LSA 2012 Stream

Care and Autonomy in the Age of Austerity

Tuesday 5th June
10:15-12:00: Re-Conceptualising Motherhood
4:30-6:15: Austerity and Financial Crisis: Protest and Sexuality
6:30 - Social at Tapa Bar, Hilton Hawaiian Village Hotel

Wednesday 6th June
8:15-10:00: Sexual Violence, Race, Borders and ‘Post-Feminism’

Thursday 7th June
12:30-2:15: Accounting for Care in Private Law
2:30-4:15: Race, Sexuality and Definitions of the Family

Friday 8th June
10:15-12:00: Vulnerability and Autonomy
2:30-4:15: Author Meets Reader - Transforming Law’s Family: The Legal Regulation of Planned Lesbian Motherhood, by Fiona Kelly
Susan Boyd: Regulating Maternal Autonomy in an Age of Austerity

Through different historical periods, motherhood has been regulated through legal norms, among others. This legal regulation has had differential effects on mothers, depending on whether they are poor, working class or middle class, racialized or non-racialized, lesbian or straight, disabled or able-bodied, and so on. This paper gives some examples of how the legal system has constructed women as ‘good’ or ‘bad’ mothers through history, based on economic status, and then examines the legal construction of motherhood in the contemporary period. Its focus is on the role that financial undertakings or obligations to children play in legal decision-making about legal parenthood. Despite the enhanced choices that women now have in relation to motherhood, maternal autonomy can be compromised by modern legal norms. For instance, a responsible mother is often expected to nurture a child’s relationship with the father, unless he is proven to be harmful to the child. The extent to which that father is able to provide financial support can influence judicial decision-making as well as legislative policy choices. Women’s capacity to make autonomous choices about the form that their parenting and their familial structure will take can be compromised in the face of this focus on alleviating the state’s fiscal role in an era of austerity and privatization of responsibilities. The paper will argue that it is more crucial than ever in neo-liberal times favouring a shrunken state, to emphasize that care is a public good and that material support for mothers is necessary. A focus on ‘transgressive mothering’ will be used to suggest directions for policy-making in the future, with a focus on single mothers who attempt to parent without a partner. An emerging difference in the legal treatment between single mothers who use assisted reproduction versus those who conceive without assisted reproduction will be explored.

Melissa Breger: The (In)Visibility of Motherhood in Family Court Proceedings

Academic literature about bias in the Family Court system has explored issues of race and the overrepresentation of people of poverty. Less attention has focused upon the parallel overrepresentation of women, particularly mothers in our Family Courts. I question whether the Family Court would function as it currently does without mothers as its core litigants. Specifically, I delve into the implicit gender biases inherent in societal expectations of mothers as ever-nurturing and ever-protective of their children -- an expectation which often ignores the complexities and nuances of motherhood -- particularly mothers without resources or a support system. To illustrate my thesis, I utilize a narrative from a case in which I was involved over a decade ago that was subsequently featured in Professor Dorothy Roberts’ book: Shattered Bonds: The Color of the Child Welfare System. This narrative is about a young mother charged with manslaughter of her baby -- who died due to poverty. Through this example and others, this Article raises provocative questions regarding the influence of gender and the construct of motherhood in Family Court proceedings. Has the gender of our Family Court litigants become virtually invisible because of its predominance? How might we identify, confront and address this invisibility in our family justice system?
Gillian Calder: To the Inclusion of All Others: Story-telling “Motherhood” with Katniss, Hermione, Candy Quackenbush, Tanya and the Warrior Cats

In November 2011 the B.C. Supreme Court released its judgment in a reference on the constitutionality of Canada’s polygamy prohibition. On the way to its holding that polygamy is inherently harmful, and thus the proper subject of the criminal law, Chief Justice Bauman said the following (para 884):

... the prevailing view through the millennia in the West has been that exclusive and enduring monogamous marriage is the best way to ensure paternal certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children, provide each other with mutual support, protection and edification through their lifetimes.

The same day that I struggled with these words during the day, I am moved to tears by rereading Katniss' words from *The Hunger Game* at night (page 24-25),

> When something unexpected happens. At least, I don't expect it because I don't think of District 12 as a place that cares about me. But a shift has occurred since I stepped up to take Prim’s place, and now it seems I have become someone precious. At first one, then another, then almost every member of the crowd touches the three middle fingers of their left hand to their lips and holds it out to me. It is an old and rarely used gesture of our district, occasionally seen at funerals. It means thanks, it means admiration, it means good-bye to someone you love.

The first set of words on the family are those of an authoritative and distant voice, transmitted through the public medium of judgment, media and law and imposing a set of views with tangible consequences. The second set of words are fictional, transmitted through the private medium of a parent, working to inscribe and reinscribe an understanding of family in a lived, embodied way.

This paper aims to do the first, law, through the medium of the second, the intimate exchange of parent and child, reading aloud. It aims to be a personal and experiential story of “motherhood” that works to counter the notion that there is one model of family that is best situated to enable the healthy development of a child. Told through the voices of a series of current characters from children’s literature, difficult themes of abandonment, colonialism, single-parenting, heterosexism, whiteness and mental health will be touched upon and laid bare. As a presenter I will work to complicate the relationship between feminism, Indigeneity, extended family and the best interests of the child, by recreating the intimacy of the bedtime story.

Fiona Kelly: Autonomous from the start: Exploring the narratives of single mothers by choice

Over the past two decades, single mothers by choice (SMCs) have emerged as a significant and growing phenomenon throughout the developed West. A single mother by choice is a woman who chooses to have or adopt a child, knowing she will be her child’s sole parent. In situations where the woman is the biological mother of the child, she typically conceives via donor insemination using the sperm of a known or anonymous donor. While the emergence of SMCs suggests that
societal acceptance of autonomous motherhood may be on the rise, at least in circumstances where the woman is older, educated and financially stable, legal and social barriers remain. In the few Canadian judicial decisions in which SMCs have sought to assert their autonomy through the courts, they have met with significant resistance. Reflecting the current trends in family law towards shared parenting and fathers’ rights, courts have strongly opposed attempts by mothers to exclude “fathers”, whether biological or social, from the lives of children. SMCs also face social censure. For example, a recent Pew Research Centre poll of 3000 individuals in the United States found that 70% believed that ‘mothers having children without male partners to help raise them is bad for society’, making SMC families the least supported family form – with less support than lesbian and gay families – included within the survey.

