LAW & PREJUDICE

16th Annual McGill Graduate Law Conference

4th - 5th
MAY 2023

General Conference

Dean Maxwell and Isle Cohen Doctoral Seminar in International Law

Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion

"Ignorance is less remote from the truth than prejudice".

- Denis Diderot

McGill University
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DROIT *et* PRÉJUGÉS

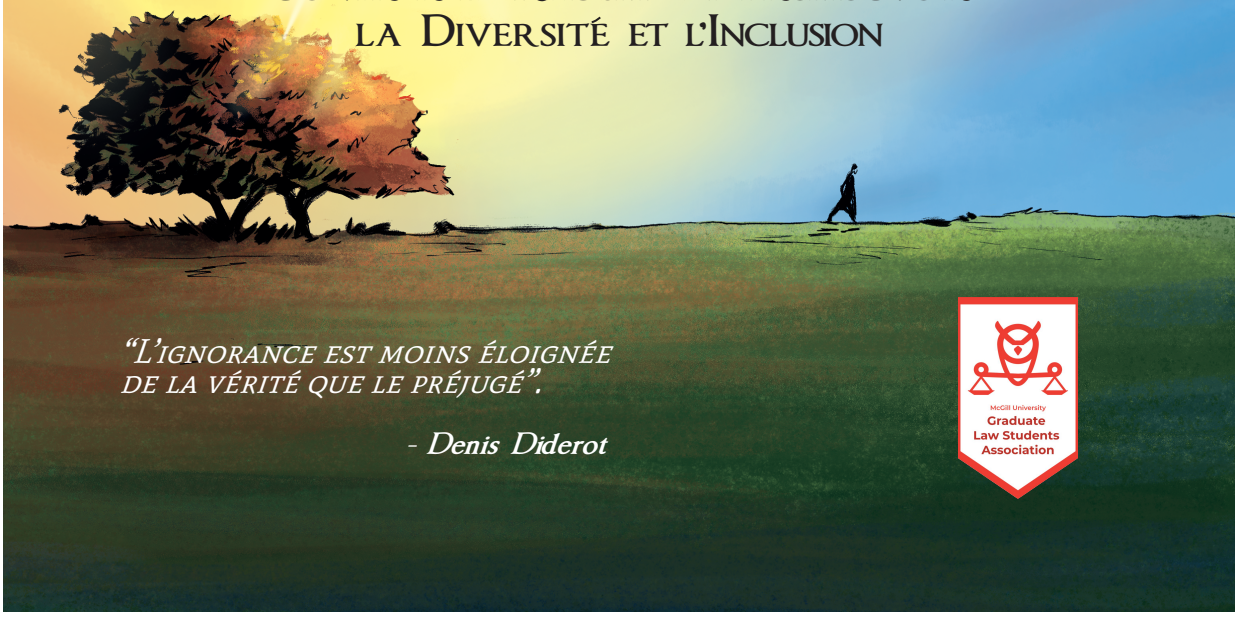
16ème conférence annuelle des étudiant.e.s
en droit des cycles supérieurs de McGill

4 - 5
MAI 2023

Conférence Générale

Séminaire Doctoral du Doyen Maxwell
and Isle Cohen en Droit International

Séminaire de la Banque Scotia pour
Contrer le Racisme et Promouvoir
la Diversité et l'Inclusion



"L'ignorance est moins éloignée de la vérité que le préjugé".

- Denis Diderot

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Abstracts and Bios (Participants and Moderators)

- Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 1: **Striving for Equality Across Legal Latitudes** 4
- Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 2: **Disability, Identity and Prejudicial Discrimination** 9
- Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 3: **Addressing Structural Injustice through Inclusion and Diversity** 13
- Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 4: **Indigenous Peoples and Prejudice Among Communities** 17

Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 1: **Striving for Equality Across Legal Latitudes**

Moderated by **Yuri Romana-Rivas**, *McGill University*

Yuri Alexander Romaña-Rivas, an Afro-Colombian lawyer, is a current doctoral (Ph.D.) student in the Comparative Law concentration of the Doctor of Civil Law (DCL-Comparative Law) program at McGill's Faculty of Law and an O'Brien Fellow at the McGill Centre for Human Rights and Legal Pluralism. He is also a recipient of the 2022 National Scholarship Vanier awarded by the Social Sciences and Humanities Research Council of Canada (SSHRC).

Panelists:

Akshat Agarwal (*Yale Law School*)

Akshat Agarwal is a J.S.D. candidate and Tutor in Law at Yale Law School, where he obtained his LL.M. degree in 2022.Akshat's academic interests lie at the intersections of public law, family law, and gender & sexuality.

