better pinpoint the changes that are still needed if real change is to occur.

Molly Marie Pucci, Ph.D. Candidate, Department of History, Stanford University, USA

Practicing Law in a Civil War: Poland 1945

In the last months of the Second World War, the Polish regime faced a political system in crisis: a heavily-armed population, violent national conflict, widespread looting, the aftermath of German and Soviet military occupations, and millions of displaced persons. Czechoslovak and German authorities experienced similar situations, as war broke down social order and state institutions across the region.

After ineffectually issuing laws and decrees calling for order and discipline, the Polish communists realized that laws and military force alone would not rebuild a state. As one official noted, "We are beginning to work by decree alone, not understanding that although we can issue decrees, the work itself is decided in the masses…"[1] To bring order to the country, the

[1] "Protokoł z posiedzienia Komitet Centralny," 9 October 1944, Archiwum Akt Nowych (AAN), zespoł. PPR Komitet Centralny: Biuro Polityczne 1944, sygn. 295/V-1.

communists needed to establish lasting institutions and teach the "rules of the game"[2] to an elite that had never held government positions.

My dissertation is a study of post-war security and state building in Poland, Czechoslovakia, and Germany after the Second World War. How did East European communists—in the absence of central political authority and functioning institutions—transform their countries from social chaos to three of the most centralized states in the history of the region, in only six years?

To answer this question, I draw on archival sources in four languages (Russian, German, Czech, and Polish) collected in a year and a half of research. In particular, I focus on memoirs by Party and secret police officials and court trials of secret police agents that reflect the everyday practices of state building, violence, and political negotiation in early communist states. In their recollections, participants illuminate how they worked out power in local societies in the absence of central directives and touch on issues that they would never have reported in official documents— how they concealed information from central authorities, looted local populations, circumvented (ill-defined) jurisdictions, and used unofficial networks to get things done.

[2] Pierre Bourdieu, "The Logic of Practice," (Stanford: Stanford University Press, 1990).

PANEL 4: Corporations, the Private Sector, and Legal Enforcement

Discussant: Professor Bryant Garth, University of California, Irvine

Chair: Rolando Garcia Miron, J.S.D. Candidate, Stanford Law School

Sinee Sang-aroonsiri, Graduate Student Major in Corporation Law, Graduate School of Law, Kyoto University, Japan

The Effort for CSR in Thailand: Supporting "Pak Shi" Activities or True Benefit to Society?

It has been a trend in Thailand for corporations to focus on their corporate social responsibilities. In international context CSR is expected to remind huge corporations of their social responsibility, so that they would take the interest of stakeholders into account, as it would lead to sustainable profit maximization. Though initiated in the western society, CSR is acclaimed to be well adopted under Thai social values where Buddhism might has rooted profoundly. Thai government passed legislations which either induce CSR directly (providing restriction) , or indirectly (providing incentives). Many institutions play important parts in promoting soft law to encourage CSR, including Corporate Social Responsibility Institute (CSRI), established under the supervision of the Stock Market of Thailand. However, the 2013 oil spill incident by PTT Global Industry, a subsidiary of PTT Public Co. Ltd, manifested that such well-reputed firm for its CSR activities could respond surprisingly irresponsible for the catastrophe. This casts doubts on CSR in Thailand that it might be just like "Pak Shi" - an ornamental herb on the top of Thai food - to make corporations - the main dish- look more favorable among investors.

First of all, this paper will search for the evolving defintion of CSR and overviews major Thai CSR history, to reveal the ideological root of CSR in Thailand. Subsequently it elaborates the current legislations and the promoting mechanism; these are to review the legal dimension of CSR . Then it shall analyze why some larges corporations, superficially accountable thanks to their corporate philanthropy, completely fail to be socially responsible. To consider this, the Rayong oil spill in July 2013 will be elaborated and scrutinized. The study reveals that regardless of the attempt by both public and private initiatives, the concept of CSR as a tool for sustainable development for both the companies and the stakeholders cannot overrule the idea of philanthropy, which harmoniously fit the society where buddhistic merit-making and patron-client system have been deeply implanted. More importantly, the investors and the consumers still has little economic bargaining power to oppose to the companies who are socially iresponsible. In conclusion, to genuinely make corporate socially responsible, the potential legal reforms, for example, the elimination of ultra vires rule under Civil and Commercial Law, will be suggested and evaluated.

Radek Goral, J.S.D. Candidate, Stanford Law School, USA

Blurred Lines: a Study of Law-Firm Funding

A major controversy in the ongoing debate on the future of the legal profession in the United States is whether lawyers should be allowed to partner with non-lawyers. Could they accept working capital from "limited partners," in exchange for a share of profits? Presently, law on the books states that attorneys may share fees with other attorneys, but not with outsiders. For example, a law firm hired on contingency to handle a big lawsuit may finance it with own (or borrowed) resources or split the cost and the fee with another firm – but not with a hedge fund.