This paper is based on preliminary analysis of data from an interview study with SMCs living in British Columbia, Canada. While there is some social science literature on the SMC phenomenon, and an even smaller amount addressing the legal context in which SMCs negotiate their familial relationships, there is nothing that addresses the relationship between the legal and social. In this paper, I draw on semi-structured qualitative interviews with SMCs to explore: (1) their decision to raise a child outside a marriage/cohabitation relationship; (2) the legal arrangements, if any, they made to secure their status as their child’s sole parent both prior to conception and since the birth of their child; (3) their legal and social experiences of sole motherhood; and (4) their perceptions of the pros and cons of autonomous motherhood.

Wander A. Wiegers and Dorothy Chunn: Choosing Lone Motherhood: Historical Perspectives

In liberal states, unmarried mothers are an enduring phenomenon that recurrently generates intense public debate. Historically, the children of unmarried parents were legally defined as ‘illegitimate’ and unmarried mothers were often treated as social pariahs. Understandably, then, much research and writing on unwed motherhood has centred on women who did not want, or were not in a position, to become single mothers and on the options they pursued to avoid lone motherhood, including abortion, infanticide, adoption and intra-familial strategies for ‘legitimizing’ children born out of wedlock. Since the late 1970s, however, as illegitimacy laws were abolished in most Canadian provinces and new reproductive technologies proliferated, the phenomenon of women giving birth to or adopting and rearing children outside marriage or cohabitation has flourished as both lesbian and heterosexual women opt to become single mothers in increasing numbers. What has not been researched very extensively to date is the extent to which some women chose lone motherhood prior to these late 20th century developments and the similarities and differences between and among women who made this choice across time.

This paper is based on preliminary analysis of data from an interview study aimed at addressing this gap in the research and literature on the topic of lone motherhood. We draw on semi-structured interviews with Canadian women in six provinces who engaged in this kind of mothering for at least a year after the birth of their child(ren) from the 1960s to the present. Specifically, we present their perceptions and experiences related to: (1) the circumstances of their pregnancy (or adoption) and the decision to raise a child outside a marriage/cohabitation
relationship; (2) their life during the pre-natal (or pre-adoption) period; (3) their post-natal experiences as a single mother living outside a marriage/cohabiting relationship; (4) their retrospective view of the decision to raise a child outside a marriage/cohabiting relationship.


Chair: Jenni Millbank

Beth Goldblatt: Tackling women's poverty across contexts: A role for the right to social security
Women throughout the world, in developed and developing countries alike, face discrimination that results in their greater poverty, un- or under employment, poorer working conditions and greater responsibilities for the care of others. The absence of adequate or appropriate social security adds to the burden faced by women. Where social security does exist, it sometimes discriminates directly but more usually indirectly against women. For example, social assistance might be provided to household heads who are usually men because of patriarchal assumptions in families and the wider society. Access to social security is in some cases more difficult for women who face the danger of violence when collecting payments or within households where men in the households attempt to control women's income. Women's caring responsibilities for children, the elderly and sick are often unremunerated or unacknowledged in social security provision. The link between social security and past employment also disadvantages many women who generally work in formal employment for shorter periods of time and at lower pay. Globalisation has led to a situation where the majority of women are located in precarious informal work, including in migrant labour, which is inadequately protected.

The paper explores the role of rights in challenging discriminatory provision of social security or gendered gaps in welfare systems. It argues that the international human rights framework on the right to social security requires development if it is to address the needs and circumstances of women and play a role in the transformation of unequal gender relations.

Drawing on literature about South Africa, Canada and India, the paper argues that a more developed gender framework for the right to social security would offer assistance for people working to address women's poverty through welfare reform in a range of different contexts.

Emily Grabham: Beyond the Concept of ‘Balance’ in Feminist Labour Law
Much current UK labour law and feminist labour scholarship focuses on the idea of ‘work/life balance’. In this paper, I attempt to put the notion of work/life balance under renewed critical scrutiny, investigating what types of legal and political action this concept produces, and what forms of political futures it organises out. My key concern is whether trying to ‘balance’ work and ‘life’ through time-based labour demands, such as flexible work for example, is appropriate for the dilemmas being
posed by the conditions of work in the UK’s ‘new’ economy. Given the continued decline of the ‘standard employment relationship’ model, both within UK labour regulation and within the broader economy as a whole, it is, I argue, politically necessary to work with the constraints and possibilities of the new economy as it is, instead of continuing to insist that the standard employment relationship will ride up on a feminist horse and save us at some unknown point in the future. As such, we should put precarious forms of ‘immaterial labour’ at the centre of our demands. We need to imagine and pursue new political strategies that value women’s ‘immaterial’ labour in the mutating economy for its own sake instead of pursuing policies that ignore precarious work, on the one hand (like many time-related work/life balance policies effectively do) or which, on the other hand, attempt to standardize such work on the basis of traditional concepts of full-time, permanent employment.

Whilst feminist labour lawyers have much to gain from time-related labour demands, we have to push our thinking into as-yet unimagined horizons in order to make a space for ourselves in the shifting terrain of the new economy. This might not mean the end of ‘work-life balance’ as a site for social organising, but it also requires a critical approach to clock time, as well as radical new visions of the employment relationship that can adapt to, and challenge, the realities of low-waged and precarious work. The aim of this paper is to begin investigating new possibilities for feminist labour lawyers, based on the current strategies and practices of precarious women workers in the UK, especially those who find it difficult, impossible, or irrelevant to access union support.