ABSTRACT: *The Changing Law of Parent-Child Relationships*

LGBT+ claims to parental recognition and the proliferation of assisted reproductive technologies (ART) have globally challenged family laws on parent-child relationships, which have traditionally focused on marriage and biological reproduction. While these transformations in family law are ongoing, courts in several jurisdictions have had to deal with questions of parental recognition and responsibility in the context of both ART and LGBT+ families. Courts have utilized approaches ranging from emphasizing equality and liberty claims of parents based on principles of intent and function to recognizing parent-child relationships to secure children's best interests. What remains unclear is the precise work these approaches do in parental recognition and their mutual interaction. Do they diverge from one another, or do they significantly overlap?

Moreover, is one approach normatively preferable over the other in responding to the realities of family formation? I analyze the law on parental recognition in the context of ART and LGBT+ family formation in the United States, England & Wales, South Africa, and in the jurisprudence of the European Court of Human Rights to understand the implications of these approaches. I argue that basing parent-child relationships in equality and liberty claims by recognizing intent and function as grounding parental interests may be normatively preferable to best interests due to the latter's insufficient attention to the dignitary claims of the individuals involved in family formation. Instead, best interests may better serve as a rule of procedure in resolving specific disputes between recognized parents.

In the process, I also seek to theorize the broader relationship between constitutional or rights-based arguments and family law to reflect on how such adjudication works in family law and its utility in effectuating family law change. Thus, I seek to respond to gaps in existing academic literature on comparative family and constitutional law.

Marie Dry (*McGill University*)

Marie Dry is a doctoral student at McGill Faculty of Law and Université Paris Nanterre. Her research is focused on the inclusion of 2SLGBTQI+ individuals in Quebec and French family law. The Philippe Lette Fellowship and the LGBT Purge Fund fund her doctoral project. Marie holds a BA in Political Sciences, an Advanced Certification in Gender Studies, and a Master's in Economic Law (Summa Cum Laude) from Sciences Po Paris. She was a visiting student at the University of Toronto and Harvard Law School. Previously, Marie worked at the World Bank Group as a legal analyst.

ABSTRACT: *The future of legal education will be queer*

During the 2022-2023 academic year, just a quarter of Canadian law schools offered courses related to LGBTQI+ studies, sexuality and/or queer theory. Full-time faculty members taught about two-thirds of these courses, but even when introduced, they were often relegated to elective courses rather than being part of the core curriculum. However, in order to drive change towards granting more rights to LGBTQI+ individuals worldwide and to foster a more inclusive understanding of justice that encompasses LGBTQI+ issues, law schools must keep pace. This article looks ahead to the future of legal education, where LGBTQI+ studies and queer theory hold a more prominent place in law schools. It aims to demonstrate that incorporating these subjects is not only feasible, but also desirable for law faculties. To do this, I will reflect on my own experience in law school and explore what a queer-er

legal education might look like. In order to imagine this queer legal education experience, the article focuses on themes central to queer theory, such as representation, performativity, failure, sexuality, and fluidity, to reveal the heteronormative structures and biases present in traditional legal education. Through this lens, it becomes possible to imagine a more meaningful inclusion of LGBTQI+ issues and theory in legal education. By educating students about the issues faced by the LGBTQI+ community, the transformative power of queer pedagogy over legal education opens the door for law faculties to address common critiques about their organization. By queering the law faculty, a wider examination of traditional elements of legal education, such as a focus on excellence and success, adversarial processes, jurisdictional limitations, and opaque hierarchical governance, can occur. This inspection opens the conversation to a more complete transformation of law faculties..

Leon Yang (*The Chinese University of Hong Kong*)

I am now in my first year of MPhil in Hong Kong, studying contract law with Stephen Hall, a well-known jurist. My research interests also include comparative law, human rights law, and technology regulation. With my thesis, I hope to provide a new perspective on contract law to find a balance between stability and flexibility under an emergency, and the goal of the analysis is to explore the effect of global health crises on contracts and how it proceeds to affect the legal rights and responsibilities of parties. Welcome to see me if you come to Hong Kong.

ABSTRACT: *The Iceberg under the Water: Where is the Future of China's Anti-Employment Discrimination Law under the Employment Prejudice*

As a unique legal phenomenon, China has developed its economy rapidly based on intensive labour production with a large labour force, but there is no independent anti-employment discrimination legislation. However, there is some significant employment discrimination in China's labour market.

Age discrimination has become the most widespread and influential employment discrimination in China's labour market. Employers set the age threshold, called the "35 years old threshold", and caused partial people over 35 years old to face career crises and re-employment difficulties. In addition, the legislation does not clearly define gender discrimination, resulting in the labour law's lack of operability in practice. Explicit or implicit gender restrictions in recruitment are still difficult to control effectively. Subsequently, under the influence of traditional culture, employment relations are unequal. Employment is seen as a reward and appreciation for workers, who can only passively accept employment contracts and labour conditions under this prejudice. Finally, sexual minorities also lack

adequate legal protection in the employment process. No further protections were ever taken in China after the first LGBTQ teacher rights case in 2018.

