

The Robbins Collection
and Research Center
in Religious and Civil Law

DIGEST
2020

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AND RESEARCH CENTER IN
RELIGIOUS & CIVIL LAW

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Berkeley Law

Director's Note

As circumstances change from one year to the next, the closure of the Law School buildings and the limited access to our collections upended the day to day operations of the Robbins Collection and Research Center. This unexpected challenge forced us to adjust our programs to the digital environment we found ourselves working in this year. This situation notwithstanding, we were able to maintain the pace of ongoing research projects albeit with a modified timeline while pursuing the expansion of the diverse collections in religious and civil law with new acquisitions of rare and non-rare material. The international conferences and the distinguished lecture series that were initially planned during the pandemic were rescheduled while new ones are planned for next year. Our publication series, including the next volumes of David Daube's collected works on Roman Law, are on schedule for next year. Although it is too early to predict the long-term consequences of the extensive shift to online operations that was accelerated by the pandemic, we can already anticipate the expansion of online access to some of our research tools and material including various indexes and repertoires to medieval and early modern legal sources. In the coming years, this mode of access to our diverse collections should become an intrinsic complement to our international research programs and conference series that have greatly benefited from our network of past and current Robbins fellows. This intellectual network has proven to be an invaluable resource during these challenging times. We will continue to build upon this strong foundation when we resume our normal operations next year.

This third issue of the Digest highlights some of the conferences and lectures that took place before the pandemic. The symposium honoring the judicial and scholarly legacy of Judge John Noonan brought together an intellectually diverse group of eminent jurists who reflected upon their formative years spent as the judge's law clerks. This symposium provided also the opportunity to underscore his fundamental role in shaping the institution that best expressed Lloyd Robbins' perceptive understanding of the bond between the living law and its diverse legal and religious traditions.

The Robbins scholarships in comparative civil and religious law were awarded to new members of the entering class in the Juris Scientiae Doctor program. Together with the members of last year's cohort, they represent many countries and legal systems from diverse continents. Their dissertation projects uniquely reflect Lloyd Robbins' faith in legal scholarship for solving present and future legal challenges. These promising young scholars are joining the international scholarly community built by the amazing accomplishments of the numerous Robbins Research and Post-Doctoral Fellows whose works we are proud to foster and share.

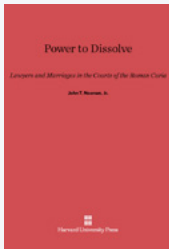
Laurent Mayali
Lloyd M. Robbins Professor of Law
Director, The Robbins Collection
University of California, Berkeley
School of Law

The Legacy of Judge Noonan

Symposium Explores Lasting Influence of Judge and Scholar



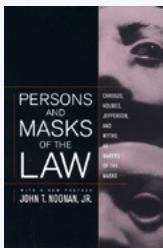
Mary Lee Noonan, Professor Abby Wood, Professor Julie Oseid, and Peter Stern



Power to Dissolve (1972)

Six case studies, spanning the 17th to the 20th century and involving such dissimilar characters as Charles, Duke of Lorraine and his duchess Nicole and Governor Parkhurst of Maine and the Rospigliosi of Rome, measure the impact of the legal process on the lives of the individuals affected.

ess Nicole and Governor Parkhurst of Maine and the Rospigliosi of Rome, measure the impact of the legal process on the lives of the individuals affected.



Persons and Masks of the Law (1976)

Legal thought in this country has always focused on the rules rather than on the persons affected by the rules. *Persons and Masks of*

the Law restores the balance by taking a person-centered view of the law. Noonan shows how even great jurists have chosen the “masks of the law” over persons, his surprising examples being Thomas Jefferson, George Wythe, Benjamin Cardozo, and Oliver Wendell Holmes, Jr.