Janet Mosher: Women’s Caring Labour, Human Capital Development and Welfare Reform

Welfare reforms in Ontario in the 1990s, like reforms in many jurisdictions, fundamentally repositioned single mothers as ‘workers’, a shift frequently described as evidencing the erosion of the male breadwinner model that had been at the heart of social policy since WWII, and the ascendency of the ‘worker citizen’. One consequence of this shift has been the increasing invisibility of gender and gendered forms of labour (social reproduction in particular) within social policy discourse. This disappearance of gender was quite plainly evident in the processes leading up to the creation of Ontario’s poverty reduction plan (2008) and most recently, in the foundation laid for Ontario’s current review of social assistance (welfare) programs.

In this paper we examine, through a gendered-equity lens, the ‘human capacity development’ approach that informs the social assistance review underway in Ontario. This approach is one characterized within the Review as “an opportunity planning program to support achieving full labour market potential through skills building, education, training, employment and related support.” While a human capacity development model seems a positive step when compared to the existing ‘work first’ model, it raises a number of important questions for women, particularly for single mothers: is there a risk that ‘opportunity planning’ will be traded off against income support?; or that social inclusion and full citizenship will become even more firmly tied to labour market participation leaving those who are unable to participate (many of whom will be single mothers whose unemployment is due to the unavailability of childcare) more stigmatized and more deeply impoverished?; or that women’s caring labour will be further devalued?
To inform our answers to these questions we review data covering a 25 year period of employment rates, labour market participation rates, and the incomes of single mothers. We also examine a number of qualitative studies that reveal the extraordinary challenges – particularly for women on a low-income – of managing labour market participation and the care of a family.

Claire Young: Privatization, Taxation and Women’s Economic Inequality
The Canadian tax system is increasingly being used to place the responsibility for women’s economic security on the private sector, rather than the state. This end is accomplished by giving a variety of tax breaks to taxpayers who support their economically dependent spouses rather than recognizing women’s economic inequality as a gendered issue that requires remedies that are delivered directly to women in their own right. Tax subsidies focusing on the “spousal relationship” are deeply flawed in terms of accomplishing their stated objectives. In this paper I shall discuss tax measures such as subsidies for retirement savings, income splitting rules, tax credits related to dependence and tax rules intended to encourage men to transfer capital and wealth to women. My conclusion is that these rules do very little to redress women’s economic inequality.

4:30-6:15: Austerity and Financial Crisis: Protest and Sexuality
Chair: Nicola Barker

Suhraiya Jivraj: Religion and sexuality – towards a decolonial approach
This paper follows on from my recent work examining the regulatory effects of homonationalism in governmental gay rights’ social policy on the work of queer Muslim grassroots organizations in the UK and the Netherlands. I argued that the (neo-)liberal ‘sexual freedom’ model underpinning these policies not only re-inforces racialisation of certain migrant sexualities, it also produces a simultaneous de-racialisation or racial upliftment of the queer migrant that adheres to the homonormative model. In this paper I build upon my critique of this (de-) racialising trend and how it circulates within certain sexualities discourse, especially those espousing citizenship, dialogue and other liberal paradigms as solutions to the supposed problematic of religion for ‘homo-emancipation’ or gay rights. Drawing on the work of Gloria Wekker in relation to queer migrants’ subjectivities and Saba Mahmood in relation to the process of religious subjectivisation I explore the possibilities for developing decolonial knowledges of migrant sexualities that attends to the modern concept of religion and its intersections with sexuality more carefully.

Ruthann Robson: Dressing Down: Symbolic Speech against Sexual Violence and Class Inequality
Recent protests and performances of symbolic speech in the Occupy, Slutwalk, and other movements seek to confront sexual violence and the criminalization of poverty. Government and cultural responses to these protests has varied widely.
This paper focuses on both the legal claims and the theories of these movements as well as the government and social reactions. More specifically, the paper uses the lenses of attire, including make-up, disguises, global goods, and “gear,” to consider expressive content and government efforts to control that expression.

The first part of the presentation discusses the burgeoning litigation in the US and Canada that not only seeks the “right” to protest but also seeks damages for infringements of that right, including claims of police brutality. The latter part of the presentation connects these movements and government reactions to previous protests, both in the recent past and in previous centuries, again through the lenses of different types of attire.


This work in progress analyses stories of national and global identity in the ‘Occupy’ movements responding to the Global Financial Crisis. It begins with a brief investigation of the ‘derivatives revolution’. It then briefly outlines the contributions of the derivatives revolution to the global financial crisis. Third, it places the causes of the European debt crisis within the context of the global financial crisis and the derivatives revolution. Finally, the bulk of the paper reads the texts of the ‘Occupy’ movement as stories about the global financial crisis and about political communities, both national and international.

**Yvonne Zylan: The Salacious State: Postmodern Patriarchy and the Enforcement of the Marriage Contract**

In 1996, the United States Congress passed (and the President signed into law) two highly publicized pieces of legislation: the Personal Responsibility and Work Opportunity Reconciliation Act—colloquially known as the Welfare Reform Act—and the Defense of Marriage Act (“DOMA”). Scholars of social policy have only rarely considered these two instances of lawmaking at the same time, perhaps because they have been deemed to operate within two different domains of law (economic/anti-poverty policy and LGB civil rights policy). Yet the first legislative finding proffered by the PRWORA was that “[m]arriage is the foundation of a successful society,” and Congressional testimony on DOMA was rife with discussion of the economic implications of extending marriage rights to same-sex couples. This paper considers these two legislative enactments as instantiations of the state’s social construction of binary sex, gender, and sexuality, and advances two arguments. First, I argue that these enactments, taken together, suggest the emergence of a phenomenon I describe as a late capitalist, post-modern collapse and rearticulation of the regulatory and distributive functions of the state. In late capitalist United States, characterized by increased dispersion of social identities, I contend that we are witnessing the emergence of a kind of reinvention of the logic of social policy, as distributive policies become ever more regulative, while regulatory policies are becoming ever more reactive to the distributive implications of regulation. Second, I argue that the substance of these two pieces of legislation is more coherent than it might appear at first glance. Starting from (and building upon) the framework developed by Carole Pateman’s landmark work, The Sexual Contract, I contend that work of the 104th Congress evinces a generalized panic over the unruly quality of male sexuality. Seen in this light, the PRWORA and DOMA represent Congress’ effort to enforce the containment of male sexuality within heterosexual marriage.
Wednesday 6th June