Based on the above, this paper recommends that China enact an independent Anti-Employment Discrimination Law to guarantee equal employment right. Firstly, current protections are based on private law perspectives, such as the Civil Code, Labour Law and Employment Promotion Law, without realising that equal employment rights have both public and private law attributes. Secondly, current legislation takes an enumerative approach, covering only narrow and vague aspects of ethnicity, race, gender, religion, etc. Thirdly, the legislative experience and research on Employment Discrimination Law in the United States and Germany are extensive and provide excellent guidelines that can be consulted. This paper hopes to propose effective legal paths to promote employment equity in China.

Sonia Anand Knowlton (*University of Ottawa*)

Sonia Saroj Anand Knowlton is a recent Juris Doctor graduate from the University of Ottawa and will be commencing her Masters of Law at Yale Law School this August. Sonia holds a Bachelor of Science from McMaster University where she graduated summa cum laude in theoretical mathematics. She has worked extensively in the area of law and technology both in research and in practice. Sonia's current legal interest lies in the intersection between legal theory and the law's protection of equity-seeking groups.

ABSTRACT: *Equality-Infused: Charter Considerations for the Regulation of Artificial Intelligence in Canada*

Many assume that Artificial Intelligence ("AI") systems and tools operate objectively and in a value-neutral way, due to their non-human characteristics and behaviour. This perception of neutrality, rationality, and objectivity allows AI's ability to cause harm to be dismissed, overlooked, or even rationalized. In the modern era in which AI is involved in sentencing decisions, college admission decisions and loan application decisions, a consideration of the potentially adverse impacts of AI is necessary. This essay argues that Canada's regulation of AI must be consistent with the Charter's value of equality, specifically in accordance with the recognition of "adverse impact discrimination" as a form of inequality, as developed in Fraser v Canada (Attorney General). Strictly speaking, in order to be consistent with the entire understanding of the Charter's value of equality, as required by law, any Canadian AI regulatory scheme must acknowledge AI's ability to perpetuate oppressive power relations through the exacerbation of the cultural subordination, marginalization, and powerlessness of oppressed groups (and members thereof) in the design, development, and implementation of AI. To

do so, the regulatory scheme should include the possibility of "adverse impact discrimination" in the scheme's understanding or definition of a "Biased Output". Part 2 explains how AI can perpetuate oppressive power relations through the mechanisms of value-embedding and value-learning. Part 3 explores the legal underpinnings of this argument and, in doing so, explains why the perpetuation of oppressive power relations must be addressed for the regulatory scheme to be compatible with the Charter's value of equality. Part 4 considers Canada's Artificial and Data Intelligence Act to illustrate how an AI regulatory scheme could include "adverse impact discrimination." Part 5 addresses concerns that may arise with my analysis from Part 3 and from my suggestions from Part 4. Part 6 concludes.

Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 2: **Disability, Identity and Prejudicial Discrimination**

Moderated by **Prof. Nandini Ramanujam**, *McGill University*

Prof. Ramanujam is a Full Professor and the Co-Director and Director of Programs of the Centre for Human Rights and Legal Pluralism at McGill University's Faculty of Law. Prof. Ramanujam's research and teaching interests include Law and Development, Institutions and Governance, Economic Justice, Food Security and Food Safety, the role of civil society and the Fourth Estate (Media) in promotion of the rule of law, as well as the exploration of interconnections between field based human rights work and theoretical discourses. Prof. Ramanujam received her Doctorate in Economics from Oxford University for her dissertation on Price Mechanism in Russia: Its role in the Old Planning and the New Markets. She holds a M.Phil and a M.A. in Economics with 1st class honours from Bhopal University.

Panelists:

Gabriel Lefebvre (*McGill University*)

Gabriel Lefebvre est un chercheur universitaire et doctorant à l'Université McGill. Son mémoire, Les infortunes de l'autisme de type Asperger en droit pénal canadien, déposé à l'Université de Montréal portait sur la responsabilité criminelle et morale des personnes autistes. Il travaille présentement sur une thèse doctorale portant sur la justice pénale préventive et ses impacts sur les délinquants socialement vulnérables. Ses champs d'expertise incluent la sécurité et la gestion du risque, la neurodivergence et le neurodroit, la pénologie et plus généralement, l'histoire et la philosophie du droit.