At a time when stark lines are drawn around political and moral questions, the scholarship and judicial opinions of the late Judge John T. Noonan Jr. defy categorization. An enlightened reader of the fundamental texts of our legal traditions, Judge Noonan could not understand why scholars might ask abstractly, “What is Law? How can that question be answered.” He inquired, “without asking another: ‘Why do you want to know?’” For him, “The definition of law depends on the purpose of the definer.” That is, he believed that “the person precedes analysis.”

At the symposium, “Judge & Scholar: Perspectives on the Intellectual Legacy of John T. Noonan,” a distinguished group of international scholars, attorneys, and judges probed the lasting influence of the judge’s

lifetime of work. Co-organizer Peter Stern said the event aimed “to bring together strands of Judge Noonan’s rich contributions to law, history, ethics, and religion. Judge Noonan was known and respected for the force of his intellect and the depth of his humanity.” The symposium was sponsored by the Robbins Collection and Research Center in Civil and Religious Law over two days at Berkeley Law in September 2019.

Before being nominated to the U.S. Court of Appeals for the Ninth Circuit by President Ronald Reagan in 1985, Judge Noonan was a professor at Berkeley Law for nearly 20 years. He wrote numerous books on canon law and Catholic theology, and on a range of topics including abortion, bribery, usury, contraception, divorce, euthanasia, family law, legal ethics, religious freedom, Shakespeare, slavery, and the development of moral theology. He is perhaps best known for his 1975 book *Persons and Masks of the Law*, which argued for a people-centered vision of the law rather than one that focused purely on rules.

As a judge, Noonan maintained a fierce independence. He often ruled in favor of immigrants and refugees and against the death penalty, underscoring his wish to focus on the humanity of people affected by the rules in addition to the rules themselves. Americans, he wrote, share the “English common law tradition of judge-made law, [and thus] are blessed with a much fuller literature on their judges’ lives, reflecting, I believe, an American appreciation of the truth that the law a judge makes is a projection of values that are inescapably personal—even while the judge labors to be impartial.”

Sessions at the symposium reflected Judge Noonan’s broad intellectual pursuits, including topics on history, religion, ethics, judging, and law and the person. The Honorable William Fletcher, a colleague of Judge Noonan’s both on the Court and at

Berkeley Law, said that what stood out to him was how Noonan's "strong sense of justice went beyond categorization."

University of Washington Law Professor Mary Fan, a former clerk, probed how his people-centered vision was put into practice. She focused on two landmark cases, *Lazo-Majano v. INS* and *U.S. v. Arizona*. *Lazo-Majano v. INS* was one of Judge Noonan's most important decisions. It has been cited thousands of times in briefs and laying the groundwork for a new understanding of gender in asylum law. Olimpia Lazo-Majano had fled El Salvador in 1981 after being abused and tortured by an army sergeant. Her application for asylum was denied on the grounds that she would not face persecution if she returned to El Salvador. Judge Noonan disagreed.

In the decision overturning the lower court's ruling, he wrote, "persecution is stamped on every page of this record." In *U.S. v. Arizona* he wrote about how SB1070, the Arizona law that required local police to determine an individual's immigration status, was deliberately creating a culture of fear in Arizona, as any interaction with police would be fraught with immigration implications.

Dean Erwin Chemerinsky, moderator of a panel on law and ethics with Professor Abby Wood and Professor Richard Painter, said that "John Noonan was such an



Prof. Abby Wood, Dean Erwin Chemerinsky, Prof. Richard Painter

important member of the Berkeley Law faculty for so many years. Even after he joined the Ninth Circuit, he remained very involved in this law school." Professor Wood spoke about Judge Noonan's book *Bribes*, saying it "broadens our understanding of what the

definition of a bribe is, by looking outside of the law, to what moralists might think a bribe is, to what the public might expect, and what might actually bring government enforcement. To me, that's a powerful and rather agnostic look at public-interest perverting behavior."