While lawyers ponder how to best regulate themselves, the norms of professional conduct clash with market realities that encourage law firms to accept capital from non-lawyers. Such third-party funding deals are usually confidential, and they remain poorly understood by policy makers and scholars.

This paper studies the case of a long-term relationship between a specialized law-firm "lender" and a prominent California lawyer. It starts by describing the history of their partnership. Second, it shows how the relationship gradually evolved from a commercial loan into something akin to an equity-style investment. Third, it finds that the impact of third-party financiers may transcend any one financing relationship, because some law firms obtain access to capital by sharing cases with funded attorneys.

The paper is an anecdote on how lawyers bend the rules; how by finding creative ways to tap third-party money and share business risks, they ostensibly stay on the right side of the fee-splitting prohibition. It also argues that that the legal profession faces a choice: it can either expressly accept revenue-sharing with nonlawyers and find a sensible way to regulate it or put up with a spontaneous order emerging in the shadows.

Gisela Ferreira Mation, Visiting Researcher, Yale Law School, USA

Structuring Corruption: the Legal Form of Illegal Deals

The misuse of public office for private gains is generally considered to be an illegal activity. As such, one could expect the structuring of corrupt deals to occur within the realm of informality. This article makes the point that while petty corruption often develops itself beyond society's formal legal structures, grand corruption schemes often relies, in one way or another, in the formal rules of private law. The literature on corruption has been extensively developed from the perspective of the regulation and functioning of the State. My research focuses on the other side of the coin of the institutional failures that affect corruption: the regulation of affairs and transactions in the sphere of the private sector, such as the corporate entity and contracts, that are used to orchestrate an illicit cash transfer. Although these regulations are referred to herein as "private law", there is obviously a critical public dimension to them, and this is yet another example of how the traditional private/public law distinction can be blurred. By looking at examples of high level corruption schemes in Brazil, I contend that this set of rules, which have national and international dimensions, can play a major role in large-scale schemes of corruption, hindering development and the rule of law.

The widespread myth that institutions of private law serve the well-functioning of the market masks the distributive implications of legislative policies on the private sector and the challenge that all private law legislation faces: preventing abuse of rights and resisting force of time and

the adaptation of the *modi operandi* for abusive conduct, which creates the cracks through which fraudulent conduct falls. The institutional shortcomings of developing countries, as well as focus on the "public" aspect of law, hinder their ability to deal with this challenge. Even when actors operate outside the law, law can matter. While enforcement of anti-corruption rules might determine whether or not agents will engage in corrupt activities, the corrupt scheme can take a number of forms. Which one will be largely determined by rules of private law.

Jorge Atria, Ph.D. Candidate, Freie Universität Berlin, Germany

Tax Evasion and Tax Avoidance of Chilean Elites: Characteristics and Determinants

In comparison with Latin American countries, tax avoidance seems to not be a major problem for Chile. Low evasion rates, an adequate institutional frame, a relatively low informality rate, and a serious and respected tax agency, present the Chilean tax system as a good case within *developing countries*. Yet a deeper analysis of some tax dimensions and indicators—such as tax expenditure, personal income evasion and avoidance, or the limited success of tax reforms during the last decades, between others—provides evidence to propose two assumptions: (i) the Chilean tax system includes a set of rules and practices which particularly benefit the elites; and (ii) this constitutes a relevant conductor of income inequality, contributing to maintaining and not reducing the durable high income concentration rates.

This article attempts to connect the institutional characteristics above mentioned with discourses from the elites. Based on 50 in-depth interviews conducted to members of the
Chilean elite, it explores the perceptions concerning tax evasion and avoidance, as well as the linkages of these with issues such as redistribution, progressivity/regressivity, and the role of State or of the tax system itself to reduce great economic disparities. The information provided by the interviews also sheds light on the social practices related to tax compliance, facilitating a general description under which evasion and avoidance are made in everyday life. As a whole, a tentative set of determinants is proposed, in order to understand the conditions under which tax evasions and avoidance occur among Chilean high-income citizens.

In a more abstract level, the article proposes some reflections aimed at describing the problems and challenges concerning the limits of the legal system with regards to elites' taxation, the need of a supranational regulatory frame, as well as the negative incidence that evasion and avoidance may have upon the objective of reducing high inequality rates. The observation of the tax system from institutional, discursive, and social practices dimensions permits not only a legal and economic analysis of taxes and the State, but also of social bonds, solidarity and possible tensions between the position of the elites and the rest of the society.

PANEL 5: Order in Order-less Places

Discussant: Professor Lawrence Friedman, Stanford Law School

Chair: Natalia Renta, J.D. '15, Stanford Law School

Alethea Sargent, Law Clerk to the Honorable Maxine M. Chesney; J.D. '12, Stanford Law School, USA

Producing Social Order in Shelter

This paper examines the production of social order within the women's section of the largest homeless shelter in New England. Based on extensive ethnographic research, the paper considers the institutional structures and informal expectations that served to maintain social order in the shelter, and the ways in which women, confronted with those structures and expectations, resisted them. Such resistance occasionally provoked crises, some of which resulted in police involvement. Ultimately, however, the cultural and social mechanisms employed by the shelter and its staff successfully sustained order even in the absence of formal policing.