8:15-10:00: Sexual Violence, Race, Borders and ‘Post-Feminism’

Chair: Mehera San Roque

Sharon Cowan: “‘Subject to Merit’: Representing and evidencing women’s rape claims in the asylum context’
It is not known how many women claim rape in the asylum context, though estimates vary widely from 1% to ‘almost all women’s cases’ depending on who is responding to the question, and the woman’s country of origin, amongst other factors. Building on the data from a 2 year national study of UK asylum applications involving a claim of rape, this paper will look at recent legal and policy decisions such as cuts in legal aid, shortened asylum processing timescales and the fast track detention of applicants, that constrain and in some cases foreclose a fair and just determination of refugee status. Structural factors such as substandard or non-existent legal representation, lack of money or time to access expert medical reports, and lack of welfare support, combined with other factors such as minimal language skills, or social support networks, means that women asylum claimants who allege rape face often insurmountable hurdles with respect to disclosing rape claims to decision makers, or, where they have disclosed, being deemed credible. It is questionable, in this context, to what extent the merits of a claim can ever be fairly assessed.

According to critics like Angela McRobbie, post-feminist culture, with its celebration of the “can do girl,” promotes a movement beyond feminism to a more comfortable zone where women are free to choose for themselves. Shaped by neoliberalism, post-feminism’s “feminism” is organized around notions of choice, empowerment, and personal gain that are deeply individualizing. Post-feminism, then, is founded upon a double movement that disavows feminism as a collective political movement in the same instant that it appears in of support its demands.

In this paper, I will read the Supreme Court of Canada’s decision in R. v. J.A. (2011) as a post-feminist text. In this split decision, the Court ruled that there is no defense of prior consent to sex that expected to take place when someone is unconscious. J.A. involved a complainant who complained to police that she had subjected to anal penetration with an object after she had been choked unconscious. At trial, KD recanted her allegations against her spouse and insisted on her prior consent to unconscious sex. While the majority and dissenting opinions diverged on the issue of advance consent, what is striking about this decision is the emphasis placed on sexual autonomy and individual choice, disarticulated from feminist claims regarding sexual violence and gender inequality. The figure of the “can do girl” most clearly informs the dissenting opinion, which promotes an individualized and decontextualized concept of sexual autonomy, refusing to acknowledge the
contradictions inherent in choosing to be objectified. The excision of feminist claims from the majority opinion that nevertheless insists upon the necessity of ongoing conscious consent reflects the post-feminist double-movement of disavowal and incorporation that McRobbie emphasizes.

While post-feminism has arguably become the new common sense of gender relations, few feminist legal scholars have grappled with what it might mean to think about post-feminist discourses in relation to law. Post-feminist positions have certainly been advanced in the field of feminist legal studies (most notably by Janet Halley in her *Taking a Break from Feminism*), but analyses of post-feminism have been largely confined to the field of feminist cultural studies. Thornton’s analysis of post-feminism in the law school is one exception to this relative neglect by feminist legal scholars. This paper uses the work of cultural studies scholars to critically examine, via *R. v. J.A.*, the role that law plays in reinforcing post-feminist culture.

**Nora Honkala: Gendered Judgments in Asylum Seeker Women’s English Immigration and Asylum Cases**

Asylum seekers continue to claim their rights within a complex international political climate which has seen the tightening of immigration and asylum policies in several states, including the UK. The rights of refugees stem from international law and are afforded protection by the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. Scholars have argued that women have been rendered invisible within the theory of the international refugee regime and in practice have been denied their right to protection. The development of more ‘just’ decision-making processes in the asylum system is thus an integral part of the UK’s obligations under international law.

In light of this, the UK Home Office adopted its Gender Guidelines in 2004. This results from international efforts, for instance by the UN Refugee Agency (UNHCR), to offer guidance to States to better understand gender-related claims of asylum seeker women through various gender guidance notes and guidelines, thus improving their decision-making processes. Arguably, this has not, at least yet, been translated into significant changes in the decision-making of women’s asylum cases in the UK.

This paper aims to show the problem of the pervasiveness of gendered judgments in the Immigration and Asylum Appeals cases in the UK. Three cases will be analysed: two from the appellate court, which is now called the Upper Tribunal (Immigration and Asylum Camber); *NA (Kyrgyz Woman) Tajikistan CG* [2004] UKIAT 0013 and *HC & RC (Trafficked women) China CG* [2009] UKAIT, and one from the Court of Appeal, *AN (Pakistan) v Secretary of State for the Home Department* [2010] EWCA Civ 757.

Through the examination of these three cases, which are linked through the discussions of forced marriage or the risk thereof, this paper aims to show that gendered assumptions by the judiciary are a common recurrence in asylum seeker women’s cases in the UK. Furthermore, this illustrates a significant problem in guaranteeing the rights of asylum seeker women. This paper concludes with a reflection on the state of the UK’s compliance with its international obligations.
Dana Raigrodski: Gender, Labor and Globalization: Finding Solutions in the Global Economy for Trafficking in Persons

The last decade brought much needed attention to the global plight of modern slavery, as numerous members of vulnerable populations are trafficked all over the world to be enslaved in bonded labor in a broad range of industries including, but far from limited too, commercial sex. Yet, the global community’s efforts to successfully mitigate trafficking and protect those who are most likely to fall victim to it have fallen short.

This paper argues that the lack of success in fighting human trafficking is to a large extent the result of framing the existing discourse of human trafficking as primarily a matter of criminal law and human rights of women and children, rather than addressing the economic and global market conditions within which human trafficking thrives.