"Judge Noonan knew why and most of all *how* to study the law, by placing the person at the center of the law," said Professor Laurent Mayali, director of the Robbins Collection and co-organizer of the event. Noonan's theories about the law, case decisions, and scholarship have influenced countless individuals and subsequently informed the work they pursue in many areas of law, policy, and jurisprudence. Mayali credited Noonan for playing a fundamental role in the history of the Robbins Collection at Berkeley Law, helping to establish the research center devoted to civil and religious law, and fostering Lloyd Robbins's wish to create a place where legal scholars could work toward "solving the legal issues of today."



Professor Mary Fan

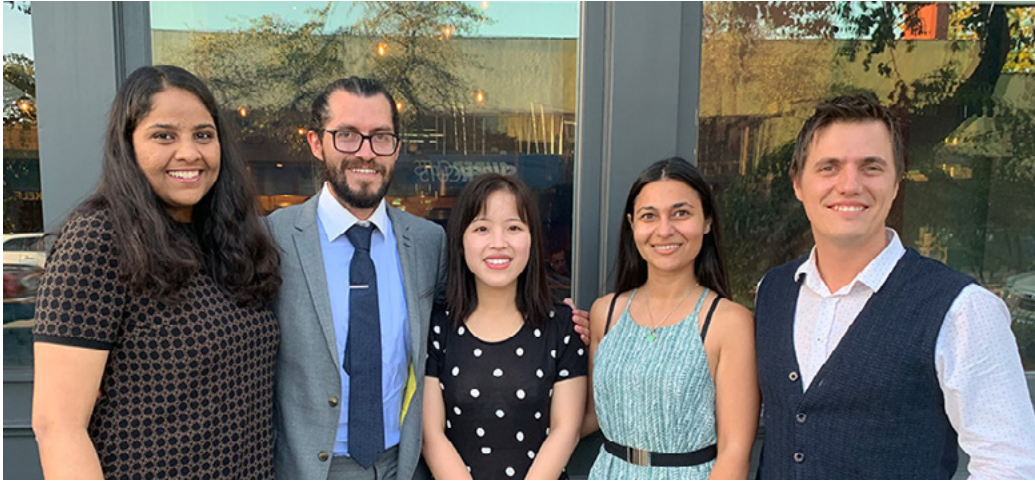
"Judge Noonan's capacity for empathy as a judge extended beyond his ability to step into the shoes of someone whose life was very different from his own. He was able to write about that person's experience with the law so you, as the reader, also feel empathy for the person too."

—Professor Julie Oseid

"Are we moving back to a system where politics will determine who the winners are in the economic sphere; where government, instead of regulating economic activity, will promote economic activity, and the squelcher of competition?"—Professor Richard Painter

Robbins Collection JSD Fellowship

New Program Paves Affordable Path to Advanced Degree



J.S.D. students Aishwarya Saxena, Nicolas Lezaca, Jiahui Duan, Zehra Betul Ayranci, and Anil Yilma.

Five new members of Berkeley Law’s Doctor of Juridical Science (J.S.D.) program have received a new fellowship, thanks to a grant from the school’s Robbins Collection and Research Center. Zehra Betul Ayranci, Jiahui Duan, Nicolas Lezaca, Aishwarya Saxena, and Anil Yilmaz are first-year students in the J.S.D. program, which offers Berkeley Law’s most advanced law degree. Their funding amounts vary from partial to full tuition waivers.

The new fellowship is a “game-changer” for the program, says Susan Whitman, the school’s assistant dean for academic planning and coordination. “We are so grateful to the Robbins Collection for generously funding the education of our entering J.S.D. students,” she says. “With this funding, we anticipate being able to compete with other highly-ranked law schools in attracting top J.S.D. students.”

Professor Laurent Mayali, faculty director of the Robbins Collection, says the idea for the fellowship grew from concerns that Berkeley Law was losing potential J.S.D. students to other schools because of funding. A partnership makes sense, he says, because of the collection’s mission. The Robbins Collection holds over 340,000 titles, including works on civil law, religious law, comparative law, jurisprudence, and legal history, with a special emphasis on continental Europe.