The paper begins with an examination of the institutional structure of the shelter. It documents how "the lottery" and "the bar" served to reward adherence and to punish disobedience to the structural expectations of the shelter by respectively granting and denying women shelter for the night. It next examines the effects on women of the shelter's written expectations—which took the forms of what sociologist Erving Goffman called "cold" as well as "warm" obligations—as well as its unwritten expectation that women maintain the proper frame of mind, consisting of resolve, drive, and temperance.

Next, the paper considers moments of crisis. While the shelter's structure threatened to subsume women's own identities, and their divergent histories, resistance to such structure through large and small acts of defiance, utilizing women's knowledge of the shelter system, allowed them to set themselves apart from the system. More often than not, however, these creative acts of defiance were self-defeating, for the best way to defy the shelter and its aims was for women to sabotage their own progress.

Finally, observing that such crises were rare and invariably minor, the paper concludes that the shelter's institutional structure successfully maintained social order without the aid of, and at times in spite of, the law. To explain this success despite the shelter's threat to women's social identities, the paper examines two annual rites, each of which allowed women, for a moment, to break free of the narrow subject position customarily allowed to them by the regulations and expectations of the shelter. Such rites allowed women to express their individual identities and histories, transiently dissipated the shelter's discipline, and allowed it, ultimately, to maintain order; through them, the shelter's cultural logic became women's own.

Nicole Lindahl, Ph.D. Candidate, School of Law, U.C. Berkeley, USA

California Prison Politics and the 'Making' of Race in the Era of Hyper-Incarceration

This paper is a starting point in a larger project intended to explore the social dynamics among men in California prisons during the era of hyper-incarceration (1980 – 2010). Findings from recent scholarship suggest that understanding these social dynamics demands beginning with race. Indeed, before individuals entering California's adult prisons are strip-searched and provided state-issue clothing, fingerprinted, or tested for illnesses, they are assigned to one 'racial' category, which is then used to segregate prisons along these 'racial' divides. This paper seeks to explore how 'racial' categorization is experienced by incarcerated men and how the category to which an individual is assigned influences his negotiation of the social dynamics within prison. To do so, I examine the "initiation" experiences of 33 men who served time in California prisons between 1980-2010 as they are expressed in semi-structured life history interviews. Specifically, the paper seeks to address the following questions: How do prisoners talk about their preferences for and experiences during the 'racial' categorization process? What social and political dynamics do they encounter within the group to which they have been assigned? How is their belonging within this group established and policed? What strategies do they adopt to navigate these social and political dynamics? I argue that the 'racial' category to which an individual is assigned upon entry to prison is perhaps the single most important factor shaping an individual's positioning in and trajectory through the social and political dynamics of prison life.

Yeon Jung Yu, PhD Candidate, Department of Anthropology, Stanford University, USA

Magnetic Ties: Conduits to Sex Work in Post-Socialist China

This paper illuminates the importance of social networks as the initial mechanism through which millions of rural migrant women enter into the sex industry in post-socialist China. It draws on 26 months of ethnographic fieldwork (2006-2009) in red-light neighborhoods in southern China (Haikou, Hainan province) as well as survey results from 175 participants. Although social network research has emphasized the significance of distantly related people in job obtainment (i.e., weak ties), my survey reveals that the majority of Chinese sex workers (76.57 %) in my study enter into illegal activities through the introduction of closely related people such as family members or fellow villagers (i.e., strong ties). In tracing the process of migrant women's decision-making, my ethnographic data suggests that what I theorize as "magnetic ties" function as a moral justification mechanism that renders sex work a moral choice; close, trusted people become increasingly influential actors who encourage the women to enter the sex trade as a way to fulfill their obligations to support their families.

PANEL 6: The Community, the Family and the Self – on the Struggle for Identity in the Local and Global Context

Discussant: Professor Manuel Gómez, Florida International University

Chair: Katherine Zhao, J.D. '14, Stanford Law School

Eden Sarid, Associate, S. Horowitz & Co. Advocates and Patent Attorneys, Israel

Don't Be a Drag, Just Be a Queen – How Drag Queens Protect Their Intellectual Property without Legal Regulation

Common wisdom in intellectual property law asserts that domains of intellectual creativity which are not regulated by the law are destined to a market failure and a tragedy of the commons. However, on the fringes of IP law, *extra-legal domains* of intellectual creativity flourish with no (or low) legal regulation. In these extra-legal domains social norm systems regulate the creative activity. One of these extra-legal domains is performances of drag queens (biological males who dress up in female attires for the purpose of performing). The paper is an empirical study of how Israeli drag queens protect their intellectual property (IP) without reverting to *legal* protection.