ABSTRACT: *Décartographier la probation : l'imaginaire libéral de la loi en tant que projet d'exclusion de la neurodiversité*

Dans le cadre de la série de conférences Droit et Préjugés, nous avons choisi de « décartographier » la probation imposée à un délinquant autiste Asperger dans l'affaire R. v. Hanssen afin de relever les présomptions (ou préjugés) qui accablent le sujet de droit neurodivergent; plus précisément la capacité qu'on prête au sujet de droit responsable à se disjoindre des déterminismes psycho-sociaux qui composent sa réalité vécue et à se déterminer, seul, par la seule force de sa Raison et de sa Volonté. Elle renforce le préjugé voulant qu'il n'en tienne qu'au délinquant de se reprendre en main et que le

bris répété de la loi ne soit qu'une question de « mauvaise » volonté de sa part. Le projet de droit libéral – l'individu libre gouverné par la loi – apparaîtra suite à notre exégèse comme étant davantage un projet d'exclusion systématique de la myriade de déviations possibles de cette construction de l'Homme raisonnable; le projet de la loi en est un fait exclusivement à sa mesure.

Grâce au recours à de nouveaux outils théoriques (la loi comme Carte de Boaventura de Sousa Santos, l'imaginaire social de Charles Taylor, le Chronotope de Mariana Valverde), nous allons pouvoir faire ressortir les formes d'oppression latentes et cachées qui accablent les personnes atteintes de troubles mentaux lorsqu'on leur impose une ordonnance de probation. Décartographier la carte-probation (à partir de ses éléments-caractéristiques, nommément son échelle, sa représentation et sa légende) nous permettra de questionner le rôle de l'Institution dans la gestion de la sécurité et de nous demander s'il est possible d'imaginer des pratiques probatoires moins sévères et préjudiciables pour les délinquants socialement vulnérables.

Philippa Duell-Piening (*University of Melbourne*)

Philippa Duell-Piening is a PhD candidate at the Melbourne Law School. Philippa's research is primarily in the field of human rights law with a focus on disability and refugee rights. Prior to commencing her PhD candidature in 2019, Philippa coordinated the Victorian Refugee Health Network. The focus of Philippa's work was on health sector development and government engagement to reduce health inequalities and improve access to health services for people who are refugees. Philippa has a Graduate Diploma in International Law, a Master in Community and International Development, and a Bachelor of Occupational Therapy.

ABSTRACT: *Data and Power: a lens to examine the Convention on the Rights of Persons with Disabilities Article 31 titled 'Statistic and Data Collection'*

Data is not neutral and inert, it is dangerous. As Michel Foucault explained, 'everything is dangerous' but not necessarily bad. Data is not 'bad', but it must be treated with caution. This paper, a chapter adapted from my PhD, highlights that historically, statistics and human categorisation have created difference and division and ranked human characteristics with disastrous outcomes. While states may use human categorisation to identify disparity and target special measures, history has demonstrated that motivations can rapidly change in times of austerity and fear for human security. During these times, difference is problematised. Those receiving targeted or special measures may be viewed as a burden on the state, and this group may be punished.

People with disability routinely experience state control over their lives. The totalising yet subtle mechanisms of power described by Foucault through administrative interactions, 'expert' assessments and documentation are used to subjugate people with disability. Assessing who holds the power of knowledge and 'truth' creation is vital in understanding how power is exerted. Documentation, information, and data are used to define truth and exert control.

Sally Engle Merry warned of the limitations of quantitative data and the caution that should be exercised when using it to inform policy decisions. 'Data-driven policy' often draws on available data and is seen as a greater form of truth than other methods of identifying pressing social issues. It is, therefore, understandable that advocates call for more data production about marginalised communities to make their disparity more visible. Nonetheless, this practice requires greater attention, as Philip Alston and others have highlighted that the digital state challenges human rights norms.

My PhD uses these critiques about data and power as a lens to examine the Convention on the Rights of Persons with Disabilities' Article 31, titled Data and Statistics.

Catherine Samaha (*Université de Montréal*)

Catherine Samaha is a Ph.D. student at the University of Montreal and the Pantheon-Sorbonne University. Her thesis focuses on the digital modernisation of class action settlements in Quebec and France. Her main research interests are class actions and online dispute resolution. She has also been a lecturer and a research assistant at the "Class actions laboratory" of the University of Montreal.

ABSTRACT: *La discrimination systémique algorithmique : un nouveau fléau social à affronter*

Les algorithmes d'IA, centre axiologique des nouvelles technologies disruptives, sont désormais omniprésents dans divers secteurs de l'activité humaine et régissent les différents aspects de la vie contemporaine . Cette évolution suscite à la fois de l'enthousiasme et de l'inquiétude, d'autant que les nouvelles technologies basées sur l'IA se sont révélées loin d'être neutres.