“Lloyd Robbins’s original idea in establishing the collection was to create a place where scholars could solve the legal problems of today,” Mayali says. “I thought it would be a good thing to use some of this money to foster research and education for our J.S.D. students who are working on comparisons between American common law and the civil law system internationally.”

Original research on a civil or religious law topic will be a part of the fellowship. Ideally, Mayali adds, the fellows will organize a workshop to showcase outside research, too. The three-year J.S.D. program centers around independent research and writing. Students complete a publication-worthy dissertation and are prepared for jobs in teaching and legal scholarship around the world.

Berkeley Law’s J.S.D. program has produced a noteworthy group of alumni, including Wissanu Krea-ngam ‘76, the deputy prime minister of Thailand; Todung Mulya Lubis, ‘90 an activist who is now Indonesia’s ambassador to Norway; Junfeng Wang ‘07, founding partner and global chairman of King & Wood Mallesons; Sung-Mei Hsiung ‘08, a high court judge on the Taiwan Intellectual Property Court; and Simona Grossi ‘11, a professor at Loyola Law School.

The J.S.D. program plays a big role in Berkeley Law’s sterling international reputation, Mayali says. He hopes the new fellowship will further enhance both the collection and the academic program. “These students will work and solve the legal issues of today in the spirit of Lloyd Robbins,” he says. “Their work will enhance the legacy of Lloyd Robbins’ vision and the law school’s commitment to excellence.”—*Gwyneth K. Shaw*

Annual Lecture in Jewish Law

From Sinai to Ethiopia, and Back to Israel

Marking the ten-year anniversary of collaboration between the Robbins Collection and the Institute for Jewish Law and Israel Studies, the 2020 Robbins Collection Annual Lecture on Jewish Thought was given by Professor Rabbi Sharon Shalom. Don Seeman, an anthropologist from Emory University, and Rabbi Shalom discussed the history, customs, and laws of Ethiopian Jews, the codification of their ancient cultural heritage and its divergence from Orthodox Judaism. Co-sponsored by the Center for African Studies, Center for Jewish Studies, and Center for the Study of Religion, the lecture drew a large audience of students, faculty, and community members.

Professor Rabbi Sharon Shalom spoke about the religious and legal implications of a diverse Jewish diaspora with an academic and religious perspective as well as a very personal lens: he himself left Ethiopia and immigrated to Israel at the age of 8. There are 125,000 Ethiopian Jews living in Israel today, immigrants and descendants of Jewish communities in Ethiopia who arrived as refugees in the 1980s and 1990s. After their arrival in Israel, Ethiopian Jews' Jewishness was questioned by some. Rabbi Shalom suggested, however, that its long isolation from other Jewish traditions means that Ethiopian Judaism may be more authentic, or no less authentic, than Rabbinic Judaism. Many Ethiopian Jews trace their origins to the rule of Menelik I (10th century BCE), the first emperor of Ethiopia and believed to be the son of King Solomon.

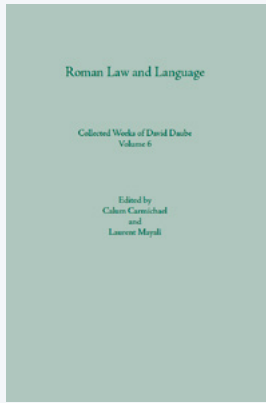
Because of their isolation, Ethiopians evolved and developed their own traditions and laws (*halakha*), including dietary laws, *mikvah* rituals, practices in prayer, and holidays that are distinct from Rabbinic Judaism. These differences in traditions became apparent when Ethiopians began arriving in Israel in large numbers. While Rabbinic scholars were developing and codifying Orthodox *halakha*, Ethiopian Jews relied only on biblical sources when creating their rules and traditions resulting in different ritual practices. For example, in adhering to Exodus 23:19—"you should not cook a young goat in its mother's milk" as quoted by Rabbi Shalom—Ethiopian Jewry permits consuming meat with milk and even cooking a goat in cow's milk, since a cow could not have been the mother of a goat. Ethiopian Jews also possess a canon of scripture different from that of Rabbinical Judaism. Their holiest book, the *Orit*, consists of the Octateuch, the first eight books of the Hebrew Bible, but also many others books not considered canonical in Rabbinic Judaism. Ethiopian Jews are unique in recognizing the Testaments of Abraham, Isaac, and Jacob to be a part of their canon.