The paper examines the unique structure of the drag domain pointing out to its distinctive social environment, its hierarchal configuration, the drag queens' non-economic incentives for creative labor, and the subject matter in which proprietary ownership subsists. It then goes on to explain why formal IP law does not, and cannot, accommodate for protection of the drag queens' intellectual creativity.

Based on the empirical research of the drag domain (mainly extensive interviews with drag queens), the paper identifies and outlines the drag IP norm system: (a) *a code of conduct* – a set of rules that the queens adhere to; (b) *prevention mechanisms* such as physical and conceptual delimitations that prevent trespassing between two peers, and an abundant public domain that helps avert the need to appropriate from a fellow queen; (c) *an enforcement mechanism* that considers the distinctive features of the drag domain and includes sanctions executed by the queens themselves such as public humiliation on stage, gossip and badmouthing, exclusion from performing and ostracism; as well as sanctions executed by the users of the drag domain (e.g., venue owners in which the queens perform and the shows' audience) these include gossip, badmouthing and boycotting an appropriator. The paper then emphasizes the importance of "moral rights", i.e., the right to attribution, in the drag domain.

Lastly, the paper evaluates what lesson the study of the drag domain holds for the general IP discourse. It suggests that by acknowledging the incentives, the different players, the structure, and the potential infringement modes of the domain, the drag norms system creates a superior system for the queens (over the IP law system). The paper also points to the disadvantages of the drag social norm system such as lack of an impartial policy maker, the propertization of ideas, and mob justice. The paper concludes that even if the IP law world should not necessarily adopt in full a social norm system, the drag domain "shifts the burden" of proof to those advocating for

the juridification of socially regulated creative domains to demonstrate that the advantages of such a move outweigh the disadvantages.

Asmita Singh, LL.M. Candidate, Columbia Law School, USA

The Wrongness of Being Displaced in India: A Study of the Aftermath of Communal Violence in Uttar Pradesh (India) in 2013

Muzaffarnagar and Shamli districts of western Uttar Pradesh are agrarian lands where Hindu Jats are predominantly land-owning and Muslims work as farm laborers and artisans for the land-owners. Muslims and Hindus in this mileu have not witnessed violence directed against each other before September, 2013. *The purpose of this paper, which is a work in progress, is to understand the significance of these events for the concept of minority citizenship in modern India.* The question of citizenship of minority groups gets implicated here on account of the fact that a minority group was the target of the violence (This is not to deny that the religious majority may have been targeted in this communal conflagration but to emphasize the fact that the violence transpired between two religious groups-one a numerical majority and the other, a minority). The paper also claims that the religious minority group suffered more severely in terms of its loss of property and the sense of collective trauma. *My research suggests that the citizenship of a minority group is being negotiated through violence on part of fellow citizens from a majority community, State apathy to ongoing violence and State action to redress the dispossession inflicted by the violence.* All three factors need to be elucidated through journalistic writing, fact-finding interventions on behalf of civil society and the State's discourse as evident in its statements before the Supreme Court, the NHRC, in the judgment of the Supreme Court and the proceedings before the National Commission for Minorities. *The paper finally argues that the State action designed to redress the violence inflicted on the minority community constituted abdication of essential State functions which may not withstand constitutional scrutiny.*

Wei Shuai, J.S.D. Candidate, City University of Hong Kong, Hong Kong

Local Court, Social Ordering and Indigenous Rights: Legal Pluralism in China

Legal pluralists believe that there are more than one legal orders or mechanisms within one socio-political space. Recent approach to law and legal pluralism opens up old questions from new angles — empirical study reveals active interactions between legal pluralism and its dynamics with social and cultural elements. China is never short of spectaculars on the interactions with ethnic minorities and state authorities.

However, past researches revealed that China shared a unified administrative order, pervasive political authority, shared or imposed value, a single culture and a recognized hierarchy (Erh-Soon Tay 1984). This article attempts to expose the innovative approach adopted by the Q court in settling civil disputes from ethnic minorities' communities.

Degus are experienced and knowledgeable seniors in the Yi tribe. They know about customary law and are capable of shooting troubles within their tribe. Starting from 2003, several Degus were invited to be "folk judges" in the civil tribunal in Q court. They had their own small

chambers to settle divorce disputes. The techniques they employ are local customs and past ethnic minorities' rulings within their tribes.

Sometimes, Degus will rely on their personal experiences to persuade couples to give up their divorce request. However, the "Torch Festival" riot between the Yi tribe and nearby tribes showed Degus' limitations in dispute settlement. The author found that both the Q court and Yi tribe have their respective "rules" for enforcement. Since people from Yi tribe have deep "rules consciousness", Degus have the capabilities to circulate disputes back to their tribes for settlement. When the Yi people felt that their native belief was not appreciated by judges, they had a feeling that their right was seriously violated. In addition to that, in the "Torch Festival" riot, Degus had a similar understanding of the same issue. They were unwilling and could not channel this type of dispute back to the Yi system when litigants had a conflicting "right consciousness". Therefore, they did not perform a role as they was like in divorce mediations.