Les algorithmes d'IA reproduisent en réalité les valeurs, les stéréotypes, et les préjugés de leurs programmeurs à chaque étape de leur développement (conception, codage, apprentissage, etc…), et les diffusent à grande échelle . Cette « automatisation de la discrimination » fait en sorte que les groupes socialement marginalisés tels que les femmes, les peuples autochtones, et la communauté africaine, restent invisibles aux regards des algorithmes d'IA. Citons par exemple, le système de reconnaissance

vocale des pilotes d'hélicoptères qui ne reconnait pas la voix des femmes pilotes , les outils d'aide à la décision utilisés par les autorités fédérales qui refusent d'accorder les permis d'études aux étudiants africains malgré leurs bons dossiers académiques , ou encore l'affaire Beaulieu c. Facebook inc. , récemment autorisée par la Cour d'appel du Québec au nom des personnes qui auraient été discriminées par le ciblage publicitaire de Facebook en raison de leur race, de leur sexe ou de leur âge .

Ces biais algorithmiques ont amené ainsi à constater que « la justice sociale est l'angle mort de la révolution de l'intelligence artificielle » . Notre présentation vise à mettre en exergue les effets des biais algorithmiques découlant des préjugés de leurs concepteurs, ainsi qu'à proposer des solutions efficaces pour les contourner.

Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 3: **Addressing Structural Injustice through Inclusion and Diversity**

Moderated by **Prof. Sarah Riley Case**, *McGill University*

Prof. Sarah Riley Case is an Assistant Professor whose research and teaching focus on slavery and the law, Critical Race Theory, Black life, Third World Approaches to International Law, settler colonialism, arts, and governing the natural world. Before joining McGill, she was a Fulbright Visiting Researcher at Harvard Law School's Institute for Global Law and Policy. She served as a Special Advisor to the UN Independent Expert on Human Rights and International Solidarity. She taught as well at the University of Toronto Faculty of Law and at Osgoode Hall Law School. Prof. Case's work crosses over law, history, conceptions of justice, representations of nature, and the arts.

Panelists:

Michael Poon (*McGill University*)

Michael Poon is a doctoral candidate at the McGill University Faculty of Law. He is a serving Reserve Officer with the Canadian Armed Forces, serving overseas in 2015.

ABSTRACT: *"Vicious Circles": Canadian Armed Forces Responses to Legal Critiques of Prejudice*

The Canadian Armed Forces (CAF) has struggled over and been critiqued frequently on bias and prejudice within its ranks. Operation HONOUR (Op HONOUR), the (now-defunct) program to eliminate sexual misconduct in the CAF, explicitly recognized the heavily gendered component of this issue, and was one of many examples of reform signals in the back-and-forth between the CAF and its critics (members, journalists, academics/practitioners, tribunals and external reviews). This paper surveys selected legal (doctrinal and related) critiques of prejudicial CAF behaviours and features and the accompanying attempts at reform, most specifically Op HONOUR. It argues that the cyclical nature of this process (as noted by scholars and journalists alike) is symptomatic of a larger mismatch between the discourses of law and military institutional logics. Stepping off from the Legal Encirclement model (Waters, 2008), the paper will propose that legal critiques and CAF responses are talking past one another. Without both discourses deeply and honestly engaging one another, the "vicious circles" will be doomed to continue. Adopting a broad socio-legal orientation, the work will

leverage existing literature around Op HONOUR and related Equity Diversity, and Inclusion (EDI) concerns, as well as legal and social science critiques and examples (such as litigation) specific to the CAF to build upon the historical record on CAF efforts to address its critics. It proposes that committing to breaking the past rote patterns of critique and reform will better achieve the aspirational goals of both the law and the profession of arms, and squarely address prejudice beyond the cliched "bad apples" model frequently abused in characterizing institutional discrimination.

Ya'ara Mordecai (*Yale University*)

LL.M. Candidate at Yale Law School. Holds an LL.M., LL.B., and a B.A. in the Amirim Honors program in the Humanities from the Hebrew University. Upon graduation, she clerked for the Deputy Chief Justice of the Israeli Supreme Court and worked as a lawyer at the Justice Ministry International Law Division. In addition, she served as the Associate Editor of the Israel Law Review, held teaching and research assistant positions, and worked at the U.N. Human Rights Committee as part of her research assistance to the Chair. Her areas of research include criminal law, human rights law and comparative law.

ABSTRACT: *Seek Justice, Love Mercy?: Moral Intuitions and Survival Crimes*

The question of how the legal system should address 'survival crimes', namely, property offenses committed due to the offender's desperate need to obtain basic means of subsistence, is one of the most imperative questions of our time in criminal justice discourse, as the unique characteristics of these crimes challenge traditional justifications for criminal punishment. In his 2003 paper Just Say No to Retribution, scholar Edward Rubin noted that "[m]ost people respond differently to Jean Valjean's theft of some bread to feed starving children than they do to a jewelry thief who steals to buy fancy clothes" (p. 34). It is this basic intuition and its implications that this empirical study intends to examine. By relying on an online survey filled out by 300 respondents, the study will assess whether moral intuition is altered when individuals are exposed to the mitigating circumstances that characterize survival crimes, as evidenced by changes in their perception of offender culpability, the severity of the crime, and appropriate punishment.