Rabbi Shalom asserted that Ethiopian Jews are a kind of living *genizah*, or archive of Jewish practice and thought. He strongly disagreed with the idea that there is one way to practice Judaism, saying "To suggest Ashkenazi Judaism is the only correct tradition is religious colonialism. The Ethiopian model is pluralistic, other traditions are just as valid. After 3000 years, we're finally all in one place, and we need to respect and honor each other."



Professor Rabbi Sharon Shalom

Announcements & Upcoming



Roman Law and Language

Roman Law and Language, the long-awaited sixth volume in the Collected Works of David Daube series, is now available for purchase. Daube, a preeminent scholar in Biblical and Roman law, was the first Director of the Robbins Collection and Research Center. Previous volumes gathered Daube's writings on Talmudic law, Biblical law and literature, ethics, and New Testament

Judaism. This new volume includes some of his work on language in Roman law. *Roman Law and Language* opens with a collection of lectures Daube gave at Cambridge University in 1966 titled *Roman Law: Linguistic, Social and Philosophical Aspects*. The following chapters explore the evolution and changing meaning of the nouns "suffrage," "precedent," "mercy," and "grace," and of five Latin verbs: *recantare*, *resilire*, *retractare*, *renuntiare*, and *repudiare*. The volume closes with Daube's 1967 *Greek and Roman reflections on impossible laws*, an engagement with Roman jurist Pomponius's observations on *iura sanguinis*.

David Johnston, QC, writes, "These papers show Daube's mastery of language, of the ancient sources and of their historical context. But there is more. If we stand back from the historical period to which these sources relate, there are wider lessons for the modern legal scholar or lawyer too, since all texts are in need of interpretation."

Robbins Collection publications are now available for purchase as e-books, beginning with our newest volume in the Collected Works of David Daube, *Roman Law and Language*. The rest of the Robbins Collection publications, beginning with our most recent, will be made available throughout the rest of the year. As e-books, our publications will be more accessible to scholars and librarians who are not able to access the print versions of our books.



The Robbins Collection and Research Center is proud to announce that former Robbins Postdoctoral Fellow and Associate Research Fellow Lena Salaymeh was recently elected to the prestigious chair in Sunni Islam at the École pratique des hautes études, section des Sciences religieuses, in Paris. The École pratique des hautes études is counted among France's most prestigious research and higher education institutions. In 2017, Lena won the AAR Award for Excellence in the Study of Religion in Textual Studies for her book, *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions*. From 2018 to 2019, Lena was a Visiting Associate Research Scholar at the Davis Center for Historical Studies at Princeton University. The following year she was a Senior Research Fellow at the Max Planck Institute for Comparative and Private International Law, where she established the [Decolonial Law Project](#). Earlier this year she was awarded a fellowship at Oxford University for her project, "Revolving in Modernity or Revolting Against it?," through their [Global Professorship](#) program.

Our "Customary Law and the Courts" conference has been delayed by the global pandemic. The event is sponsored and organized by the Robbins Collection in cooperation with the Institut des Usages, at the University of Montpellier Law School (France). The conference will bring together legal scholars and academics who share a common interest in the increasing significance of informal norms and customary practices as a self-contained source of law distinct from statutory legislation and judicial interpretation in the diverse legal fields that define today's legal systems.

This conference will be a follow up on the conference, "Customary Law Today," that took place in Montpellier in 2017. This second meeting will explore the relevance of customary rules in the adjudication of disputes and discuss their normative authority in the judicial decision-making process.