This article is a combination of doctrinal research and empirical study. Doctrinal research follows the path set by scholars in legal pluralism and legal anthology, and aims to find the interactions between legal pluralism and ethnic minorities in China. For the empirical research, the author interviewed Chinese judges who were in the Chinese Judges LL.M. Program of the 2013 Cohort at School of Law, City University of Hong Kong and judges from Q district People's Courts at Yunnan Province in China in August 2013. Thirty-eight judges were interviewed for this study. The author also examined newspaper reports from the People's Court Daily on Chinese courts' approaches in dispute settlement for ethnic minorities. Newspaper reports from a trustworthy source provide convincing supplementary materials for this research.

PANEL 7: Constitutional and Legal Reforms from a Socio-legal Perspective

Discussant: TBC

Chair: Cindy Garcia, J.D. '16, Stanford Law School

Arm Tungnirun, J.S.M. Candidate, Stanford Law School, USA

Lost in Narration: A Preliminary Look at News Coverage of the 2007 Thai Constitution-Making

Most studies of constitutional law focus on the formal constitution or its formal drafting process in the Drafting Assembly. My project presents an alternative view as it seeks to examine informal narratives about the constitution that were circulated in the press.

I am especially interested in how public knowledge and perception about the constitution was constructed and shaped by the mass media. The 2007 constitution making of Thailand presents a unique case study as the two political camps – the Red Shirts and the Yellow Shirts – developed contrasting visions of the ideal constitution and fought to exert their differing narratives through the media.

The goal of my research is to answer the following descriptive question: How do the popular and elite Thai newspapers coverage during the constitutional drafting period reflect the Red and Yellow narratives about constitution making in Thailand? For the Red Shirts, the drafting process and the draft constitution were captured by the military and the elites.

A true democratic constitution, according to the red narratives, should limit the intervening power of the elites and the royalists, permitting both the senate and the house to be fully chosen through popular election. For the Yellow Shirts, the draft constitution was designed to enhance check and balances against the "tyranny of the majority". Emphasis should be given to strengthening the power of the constitutional court, the senate, and independent institutions, selected by a group of elites, to limit government power.

I conducted a quantitative and qualitative content analysis of a random sample of news articles mentioning the constitution making during a period of eight months (1 January 2007 – 18 August 2007) from the establishment of the Constitutional Drafting Assembly to the national referendum of the new constitution. The research population is two mainstream Thai language dailies for the general population: Thairath, the popular daily with the highest circulation in the country, and Matichon, the elite daily.

My project complements studies that focus attention on the legal and political culture of citizens, extending law and society outlook to the study of constitution making in a divisive society. It adds an intriguing, real world example to enhance our understanding of constitution making as an informal social process where the media serves as a significant venue for the contestation of constitutional narratives.

Carolina Silva Portero, S.J.D. Candidate, Harvard Law School, USA

Rethinking Democracy: Indigenous Political Movements and Constitutional Change in Ecuador and Bolivia

After approving plurinational constitutions, Ecuador and Bolivia brought to the table important questions about the redefinition of the modern national State in Latin America. Their emphasis was on a redrawing of the democratic mechanisms of political participation that stresses indigenous peoples' rights to autonomy and self-determination. These political changes have been claimed to point to some post-liberal democracy emerging in the region.

This paper addresses such claims, with a focus on how indigenous political movements have challenged state-sanctioned form of liberal representative democracy. On a country-specific level, it presents a historical analysis of indigenous political mobilization vis-à-vis the constitutional processes. On a comparative level, it explains how institutional innovations in these countries diverge from traditional liberal representative democracy. It examines how indigenous movements used different extra-institutional strategies to enhance political participation. Using the framework of how a post-liberal democracy is delineated, it argues that these countries present a complex, rebalancing of liberal democratic norms and mechanisms. Approximating a post-liberal democracy in the region, is a process of readjusting the normative dimensions of liberal democratic values.

Finally, this paper suggests how these changes reveal limitations to democratic innovations. The centralist features could distort the participatory focus of these constitutions and become instruments of political control and cooptation. Despite these challenges, this analysis points to the fact that the attempt to transform democracy is a complex and contradictory process.