After the definition of 'survival crimes' is clearly established, the study will delve into the critical role moral intuitions play in the communicative role of criminal punishment, while acknowledging the limitations and potential risks associated with adherence to prevalent moral intuitions in the criminalization and enforcement of punishments. Nevertheless, the study will argue that empirical inquiries of this sort remain essential for criminal research and provide valuable insights. The

methodology, data analysis, and results of the empirical examination will then be presented and evaluated. The study will reveal that the public does not view survival crimes as suitable for criminal punishment. It follows that the expressive justification for criminal punishment is severely undermined by the current enforcement mechanisms, and that the reexamination of these policies could assist in counteracting their biased and discriminatory effects on impoverished populations.

Braden Skippen (*McGill University*)

Braden Skippen is currently completing his LLM thesis at McGill University. He is a graduate of Osgoode Hall Law School and the University of Toronto. Prior to starting his masters, he worked for three years as a civil litigator with a focus on underserved communities in Toronto, Ontario. His research interests include unjust enrichment, private law theory, historical injustices, and reparations. Outside of school and work he is an avid Manchester United supporter and fan of all biryani dishes (although his partner's mom's biryani is definitely the best).

ABSTRACT: *Justifying Unjust Enrichment's Role in Redressing Historical-Structural Injustices*

It is growing more difficult to ignore the role played by Canadian state laws and policies in creating and perpetuating structural discrimination. Despite this budding awareness and acknowledgement of wrongdoing, the Canadian state continues to offer only hollow words and to shirk accountability for its past conduct. Given the sclerotic pace of political efforts at redress, it is worth asking if the common law might provide a means of addressing historical state sanctioned injustices. Turning to the courts is not a novel solution as many individuals and groups, including Holocaust survivors, the slavery reparation movement, residential school survivors, and Canadians subjected to the Chinese head tax, have attempted to hold the state accountable through litigation. These efforts were largely unsuccessful or focused on public law or tort claims. However, courts in Canada and England have recently demonstrated an openness providing remedies for historical injustices and a willingness to dismantle traditional legal obstacles to these claims. These decisions may signal a growing appreciation by courts of the normative incongruence between society's conception of injustice and the law's reliance on technicalities to protect the state from past injustices and their ongoing repercussions. In this regard, the private law branch of unjust enrichment provides an under-explored avenue for remedying historical injustices perpetrated by the state. Indeed, Canadian courts have demonstrated a flexible approach to unjust enrichment that leaves open the possibility for further expansion and the development of novel causes of action. Accordingly, the best avenue for taking advantage of courts' newfound openness to claims against past injustices and their ongoing effects is the Canadian law of

unjust enrichment, which may be relied on as a means for holding the state accountable for its normatively flawed retention of benefits accrued through historical injustices.

Bradley Por (*McGill University*)

Bradley is a doctoral candidate at the McGill Faculty of Law. His research is rooted in constitutional law, critical legal and political theory, and studies of place, embodiment, and resistance.

ABSTRACT: *Wet'suwet'en and Gitxsan Blockades as Sources of Law*

In winter 2020 blockades in support of the Wet'suwet'en resistance to pipelines development in BC shut down the entire Canadian National (CN) railway network, severely disrupting the flow of goods and destabilizing the national economy.

The Wet'suwet'en hereditary chiefs and their allies across the country ground their resistance in thousands of years of uninterrupted Indigenous jurisdiction on unceded land. They cite the Supreme Court of Canada's (SCC) 1997 decision in Delgamuukw that affirmed the hereditary chiefs of the Wet'suwet'en and neighbouring Gitxsan nations as legitimate governments and rightful holders of title to the land. Delgamuukw itself was decided in courtrooms while blockades simultaneously protected the 'claimed' land.

While Settlers tend to see blockades as 'outlaw' actions, the boundaries of the Indigenous/Settler relationship have always been set by blockades. Beginning with a blockade in 1872 that brought Gitxsan and Settler officials into contact for the first time and originated the legal relationship between Gitxsan and Settler nations, I present the history of relations between Wet'suwet'en, Gitxsan, and Settler peoples as a history of blockades, and argue that blockades are sources of law. Contemporary blockades are a manifestation of colonial contention that bring us back to the roots of the Indigenous/Settler relationship at a local and continental scale. An understanding of blockades as sources of law refutes their criminalization by Settler courts and allows us to see ongoing Wet'suwet'en resistance as constitutive action working to renew the Indigenous/Settler relations on a decolonial foundation.