Comparative Law in the Field

The Robbins Collection has expanded our offerings of digital exhibits. Our newest exhibit, [South Africa's Mixed Legal System](#), is based on the Robbins Collection's extensive holdings of Roman-Dutch legal texts. We have also adapted some of our most compelling exhibits, such as [California's Legal Heritage](#), into teaching resource documents following the model of our popular [The Common Law and Civil Law Traditions](#) resource. All of these can be found on our website under the "[Resources for Teachers](#)" tab on our homepage. Founder Lloyd M. Robbins envisioned the Robbins Collection as an institution encompassing both scholarship and education. Community outreach is an important component of the academic mission that the Robbins Collection shares with the University of California in its commitment toward equity, access and excellence, and in serving a diverse population of students at all levels.

The much anticipated symposium, "60 Years of Chinese Legal Reform: A Berkeley Perspective," in collaboration with the Berkeley Center for Law and Technology, has been postponed. We will announce a new date as soon as logistics have been finalized. The symposium will look at the past and future of Chinese legal studies through interdisciplinary and intergenerational discussions on a range of Chinese legal topics including intellectual property and other technology-related issues, dispute resolution, empirical research, administrative law, and international law. This program will commemorate the 60th anniversary of Chinese legal studies at Berkeley, with its two founders, Jerry Cohen and Stanley Lubman, and the many scholars and practitioners they have inspired.

The Robbins Collection sponsors Berkeley Law J.D. students in the International Away Field Placement program whose placement work engages in civil or religious law.



Alexia Diorio, JD '20

*Clerk for Justice Steve González,
Washington State Supreme Court*

Why did you choose the Centro de los Derechos del Migrante?

I applied to Centro de los Derechos del Migrante (CDM) for an externship because I wanted to learn more about the issues migrant workers face. I came to law school interested in workers' rights, especially issues like wage theft. The work CDM does was aligned with my legal and career interests.

What was a typical work day like?

Most days involved legal research and writing, communicating with workers on the phone, and assisting with other projects such as policy efforts or community outreach. One day a week I answered phones and conducted intakes with workers who may have experienced workplace abuses while working in the United States or who suspected fraud in job postings.

How did your placement correlate with a civil law system?

While CDM assists workers primarily with their legal rights after abuses occur in workplaces within the United States, the system of migrant work is quite complicated and pertains to the laws of Mexico as well as international law. Many workers face abuses, such as recruitment fraud, before they get to the United States. I learned how these aspects interact, and the variety of ways to hold employers and recruiters accountable in both Mexico and the US.

Do you have any advice to give to current J.D. students?

There is a lot of pressure to specialize and stick to your chosen legal track in law school, but don't be afraid to be open to new ideas and opportunities. I had no idea prior to law school that an away placement was a possibility, and I could not have imagined that I would spend a semester in Mexico City.

Robbins Fellowship Program



The Robbins Collection has been welcoming local, national, and international researchers and academics into the doors of its Reading Room for decades. Fellowships through the Robbins Collection allow scholars to study collection holdings, as well as utilize Berkeley Law and campus resources, to further their scholarly endeavors in legal research. Since 1990, the Robbins Collection has sponsored nearly two hundred fellowships for scholars who perform historical and comparative research in the fields of civil law and religious law.

Mahwish Moazzam

Robbins Fellow, 2020

Undertaking a Robbins Fellowship during the COVID-19 pandemic comes with a unique set of travails but Mahwish Moazzam is no stranger to contending with challenges. “I am used to adversity in my academic pursuits” explained the Robbins Collection and Research Center’s most recent fellow.

Mahwish recently earned her LLM at Berkeley Law, with a specialization in International Law and also served as associate editor for the *Berkeley Journal of Middle Eastern & Islamic Law*. Prior to coming to Berkeley, she taught Comparative Constitutional Law, Jurisprudence, Islamic Law, and the Law of Torts at the Superior College of Law in Lahore, Pakistan. She has published extensively on topics related to human rights and the rule of law.