I will further suggest that the almost exclusive focus on criminal and human rights discourse developed in response to the paradigmatic story of human trafficking— the young woman or child being duped and kidnapped for exploitation in the illegal commercial sex industry. However, that focus continues to marginalize both the impact on- and the role of women, children and migrant workers from developing nations in the global economy. Without acknowledging the gendered and class underpinnings of human trafficking discourse, we will not be able to mitigate human trafficking or to achieve economic and social equality around the world. Without such economic and social equality, women, children and many others in developing nations will continue to lack meaningful realization of their human rights.

While recent efforts link human trafficking to economic pull and push factors exacerbated by globalization and trade liberalization, very little has been done to frame the discussion in those terms and to find concrete incentives to combat trafficking via market tools. In starting to develop such economic framework, I suggest we reexamine the scope of U.S. led sanctions authorized by TVPA, explore avenues via bilateral and multilateral trade and labor agreements, revise international, public and private lending policies, and develop best practices (and market sanctions) for transnational businesses and governments to regulate supply chains.

Rather than viewing market-based approaches as competing with the quest for human rights and global justice for women, children and vulnerable laborers, I suggest that such approaches may not only remedy some of the limitations and weaknesses of the current discourse, but in fact further the mission of the global human rights movement, and with it the quest for the elimination of trafficking in persons.

Brenda V. Smith: Uncomfortable Spaces, Closed Spaces: Theorizing Female Correctional Workers’ Sexual Interactions with Men and Boys in Custodial Settings

I have had a long interest in the intersections of gender, crime and sexuality both in my professional practice as a lawyer and in my scholarly work.[1] Much of that work has addressed the “comfortable” topic of staff sexual abuse of inmates, which is widely perceived as a problem of male staff sexually abusing female inmates. An area that remains relatively unmined is the role of female workers who sexually abuse persons in custody. The female corrections’ worker narrative is complicated and characterized by strategic silences and accommodations by many invested...
actors both internal and external to the criminal justice system – women’s rights
groups, correctional agencies, and states. This paper attempts to untangle those
complicated and overlapping narratives, identify the discomfort that feminist
scholars and other actors (not necessarily separate) have in addressing female
workers who sexually abuse adults and youth in custodial settings, discuss relevant
research and suggest a framework for additional research in this area.

Thursday 7th June

12:30-2:15: Accounting for Care in Private Law

Chair: Emily Grabham

Simone Degeling and Mehera San Roque: Valuing Care: how does private law
account for care?
The tort liability model in part assesses damages for personal injury by reference to
the value of gratuitous care provided by the carer to the tort victim. For example,
nursing care, domestic services or the care of children. This care is particularly
prominent where victim does not have the financial resources to pay for commercial
care. The prevailing feminist account of this valuation argues that care provided by
family members tends to be treated differently than care provided non-gratuitously.
This paper notices that services, including care, are also valued in the unjust
enrichment liability model and investigates the extent to which the apparent gender
bias evident in the tort example is also present in unjust enrichment. This paper
also examines the role of autonomy in these liability models and the extent to which
this feminist account of service valuation is supported in the non tortuous (although
gratuitous) context of unjust enrichment.

Elaine Gibson: The Foetus in Common Law Jurisprudence
The foetus has historically played a contested role in common law jurisprudence.
Recent judicial pronouncements have revived the debate. In separate judgments,
courts have ruled that putative parents and governments cannot sue on behalf of an
as-yet-unborn foetus. A right of the foetus to sue at common law on her/his own
behalf for injuries sustained prenatally does crystallize on live birth; however, there
are limitations on this right. A lawsuit by the child against one’s mother for prenatal
injury is prohibited. Likewise, lawsuits for wrongful life are barred, as are most
lawsuits for costs of raising a child born due to wrongful pregnancy. And, recently,
the Ontario Court of Appeal has ruled that a physician providing treatment or
services to a woman of childbearing potential owes no duty of care in negligence if
the woman becomes pregnant and the foetus incurs injury due to the treatment or
service.
Rationales for limiting the right of the foetus to sue, and for others to sue on behalf
of the foetus, include the fundamental protection of the pregnant woman’s right to
decision-making. Corollary to this right is a concern that a physician might be
compromised in his/her ability to provide optimal medical services to a woman of
childbearing potential if the potential foetus is within the scope of the physician’s
duty of care. A conflict of interest could arise if the physician is required simultaneously to consider the best treatment for the woman and the possibility of injury to a foetus if born alive. The primary rationale for denying an action for wrongful life is the stated impossibility of calculating damages. Similarly, courts tend to deny the costs of raising a healthy child born following wrongful pregnancy for a number of reasons, including the difficulty in assessing the blessings and burdens of parenting a child.

Rationales for granting the foetus the right to sue following live birth include the fact that if legal action is denied, a child who has incurred injury prenatally due to another’s negligence must in theory bear the entire cost of injury. His or her autonomy as injured victim is flatly denied. The tortfeasor, on the other hand, goes scot-free. And the burden of raising a disabled child most likely falls primarily on the mother who, along with the child, stands the most to lose if injury goes uncompensated.

In this paper I intend to examine the range of jurisprudence to identify and analyze arguments as to the wisdom or lack thereof in finding a duty of care to the foetus following live birth. I will be reviewing jurisprudence from American, British, and Canadian jurisdictions to compare and contrast approaches to this topic.

Palma J. Strand: Do We Value Our Cars More than Our Kids? The Conundrum of Care for Children

Formal child care workers in the United States earn about $21,110 per year. Parking lot attendants, in contrast, make $21,250. These relative wages are telling: The market values the people who look after our cars more than the people who look after our kids. This article delves below the surface of these numbers to explore the systemic disadvantages of those who care for children—and children themselves. The article first illuminates the precarious economic position of children in our society, with a disproportionate number living in poverty. The article then documents both that substantial care for children is provided on an entirely unpaid basis in households, predominantly by women, and that care for children is undervalued when it is provided through the market. After presenting three distinct perspectives on market payments for care for children—(1) a public goods analysis; (2) a patriarchy analysis; and (3) a gift analysis—the article proposes a set of tax breaks for income from jobs that involve care for children.