I confront the prejudice of Settler judges who refuse to respect Indigenous law, and people in Settler society who see Indigenous blockaders as outlaws. The true history of Canada is a history of unflinching resistance by Indigenous peoples, and the sensational blockades of recent years are an invitation for Settlers to overcome their prejudice, protect the land, and move towards a peaceful future.

Scotiabank Seminar on Addressing Anti-Racism, Diversity and Inclusion Panel 4: **Indigenous Peoples and Prejudice Among Communities**

Moderated by **Prof. Kirsten Anker**, *McGill University*

Prof. Kirsten Anker is an Associate Professor at McGill University's Faculty of Law. She teaches property, legal theory and Aboriginal law/Indigenous legal traditions, with research interests extending also to evidence, dispute resolution, resource management and legal education. Her book Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights explores various aspects of claiming Native (Aboriginal) Title as a way to inspire a re-imagination of law. She has written widely on the challenge to orthodox understandings of law and sovereignty posed by the recognition in Australia and Canada that Indigenous law "intersects" or co-exists with state law, and draws on studies in legal theory, anthropology, Indigenous and occidental philosophy, translation and language.

Panelists:

Erin Tyler Thomas (*Cardiff University*)

I am Erin Tyler Thomas, a doctoral researcher at Cardiff University, South Wales, UK. I am currently in the first year of my PhD which is in collaboration with Public Health Wales, and is funded by the Economic and Social Research Council. My research is broadly within the field of human rights law, with my background being in public health law. My project is entitled: 'Trust, Health and the Right to Health in Travelling communities'. The aim of my project is to explore the barriers in access to healthcare and health inequalities within the Travelling community, and the way in which the socio-legal concept of trust impacts on their enjoyment of fundamental human rights, and in particular the right to health.

ABSTRACT: *Trust, Human Rights and the Right to Health of Travelling communities*

Religious, cultural and linguistic minorities have long-faced discrimination relating to their distinct identity. One such community are Gypsies and Travellers, an 'invisible' ethnic minority group in worldwide academic and policy-making discourse. Of course, this issue of 'visibility' is ironic. The 'invisibility' of Travellers in an intellectual and policy space contrasts with their extremely high 'visibility' in the media, for example accusations of 'aggressive begging' on the streets, where they become all too visible, and nearly always in a negative and prejudiced light. Anti-Gypsy rhetoric is an acceptable

everyday racism, and members of the population are constantly having to shrink or dilute their ethnicity in order to be more palatable to others.

Travellers across the world continue to experience significant barriers to accessing healthcare. Challenges such as Covid-19 have exacerbated long-standing inequalities, as the Traveller population are more likely to be at increased risk of morbidity, mortality and the psychological, social and economic effects of the pandemic. However, studies addressing these health inequalities have seldom had widescale impact. My work explores these barriers, considering ways in which they might be resolved in order to make Travellers more visible, within the legal, academic and policy context.

Longstanding stigmatisation of the Travelling community has led to a lack of trust between Travellers and mainstream health services. The sense of fear and distrust will be explored, considering how trust has potentially hindered the realisation of human rights in Travelling communities, with reference to the right to health. The right to health purports to prohibit and eliminate racial discrimination in all its forms, [guaranteeing] the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. To what extent has this right been forgotten about, or altogether abandoned, when it comes to Travelling communities?

Luisa Castaneda-Quintana (*McGill University*)

Luisa Castaneda-Quintana is a Vanier scholar and Doctoral Candidate in Comparative Law at McGill University. She is a lawyer with over 10 years of progressive human rights expertise in Indigenous Peoples, collective rights, and conservation. She has gained experience working for international cooperation organizations, civil society and United Nations. She also has worked as a lawyer for Indigenous Peoples in Colombia on environmental, territorial management, and governance issues, orienting her work on strategic litigation. She is the co-creator of the Dialogues on Indigenous Peoples' Territories at McGill University. Mainly interested in legal pluralism, Indigenous Peoples, biodiversity, and extractive industries.

ABSTRACT: *Narratives of post-colonialism, military occupation and Indigenous Peoples' territories: the case of the Arhuaco women and the Inarwa Mountain – Spiritual Father of Food*

The State's position regarding its law as superior to other existing legal systems results from entrenched colonial practices that were the precursors of racism, discrimination, and assimilation against Indigenous Peoples. This hegemonic legal system prejudices and denials different forms of laws and ways of interpreting the law. Although Colombia underwent decolonization two centuries ago, many

traces of that period have been reinforced to this day. Notably, the military occupancy of Indigenous Peoples' territories in the name of national security but against their laws and without their consent embodies today's post-colonialism. Based on my positionality as a Mestiza woman, having worked as the Arhuaco people's lawyer and, specifically, in the lawsuit against the occupancy of the Inarwa Mountain - the spiritual father of food of the Arhuaco people, I will provide some insights from the field on the 72-years-military occupation of the Inarwa Mountain. Drawing on narratives from some Arhuaco women, I will demonstrate that despite the Arhuaco people's laws prohibiting looting and occupation of their sacred territory, the reinforcement of post-colonial policies fostering military occupancy on the Arhuaco people's territories has posed significant burdens on Arhuaco women.