During her time as a Robbins Fellow, Mahwish is researching the jurisdiction of the Supreme Court of Pakistan. She explains that, “Despite being the third tier of the democratic system, [the Supreme Court] is often used to facilitate military and authoritarian regimes by validating and providing a cover of legal legitimacy.” However, during the beginning of the 21st century, the Supreme Court started a campaign of judicial atonement, including “judicial review,” and began taking *suo moto* notices in matters of public importance. Mahwish shares that, “A lack of restraint and political accountability resulted in the transmutation of activism into judicial overreach, undermining the constitutional doctrine which assures the separation of powers between legislature, executive, and judiciary.” Her research highlights this fine line between judicial activism and overreach. She asks, “Is it appropriate for the judiciary to decide its own limits, or should this matter be addressed and solved in parliament?”

Mahwish’s research also has a secondary, comparative approach. Pakistan borrowed the concept of judicial review from the U.S. judicial system. She is investigating the role and effects of partisan entrenchment on the U.S. Supreme Court’s choice to accept cases and how it is used to keep other branches of government in check. Mahwish says that the Fellowship has, “granted me unprecedented access to the best sources of legal research available, including the Robbins Collection and the Berkeley Law Library.” Because of her Fellowship, Mahwish has access to a rich diversity of U.S. legal research tools to enrich the comparative dimensions of her project.

One of the major difficulties of doing research during the global pandemic is that the Law Building is closed and thus Mahwish has not had access to a personal desk in the Robbins Collection reading room. In addition, she explains that “Unfortunately, many of the books required for my research are not available online. However, I am extremely grateful to the Robbins Collection staff who are helping to find work-around solutions to this problem.” But, she says, “I am honored to be a Robbins Fellow, even under the arduous conditions caused by COVID-19. In Pakistan, I have had many different hurdles to overcome. No challenge is too great in the pursuit of knowledge.”



Corinne Leveleux-Teixeira

Robbins Fellow, 2019



Professor Corinne Leveleux-Teixeira spent two months at the Robbins Collection conducting research on oaths in the middle ages. She spent her time collecting material for a book on oaths in the middle ages. Other scholars have studied oaths during this time period, but usually with a political lens. It was the linguistic and social elements of oaths that drew Professor Leveleux-Teixeira to the topic. In the middle ages people gave oaths while signing contracts, during trial, and many other day-to-day activities that required some sort of guarantee. “When you wanted a sure thing, an oath was all you had. It established a truth that could not be invalidated,” said Professor Leveleux-Teixeira. How did oaths work? Why were oaths so important to people in the middle ages? These were just some of the questions that Professor Leveleux-Teixeira set out to answer with this research trip, her fourth, to the Robbins Collection.

Professor Corinne Leveleux-Teixeira first came to the Robbins Collection in 1995 when she was a PhD student from France studying blasphemy. “In those two months, I did more work than I could have in two years in France,” she said. Coming to the Robbins Collection as a young scholar also gave Professor Leveleux-Teixeira an international perspective, since there were several other early-career fellows at the Robbins Collection at the same time.

What she found in her research was not at all what she expected. Although blasphemy was written about as a serious crime previous to the 16th century, the only real punishment seemed to be small fines. It wasn’t until the 16th century that Catholics began to use blasphemy as a suppressive tool against Protestants. In 2001 she published her book *La parole interdite: Le blasphème dans la France médiévale (XIIIe-XVI siècles)*, which largely comes from the research she did during her time spent at the Robbins Collection.

Professor Leveleux-Teixeira’s previous work on blasphemy brought her to her current work on oaths. Until the 12th and 13th century, blasphemies were called “bad oaths.” After the 13th century, blasphemy was specified as a crime, separate from the concept of an oath. The study of blasphemy and oaths allows Professor Leveleux-Teixeira to explore the relationship between laws and language, since both are about what people say and promise to each other.