2:30-4:15: Race, Sexuality and Definitions of the Family

Chair: Reg Graycar

Anisa de Jong: Adoption by same-sex couples in the UK: exploring gendered and heteronormative conceptions of parenthood and ‘the family’

Issues of sexuality and gender have become more pertinent in adoption practice in the UK as a result of two recent legal changes: firstly, the Adoption and Children Act 2002 that allows same-sex couples to adopt jointly (implemented 30 December 2005) and, secondly, the Equality Act (Sexual Orientation) Regulations 2007, banning discrimination on the ground of sexual orientation in the provision of goods and services, including in the provision of adoption services. The first piece of legislation was ostensibly argued in Parliament as not being motivated by equalities principles, but rather as a measure required to address the shortage of adopters for children in public care and therefore serving the welfare of children. The main
arguments against this legal change at the time included the need for children to have a mother and a father, or male and female role-models to develop ‘normally’, as well as the alleged instability of same-sex relationships and concerns about children getting bullied or being made to feel ‘different’. The second piece of legislation, this time with the equalities argument centrally placed, exacerbated in particular tensions between religious, moral or cultural family values and adoption by same-sex couples. In particular many Catholic adoption agencies resisted the requirement to assess and place children with lesbian and gay adopters.

This paper explores (aspects of) the context in which the legal changes occurred and the developments since its implementation, such as the question of how legal equalities demands interact with wider issues such as the legal regulation of ‘families’ and state versus charitable funding of adoption. The paper explores the tensions within the fluctuating relationship between state and voluntary provision of adoption services, against a backdrop of growing anxieties about the overall failings of the child care and child protection systems and the resultant increases in state regulation of child care services and in the drive to get more children adopted. The paper also explores how social workers, adoption agencies and other professionals in the field have responded to the legal change in their policies and practice, and what the experiences of LGBT couples coming forward to adopt have been. Are there indications that new hierarchies are being reinstituted, and does adoption by same-sex couples open up possibilities to re-think adoption in general, shifting debates away from who ‘is’ the family or what ‘is’ kin?

Lois Harder: Foreign Affairs: Security, Birthright and National Citizenship Determination in Canada

This paper explores the confluence of national security, birthright citizenship determination, and definitions of family. Using Canadian citizenship legislation and a series of relevant cases (Benner v Canada (Secretary of State) 1997; Augier v Canada (Minister of Citizenship and Immigration) 2004; Taylor v. Canada (Citizenship and Immigration) 2007, 2007; M.A.O., among others), I explore the circumstances that have led Canadian courts and Parliament to privilege equality and birthright over security, as well as those instances in which narrow definitions of family have been upheld in the service of security and the integrity of national borders.

Birthright is connected to parentage as well as the presence or absence of a marriage between parents. In Canada, for people born abroad prior to 1947, children inherit their citizenship from their fathers, if their parents were married at the time of their birth, and from their mothers, if their parents were unwed. In the context of World War II, this law protected Canada from the citizenship claims of children resulting from relationships between Canadian soldiers and foreign nationals (Canada, Debates, 30 April 2007 at 16:45). For people born after 1947, these same rules pertained until they were successfully challenged in Benner 1997 and Augier 2004. Intriguingly, both of these cases involved an adult with a criminal record, born outside of Canada, who attempted to claim citizenship on the basis of a Canadian parent. The principles of coverture that resided in such rules are abhorrent to contemporary notions of gender equality, and it was gender equality and marital status that became the focus of the courts’ corrective action in these decisions. Taking a broader view though, these important principles of equality are entrenched within a profoundly illiberal (if pervasive) principle of birthright
entitlement to citizenship, in a confrontation with the sovereign power of the state to protect itself from undesired claims on resources and from dangerous individuals.

Liberal political theorist John Locke declared, contra his contemporaries, that the family was not an appropriate metaphor for the state. While families were formed on the basis of affection and blood, political societies were a product of consent. Locke was mistaken. Families are also the product of rules, while the state instrumentally recognizes and ignores the formal rules that constitute the apparently ‘natural’ status of birth, and the familial orders that lie at the heart of political membership. Ultimately, my argument is that the legal fictions that create family forms and political societies merit exposure and clear-headed debate in the service of both more democratic polities and appropriate recognition for various familial forms of interdependency.

This paper considers whether a human rights approach can offer greater autonomy to Indigenous women with respect to their children’s welfare and well being. How do contrasting conceptions of human rights law – as universal, transcendental and fixed on the one hand and pluralised, grounded in experience and transformative on the other – impact on different approaches to Indigenous children’s welfare and well being? Child welfare legislation in Australia has been influenced over the past decade by developing United Nations human rights jurisprudence with respect to Indigenous people’s rights, in particular the right to self determination and rights under the United Nations Convention on the Rights of the Child. The peak Australian Indigenous children’s organisation, the Secretariat of National Aboriginal and Torres Islander Child Centres (SNAICC) has lobbied for a human rights approach to Indigenous child welfare, and in a number of Australian jurisdictions has attained greater participatory rights in child welfare processes. While there is tension between universal, statist and regulatory conceptions of human rights and pluralised and inclusive understandings; Indigenous peoples engagement with and inclusion within UN processes has augmented greater emphasis on the latter. This in turn has influenced national child welfare reform. This paper will consider the possibilities which a pluralised approach to human rights offers to extend from child welfare to broader community development issues pertaining to Indigenous children’s well being. In particular, could a human rights approach transform the largest welfare program with respect to Indigenous peoples in Australia, the Northern Territory Intervention, which addresses structural reforms which underlie neglect and abuse, but from a paternalistic and discriminatory framework?