They have faced a de-configuration of their territory resulting from the State's imposition of the military base, the change of the Mountain's name, the constant fear perpetrated by armed groups, and the banning from accessing the Mountain to conduct spiritual ceremonies. Those actions disrupted their physical and spiritual relationship with the Inarwa Father, which provoked the dispossession of some Arhuaco women's voices, safety, family integrity, and the role of inter- generational transmission of knowledge. It also impacted their food security and sovereignty. However, amidst the circumstances, those Arhuaco women are currently the foundations that encourage and sustain internal processes to construe territorial imaginaries around the Inarwa Mountain and the long-legal battle to recuperate it.

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ABSTRACT: *Tribal Endowments: The Next Step Toward Self-Determination*

This paper argues that securing permanent and unconditional funding for Indian tribes in the United States is crucial to fortifying the self-determination era's goals. This paper explores an alternative framework to ensure continued funding for Indian tribes within the confines of the trust responsibility, serving as a complement to the self-determination policies currently in place. The first part of this work argues that vesting tribes with educational endowments would allow tribes to benefit from the existing

legal and constitutional framework while guaranteeing permanent and unconditional resources for tribes. Federal Indian policy has struggled to provide tribes with absolute protections for their fundamental rights. This lack of certainty constitutes a severe impediment to the tribes' ability to develop. Secondly, this paper provides an overview of the history of educational endowments in the U.S. to draw insights from this experience. The unique experience of the U.S. with educational endowments shows their potential to advance the self-determination of political communities in the United States. It also shows the importance of an appropriate legal framework safeguarding the funds from misuse and poor management. The third section explores how endowments may help complement self-determination policies as tribes have increased their governmental capacity to manage new funding sources. Finally, the paper focuses on the Indian Self Determination and Education Assistance Act of 1975 (ISDEAA). The success of this policy has allowed federal and tribal organizations to develop a stronger self-governance infrastructure. This section argues that the incremental implementation of ISDEAA provides a roadmap for future steps toward self-determination.

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Milagros (Millie) Mutsios is an LL.M graduate from Yale Law School (YLS). Before coming to YLS, Milagros worked as an associate at a Peruvian Law Firm specializing in mining, environmental, and natural resources law. This experience permitted her to become an Adjunct Professor at Pontificia Universidad Católica del Peru, where she assisted in teaching Mining, Law & Economic, Effective Legal Communication, and Corporative Law. She is also part of several international research groups focused on natural resources, environmental law and the intersection with human rights. When COVID-19 started, Milagros co-founded "Abogadas Probono", an association of female lawyers who offer free legal assistance to those in need. Finally, her love for wildlife and conservation led her also to co-found "BOCES," an NGO dedicated to creating awareness about biodiversity and the importance of creating active actions regarding Latin America's nature. At Yale, Milagros' research agenda explored the impact of western construction of legal concepts related to international human rights with a focus on economic, social, cultural, and environmental; as well as the dissonance with indigenous peoples' ideas of democracy, development, resources, and nature.

ABSTRACT: *The emancipation-domination paradox. The right to consultation and consent in Peruvian mining*

As in most Latin American countries, Peruvian indigenous peoples have suffered a long history of racial discrimination, oppression, and cultural assimilation from colonizers and later from political and social elites. Governments have built extractive political-economic institutions that favor mining

projects to the detriment of indigenous peoples' rights. They have been reluctant to recognize indigenous rights and create adequate livelihood conditions.

In this context, the rights to prior consultation and consent appear as an "equalizer" for indigenous peoples when facing the elite society and state's policy. In theory, these rights play a pivotal role in establishing and developing "active" tolerant rights-based relationships between States and indigenous peoples. However, in the domestic arena, the practice maintains an unbalanced relationship that keeps indigenous peoples as "the other" in opposition to the hegemonic "rational" and "developed" power.

By studying the recognition and implementation of indigenous participatory rights in Peru, this article aims to determine if the rights to consultation and free, prior and informed consent provide absolute protection for indigenous peoples to participate in State decisions that affect them or if – on the contrary- these rights impose domination upon indigenous peoples. I will focus attention on the implementation of the prior consultation right in Peruvian mining activities and the impact of judicial review made by the Peruvian Constitutional Court on the application of that right. Studying the Peruvian Court decisions will determine how the prior consultation right has been developed and the steps needed to fully recognize indigenous peoples as part of Peruvian political life through active participation mechanisms.