Thomaz Pereira, J.S.D. Candidate, Yale Law School, USA

Entrenchment and Constitutional Politics: Interpreting Eternity Clauses

Constitutional amending procedures purport to channel the revision of the basic agreements that structure politics and, as such, can be themselves the most fundamental agreements on the identity and nature of a constitutional system. Thus, if unamendable constitutional provisions ("eternity clauses") are the product an act of self-definition, analyzing their political meaning is necessary to an accurate understanding of these regimes. Ignoring this, the mainstream legal narrative generally depicts eternity clauses as identifying legal systems that define themselves as independent of and prior to politics – disregarding their historical contexts, institutional settings, and practical functioning. In this way, understood as extreme formal limitations on politics, eternity clauses are generally understood as: (i) important barriers on the power of majorities, capable of preserving the constitutional order and the political process, or (ii) unfair and cumbersome limits on the power of new political majorities, leading to either (a) informal / illegal constitutional amendment or (b) political crisis and regime change (believing, therefore, that too much legal structure leads to informal behavior or chaos). It is my belief that an accurate understanding of the meaning and institutional consequences of eternity clauses requires an analysis of the inner-workings of constitutional democracies in which they exist. And, on an effort to move beyond both the abstract rhetoric and the limited focus on German constitutional law that marks the current debate, my research critically examines the political origins and

institutional practices of eternity clauses in Germany, India, Portugal, and Brazil. Engagement with these diverse legal systems allows me to (i) critique the mainstream narrative that depicts – and therefore, justifies or criticizes – eternity clauses as extreme expressions of legal rationalism limiting "irrational" manifestations of the popular will; and (ii) enables an alternative narrative that highlights the political nature of eternity clauses – while contextualizing them as (a) products of social struggles, (b) embedded in a legal and political culture, and (c) functioning within a legal structure forged through interactions between distinct legal traditions. In other words, I seek to investigate if, when, why and how constitutional entrenchment matters.

PANEL 8: Administrative Law, Regulation, and Governance

Discussant: Professor William Simon, Columbia Law School

Chair: José Aleman, J.D. '14, Stanford Law School

Dr. Danny Cullenward, Philomathia Research Fellow, Berkeley Energy and Climate Institute, U.C. Berkeley; J.D./Ph.D. '13, Stanford University, USA

Property Rights and Transparency in California's Carbon Market: Lessons for Climate Policy Implementation

Economists generally agree that emissions pricing is the most cost-effective climate policy strategy, with a range of viable options including carbon markets, carbon taxes, and hybrid designs that blur the two approaches. While carbon markets have been most popular to date, economic theory suggests that these different instruments do not differ materially in terms of their effect on regulated parties' behavior. Here, I argue this dominant perspective overlooks a key weakness specific to carbon markets: the vulnerability of the rules underlying the property right.

Carbon markets are built on tradable emissions permits. Emissions permits are particularly vulnerable as property rights because their value depends not only on the expected emissions trajectory and mitigation costs within the market system—the very reasons economists argue that a market-based approach is more efficient than a centrally planned policy—but also on the stability of the liability regime imposed on all affected polluters.

In practice, however, the rules establishing that liability are complex and constantly subject to political re-negotiation. Using the California carbon market as a case study, I show how the liability regime in a leading carbon market was manipulated through complex regulatory proceedings. The end result is a system where the formal rules differ materially from the practical operation of the market, with the gap reflecting a significant degradation of the emissions liability regime. This example shows why carbon markets may be more difficult to implement than carbon taxes for two reasons. First, carbon market oversight resembles financial regulation, yet is typically assigned to environmental regulators who generally lack the necessary economic skills to anticipate market responses or bring enforcement actions against market actors. Second, the complexity of sophisticated carbon market designs dramatically reduces public oversight of markets due to the technical skills required to analyze them. Both factors increase the likelihood that policy opponents will successfully apply political pressure to change emissions liability rules, thereby undermining the stability of carbon market property rights.

California's recent experience suggests that policymakers, researchers, and environmentalists have underemphasized the need to focus on climate policy implementation. While this case study does not resolve the superiority of one policy instrument over another, it nevertheless demonstrates a crucial weakness in the conventional argument for carbon markets. In order to make carbon markets work as intended, policymakers and civil society will need to put additional efforts into market implementation.

Reflecting on this experience, I argue that if carbon markets are not implemented according to the rule of law outlined in the design phase of policymaking—or even if the markets transition from one design to another through proper administrative procedures but without sufficient public oversight of the changes—they will not produce a politically credible price on carbon. Where carbon markets are the preferred policy instrument, California's example counsels additional efforts to strengthen the institutions required to facilitate the development of stable property rights.

Dr. Natasha Salinas, Professor of Law, School Of Economics, Business and Political Science, Federal University of São Paulo (Unifesp), Brazil

Government-Nonprofit Policy Partnerships: Tensions between Bureaucratic and Social Accountability Models