Honni van Rijswijk and Thalia Anthony: ‘An element of bluff or deception’: Parental Consent and State Control in the Stolen Generations Cases
Consent, will and agency have problematic uses in the law. Subjected groups are implicitly inferiorised through these concepts, such that their complicity to acts of the subjector is taken for granted. This complicity, Sadiya Hartman asserts, shrouds the ‘condition of violent domination’ that actually operates between subjector and subjected. Writing about the legal context of racial subjugation during slavery and its aftermath in the US, Hartman argues that consent became ‘intelligible only as submission’. In the Australian context, non-‘whiteness’ has historically been a point of reference for structural inferiority in Australia, according to Ghassan Hage. Yet the law nonetheless assumes consent as capable of being equally afforded by
In Stolen Generations cases, assumptions that ‘whites’ could better care for children underlie the implication of complicity in the Aboriginal child removals. These assumptions were taught to and at times appropriated by Aboriginal parents – who were then seen as succumbing to the system’s logic. It allowed the state to be presented as a benevolent institution rather than a terrorising one. But there is a further sinister side to the domination, which is always on guard when manipulations falter. When parents failed to comply with the removal of their children, they would attract reprisals from state agents – with consequences that included being reported to police, losing employment or experiencing physical violence.

Our reading of recent Stolen Generations cases below argues that Courts prior to *Lampard-Trevorrow* (2010) treated consent as an individual act freely and voluntarily given by a liberal subject. Consent was seen as a legitimate factor that duly activated the powers of the legislation to bring about legal removal, according to O’Loughlin J in *Cubillo*. In the previous Stolen Generations case of *Williams*, formal consent had barred false imprisonment and trespass on the basis that a child cannot be imprisoned if her mother consented to the removal. We go further than simply suggesting that Aboriginal consent has been misread by the courts—which was clearly the situation until the case of *Lampard-Trevorrow*. It also proposes that consent was, and is still used in an underhanded way by the state to legitimise its actions and protect itself from liability. After all, most statutory creatures governing the Stolen Generations allowed for removal irrespective of consent. The state, nonetheless, sought to procure consent in order to rationalise the policy, facilitate removals, and shift the responsibility for removal from the state to Aboriginal parents. The use of consent in this way turned the state’s act of removal into a parental act, thereby transforming ‘relations of violence and domination into those of affinity’. It suggests that the powerless had agency and strength, and that there is an ‘ostensible equality between the dominant and the dominated’, while at the same time concealing the actual powerlessness of the subjected.

**Aleardo Zanghellini: Hawaiian Mahuwahine, Tahitian Mahu and Childrearing**

Queer parenting, although still a relatively novel phenomenon (at least under conditions of visibility), is quickly becoming an established feature of more and more societies in the contemporary West. As this happens, questions of care at times of austerity acquire new shades of meaning and a new urgency within queer communities. Yet, there are sexuality and gender variant people around the world for whom such questions – caring for children, and doing so during periods of economic uncertainty – are not new, although they may arise in different terms. In particular, for Hawaiian *mahuwahine* (male to female transgender people of Polynesian descent) the question may be not so much how to care and provide for their own children at times of contracting personal and collective economic resources; but one of engaging in childcare as a survival strategy under routine circumstances of relative economic deprivation:

‘Not fully accepted in today’s mainstream economy, mahuwahine have maintained a subculture of survival through welfare/SSI supplemented by hustling, drag
entertainment, small jobs and care giving for children and the elderly’ (http://kulianamamo.org/).

From a Euro-centric perspective, it may appear surprising that this passage singles out caregiving for children as typical work of male to female transgender people. However, Eastern Polynesian social norms have traditionally seen gender-variant people involved in childrearing.

Nonetheless, the quote sketches a picture of the involvement of Hawaiian *mahuwahine* in childcare that seems only a pale reflection of the childrearing role that gender-variant people are likely to have traditionally played in Hawaii, and which they still play elsewhere in Eastern Polynesia. In particular, in the Society Islands it is not uncommon for *mahu* (male bodied gender variant people) to be involved in childrearing as foster parents through the mechanism of traditional adoption – something strikingly different from undertaking paid childcare as a survival strategy. What accounts for this difference between the childrearing roles of Hawaiian *mahuwahine* and French Polynesian *mahu*?

This paper argues that law is part of the answer to this question. The paper hypothesises that the reduced childrearing role played by *mahuwahine* in Hawaii is related to their loss of social status and that colonial law was partially responsible for this loss. Legal (and social) developments followed a different trajectory in the Society Islands, meaning that Tahitian *mahu* have experienced nowhere near as dramatic a loss of social status as their Hawaiian counterparts. Consequently they have been able to retain a role not merely as child minders and carers but as parents.

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**Friday 8th June**

**10:15-12:00: Vulnerability and Autonomy**

Chair: Diana Majury

**Nicola Barker and Marie Fox: Revisiting Capacity to Marry: Balancing Autonomy and Protection**

This paper critiques the UK High Court’s formulation of the test for capacity to marry in the case of Sheffield City Council v. E and Another [2005] Fam. 326. E was a 21 year old woman with a learning disability, who wanted to marry S, a 37 year old man with a substantial history of sexual violence. In his judgment, Munby J set the bar for capacity to marry very low, claiming that the institution of marriage is easy to understand and emphasizing that the lives of those with learning disabilities would be ‘immensely enriched’ by marriage. Whilst accepting that marriage will be experienced very differently depending on whether one marries a ‘loving pauper’ or a ‘wife-beating millionaire’, he also rejected the arguments of Sheffield that the understanding of marriage should be considered in relation to a particular (intended) spouse rather than in the abstract. Therefore, had E lacked capacity to
marry S, she would have lacked capacity to marry anyone at all – a situation that Munby J was reluctant to create.

We have previously written a shadow judgment for this case as part of the UK Feminist Judgments Project. Drawing on the more nuanced test of capacity to consent to medical treatment, we instead based our decision on the question of whether E understands marriage in the context in which she will enter the institution: this puts both E and S at the centre of the question of capacity. Does E understand the institution of marriage and what it might mean to be married to S? This would include, amongst others, questions about the extent of E’s understanding of S’s previous convictions. In this paper, we outline and expand upon our reasoning in formulating the test in this way, drawing upon academic literatures on capacity and autonomy. Capacity is central to notions of autonomy, agency and choice, which have been the subjects of extensive feminist analysis, yet capacity itself has not been given such attention.

Kate Gleeson: Just What Is a Feminist Abortion Law Anyhow?
From 2004 to 2006 abortion became the subject of much debate among Australian MPs, culminating in the passage of a private members bill in regard to the use of the so-called ‘abortion pill’ RU486. The then Minister for Health, Tony Abbott, initiated the anti-abortion debate with a speech in March 2004. His stake in the issue of abortion led to the first serious consideration of the question by the Australian Parliament since the debate over the Human Rights Bill in the early 1980s. Many commentators linked the recent debate to Abbott’s Catholic faith, and some identified the debate as an indication of the heightened prominence of ‘religious influences’ in the ‘nation’s parliamentary protocol’. While the religious motivations for the debate are perhaps obvious, and to be expected, what was more puzzling was the ways in which anti-abortion arguments were framed by way of post-feminist rhetoric. Abbott himself did not speak of a religious perspective on abortion, but rather asked, ‘What does it say about the state of our relationships and our values that so many women (and their husbands, lovers and families) feel incapable of coping with a pregnancy or a child?’, and so on. In this paper I examine contemporary post-feminist framings of abortion and law, which tend to rely on a notion of what Angela McRobbie terms a ‘feminist success’, in order to portray abortion as representing a failure of women. In particular, in examining the recent debate over Australian laws governing Ru486 I examine the ways in which conservative politicians in Australia have coopted the feminist ideal of ‘choice’ to inform anti-abortion arguments which rely perversely, on the myth of a now redundant feminism, as articulated by post feminism. Australia is an informative example to study because in the 1970s feminists had relative success in arguing for abortion as ‘choice’, to the extent of securing sustained public subsidies for abortion services. The legal protection of abortion has been more or less secured since that time, but increasingly the ideal of abortion as ‘choice’ has been publicly debated, both by feminists and conservative politicians informed apparently by the discourses of post feminism. In this context, I examine conservative Australian ‘post feminist’ treatments of abortion and choice to show the ways in which canny conservatives may manoeuvre their arguments within post feminist discourse, and yet still maintain a condemnation of abortion, which seems to be at odds with the ethos of the new sexual contract of neoliberalism.
Margaret Hall: Mental Capacity in the (Civil) Law: Fairness, Control and Vulnerability

This paper considers mental capacity in three (non-criminal) legal contexts: property related transactions (including wills), health care decision making, and guardianship. Capacity is conceptualised in each as essentially cognitive: the ability to make rational decisions (although the capable person can choose, as an exercise of individual autonomy, to make irrational decisions so long as they possess the capability of doing otherwise). Capacity is further conceptualised as existing in different “degrees,” more or less of which will be required for the range of different “decisions” within the three contexts given above. The author concludes that, counter to this formal account, the capacity inquiry in each of these contexts has a very different purpose and is therefore about a fundamentally different subject. In the property context, the “capacity” analysis (legal in nature and controlled by legal actors) is fundamentally about fairness. In the health care context, the “capacity” analysis (medical in nature and controlled by medical actors) is fundamentally about control. In the guardianship context, the “capacity” analysis (medical in nature although formally controlled by legal actors) is fundamentally about the social response to vulnerability is a certain class of cases (older adults with “cognitive impairment” which in this case may be taken to include mental illness). This de facto deviation from the (theoretical) mental capacity model (as embedded in the capacity/autonomy paradigm) is not faulty practice: vulnerability is, must be, and should be the proper focus of guardianship and guardianship-like interventions. The author contends that the conceptual framing provided by the capacity/autonomy paradigm in the guardianship context has precluded the coherent theorizing of vulnerability and she suggests a framework for doing so drawing on theories of equity and relational autonomy.

Helen Pringle and Siti Muhammad: Recognising Shari’a? Religious Law, Autonomy and Vulnerability

The argument of this paper is that the criterion for recognising religious laws in multicultural societies should not be the overall compatibility of a system of religious law with liberal equality, but rather, whether and how a proposed measure of recognition addresses questions of autonomy and vulnerability. The example used is that of marriage law. In early 2008, the Archbishop of Canterbury Dr Rowan Williams suggested that religious law such as Shari’a should be recognised in some circumstances. This suggestion was met with hostility in England and elsewhere. For example, members of the Australian government insisted that there is no place for Shari’a here and that the Australian legal system upholds important values such as justice, equality and human rights norms through the ‘facial neutrality’ of existing laws and structures (in the sense of not explicitly prohibiting or favouring specific religions or religious practices). In contrast, we argue that discussions surrounding such questions, as well as arguments against the recognition of religious law more generally, have focussed too much on the need to safeguard social cohesion with the guiding principle that everyone should be subject to the same set of laws at the risk of social catastrophe. Our argument here is restricted to the specific issue of the possibility of recognising Shari’a in Australia. We argue that recognition of Shari’a is possible and might in certain circumstances be desirable in justice in order to address the vulnerability of certain individuals, a vulnerability that existing Australian laws ignore and in some cases perpetuate.
2:30-4:15: Author Meets Reader - Transforming Law’s Family: The Legal Regulation of Planned Lesbian Motherhood, by Fiona Kelly

Chair: Rosemary Hunter

Author: Fiona Kelly

Readers: Diana Majury, Nancy Polikoff, Yvonne Zylan

Published May 2011. Within the field of law and society, increasing attention is being paid to constructions of the family. Social shifts and new reproductive technologies are challenging traditional models of parenting, leading to a wider range of family formations and urgent new questions about the legal regulation of kinship. Central to these dilemmas are challenges posed to current legal structures by planned lesbian families. Fiona Kelly's important new book, Transforming Law's Family, is the first empirical legal study of lesbian families in Canada and an impressive analysis of this complex area of law and policy, with relevance far beyond North America. This author meets reader session brings together a range of critical legal scholars from common law jurisdictions to debate the implications of Kelly's book for socio-legal theory, family law, and feminist and queer jurisprudence.