The paper I would like to present at the Inaugural Conference for Junior Researchers aims to explore the limits of legal structures in governing state-nonprofit policy partnerships in Brazil, a subject that has been part of my research agenda for the last few years. The contracting out of public services from nonprofit organizations has become a common practice over the last two decades in Brazil. Federal, state and local governments have been delegating policy implementation authority to nonprofit institutions in a wide range of social policy areas such as education, health, social service and environment. This major shift of implementation authority from the public to the private sector has been accompanied by a new institutional scheme in which contract-type legal rules govern the relationship between the state and nonprofit institutions. Although these contract legal rules have been designed specifically to govern these relationships, they have not been successful in fostering effective and efficient public-private policy partnerships. There are various factors that lead to the ineffectiveness of these partnerships, but this paper will address especially one, which I believe suits the theme of this conference: the incompatibility between the government and the nonprofit sector accountability models. The government resorts to a formal, hierarchical and rigid accountability model, which causes dissatisfactions and anxieties in the nonprofit sector. The nonprofit sector, nonetheless, resort to a substantive, multilateral and informal accountability model informed by social norms which are seen by public officials with distrust. Under this background, it is important to analyze whether this seemingly incompatibility between government and nonprofit models of governance can be reversed through institutional design. Is it possible to create institutions able to balance the conflicting needs and modes of operation of both the State and nonprofit organizations? The paper does not aim to provide a definitive answer to this question, but rather systematize the theoretical background addressed by the literature on this problem. An analysis of the theories informing the limits and possibilities of the problem of incompatibility between the state and nonprofit accountability models is crucial to provide a common language and background to guide future empirical investigation on the topic.

Julia Cadaval Martins, S.J.D. Candidate, Georgetown Law School, USA

Designing Interlocal Cooperation: Institutional Collective Action and the Brazilian Public Consortium Law

The main challenge of the development literature is the problem of global, regional and local inequality, which demands considerable abilities from developing countries' governments. In order to understand what developing countries have tried, and what has succeeded, I examine the costs and benefits associated with centralized and decentralized government structures and discuss the idea of institutional collective action.

When faced with challenges to pursue better local policies, local governments have different options: they might simply not pursue the specific policy (and politicians may be able to stay in power anyway due to lack of information in society, or political capture); local governments might pursue a limited policy by themselves (perhaps favoring only a few parochial interests); local governments might request external support (usually from the federal government, a solution that is often dependent on political affiliation). Finally, local governments have the option of forming cooperation mechanisms (collective action institutions) for addressing collective action problems. Why would local governments prefer the voluntary association to external support?

Understanding the potentialities and limitations of an innovative mechanism for public cooperation may be especially helpful for dealing with issues that usually spill over more than one jurisdiction, such as transportation, electricity, sanitation, and water supply. These arrangements can occur through different structures and can vary largely in terms of the flexibility and local autonomy preserved. Despite the importance of these structures, especially at the local level where the ability to pull together administrative, financial and technical resources is particularly valuable, most legal scholars have focused on the vertical relationship between central and local authorities, with limited consideration given to the possibilities of cooperation not only between the center and local governments, but also among subnational governments. The Brazilian public consortium structure was transformed by the Federal Law n. 11.107/2005 and offers a mechanism for cooperation between local jurisdictions pursuing common goals. To understand the challenges and accomplishments of institutional collective action, I focus on the Brazilian mechanism of public consortium, an instrument of association between municipalities to pursue common goals. This paper addresses the limits and potentialities of cooperation through the analysis of the public consortium.

Ching-Fu Lin, S.J.D. Candidate, Harvard Law School, USA

Public-Private Interaction in Global Food Safety Governance

The exponential increase in food safety scares across the globe have resulted in growing regulatory initiatives, including rules and institutions from national governments, international organizations, and private actors. Due to the inefficiency and ineffectiveness of public regulation, private governance in food safety, reinforced by economically powerful players like WalMart or Carrefour, has gradually become *de facto* mandatory and replaced public regulation. Private ordering has emerged as an informal way of governance with different designs, such as private standards, certification protocols, third-party auditing, and transnational contracting. Private ordering initiatives transcend national boundaries and filter all the way back through processors, traders, and down to the level of agricultural production in different states. Such private dominance in the traditionally public regulatory space has given rise to concerns as well as stimulating theoretical and practical inquiries.

This paper therefore intends to explore the structure and processes of private food safety governance, its interactions with public regimes, and an optimal institutional design for public-private cooperation. Through various modes of public-private regulatory interactions, traditional command-and-control regulations are increasingly being supplemented or replaced by more flexible and informal, market-oriented mechanisms. It is crucial to understand how global food safety governance is configured and reconfigured through such complex and dynamic interactions. More specifically—What strengths and weaknesses are associated with the private approach to food safety regulation? Are public and private forms of governance in competition or do they complement each other? What problems and opportunities are associated with public-private regulatory collaboration? Whose values, interests or preferences tend to prevail when in such regulatory hybridization? What guiding principles, if any, should inform such public-private collaboration?

This paper will provide an analytical account of how public/private boundaries in the governance of food safety have developed and shifted over time. By emphasizing the importance of cross-boundary interactions instead of institutional boundary building, this paper intends to reconceptualize the traditional public/private dichotomy and delineate the architecture of hybrid global food safety governance. At a more general level, this paper highlights the need for fostering constructive public-private regulatory interactions as a way of effective governance. Public-private regulatory interactions are *jurisgenerative* and therefore able to serve as a vehicle for regulatory learning, norm diffusion, knowledge production, power distribution, and legal innovation.

PANEL 9 –The Role of Law in Education

Discussant: Professor Robert Gordon, Stanford Law School

Chair: Sophia Rios, J.D. '15, Stanford Law School

Abhinav Chandrachud, J.S.D. Candidate, Stanford Law School, USA

From Hyderabad to Harvard: How U.S. law schools make clerking on India's Supreme Court worthwhile

Since the 1990s, judges of the Supreme Court of India have hired law clerks to help them perform some of their routine tasks. However, while clerkships on the U.S. Supreme Court are considered very prestigious and are extensively written about, clerkships on India's Supreme Court are considered to be of significantly lower value by the local legal profession and teaching market in India. Instead, ironically, clerkships on the Supreme Court of India are most often pursued by students interested in getting an advanced law degree (usually an LL.M.) at a U.S. law school. Relying on interviews conducted with law clerks and interns who have served on the Supreme Court of India, and using India as a case study, this paper argues that advanced degree programs at elite U.S. law schools, meant for foreign students, have inadvertently encouraged students in other countries to "Americanize" themselves by doing the things that stellar American law students do.

Doron Dorfman, J.S.M. Candidate, Stanford Law School, USA

Formally or Informally Disabled: the Difference Dilemma and Alternatives to the Learning Disability Evaluations Requirements of the IDEA

In this paper I will explore the difficulties that surface in trying to evaluate and categorize children who are in need of special education. I will point out the ramifications of labeling a child as having a learning disability, and how contemporary concepts and definitions of disability can be implemented into creating a better evaluating system.

This issue is particularly important since it impacts the lives of about 5.8 million American students (ages 3-21) who receive special education services. Not coincidently, this phenomenon produced a huge market for evaluations of learning disabilities.

Evaluation of learning disabilities are considered as gatekeepers for claiming rights according to the Individuals with Disabilities Education Act (IDEA). In order to be eligible for services given to those considered as "special needs," the IDEA requires the student to go through a highly formalistic two stage process. First, the student is identified as having one of the medically defined disability categories listed in the law, and then she needs to show that the disability results in an adverse educational impact.

According to the famous "Dilemma of Difference" framework, labeling someone as different carries consequences in private and intimate settings as well as in public. Even if the intention is pure, and the labeling process is driven by the will to help the individual or group, this process

can bring about stigmatizing and other negative implications, and therefore should be done (if at all) with great care.

I argue that there is a need for a change in the way of thinking about learning disabilities. A more inclusive approach that takes into account environmental aspects that cause the difficulties in an academic environment should be implemented into the legal system and thereby help to address some of the issues that arise from the current one.

This paper can shed a new light on the issue special education and ideally inspire policy makers to look for better ways of dealing with the current situation.

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Not in My School: The conflict between Law and Religion from the Eyes of Religious Educators

Individuals and groups often face normative conflicts between their obligations under the law and their obligations under their religion. How do they resolve these conflicts, what considerations do they make, and what, if anything, can lawmakers do to encourage compliance with the law in situations of conflict?

These three interlinked questions are in the heart of this paper that studies the conflict between law and religion in one of its fiercest arenas: education. Through in-depth interviews of over 40 Jewish-Israeli educators I shed light on the myriad conflicts that religious educators experience when they seek to construct the school according to religious norms, conflicts that often find their way to court. For example, conflict abound when a religious school deliberates whether to fire a teacher who became pregnant out of wedlock, knowing that this act might be contrary to anti-discrimination laws;[3] or when the principal of a state-funded school contemplates whether to abide by the public curriculum requirements or teach a more religious curriculum.[4] Or, when schools adopt religion-based admission policies that implicitly or explicitly discriminate students on the basis of ethnicity,[5] race, or sexual orientation.

While empirical legal scholars have extensively researched the concepts of legal consciousness and compliance with the law (e.g. Ewick & Silbey, Tyler), little is known about the way people conceive of and resolve normative conflicts between the law and other normative systems, particularly in the case of law vs. religion. These normative conflicts can give rise to distinctive types of legal consciousness, from blatant disregard to the law and feeling above the law to efforts to reconcile the dissonance and harmonize law and religion. Building on my interviewees' multiple ways of positioning themselves with relation to law and religion, I explore whether law matters – and how – for believers when it comes into conflict with religion. I suggest that the educators' solutions of compromise, including reframing policies and legal decisions and

[3] RLC 12137-09 (TLV) Plonit v. Almonit (Israel 3.4.2013); Chambers v. Omaha Girls Club, 629 F. Supp. 925, (D. Neb. 1986).
[4] "Rabbi Elyashiv instructed: no math and English", *Ynet* (5.27.2004) [Hebrew]; Tammy Kitzmiller, et al. v. Dover Area School District, Case No. 04cv2688 (2005).
[5] HCJ 1067/08 Noar KeHalacha Association v. Ministry of Education [2010].

redrawing the boundaries between private and public, should be taken seriously by judges and policymakers who wish to minimize the conflict and increase compliance with their decisions.