La parole interdite: Le blasphème dans la France médiévale (XIIIe-XVI siècles)

Judy Gaughan

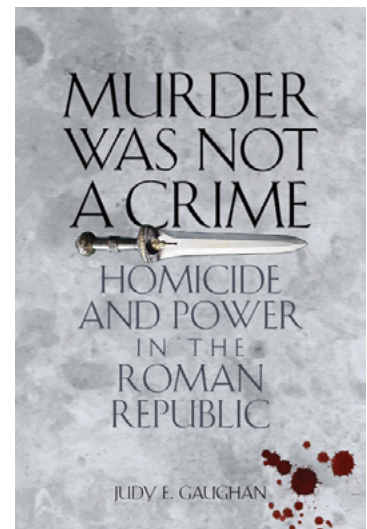
Robbins Fellow, 2019

Robbins Fellow Professor Judy Gaughan has a long history with the Robbins Collection; her first Fellowship was in 2000 shortly after she received her PhD from UC Berkeley. In the intervening decades she has visited five more times. She returned to the Collection this spring to research a new project, foreigners in Roman courts, where she looks at how provincial governors helped to shape criminal legal procedure in the Late Republic and Early Roman Empire.

“As a Fellow, I have almost all of the resources available in the world for me to complete this project,” Professor Gaughan said. She made use of her extensive knowledge of the Collection during this research trip, accessing materials from the Robbins Collection stacks, the Law Library, and the reference materials in the reading room. The journal compilations such as *Iura, Labeo, Zeitschrift der Savigny Stiftung*, and recent editions of Roman Law journals were particularly helpful. “Since I am at a small university with limited resources, the Robbins Collection has allowed me to get up to date on recent research that will allow me to be a better teacher of Roman law for the next generation of scholars,” she said.

This visit to the Robbins Collection also provided Professor Gaughan an opportunity to access more rare books, like Ludwig Mitteis’ *Reichsrecht und Volksrecht* and Antonius Mattheus’ *On Crimes: A Commentary on Books XLVII and XLVIII of the Digest*. She commented, “The resources in the Robbins stacks, in particular, are often hard, and sometimes even impossible, to get my hands on if I am not at the Robbins Collection in person.” For Professor Gaughan, doing her research at the Collection has other benefits. “The table made available to me in the Reading Room is a significant resource. I am able to keep books on my desk for easy access and use the reference materials with ease. The staff are helpful when I need assistance in getting the materials that I need. They all also have great insight and are, frankly, just pleasant to be around,” she shared.

In 2009 Professor Judy Gaughan’s book, *Murder Was Not a Crime: Homicide and Power in the Roman Republic*, was published by The University of Texas Press. She is currently an Associate Professor of History and Philosophy at Colorado State University, Pueblo.



Murder Was Not a Crime: Homicide and Power in the Roman Republic

A historical map of New France, showing the Saint Lawrence River Valley, Lac Supérieur, and Lac Érie. The word 'NOUVELLE' is written in a decorative font at the top. The title 'Practising Law in the "Lawyerless" Colony of New France' is overlaid in large blue letters.

Practising Law in the “Lawyerless” Colony of New France

by Alexandra Havrylyshyn

This chapter, published in Canada’s Legal Past: Looking Forward, Looking Back (University of Calgary Press, 2020), argues that long before the formal establishment of the Québec bar association in 1779, legal practitioners in the French colony along the Saint Lawrence River Valley represented individuals in their civil disputes.¹ A critical examination of Ancien Régime dictionaries first disentangles the terms advocate, attorney, and practitioner, helping us grasp the many modalities of legal practice in the early modern world. The superior status of the advocate helps explain why colonial authorities tolerated the development of the legal profession’s lower branches, whose members were less well-equipped in terms of legal knowledge, social prestige, and political power to overtly challenge an absolutist regime. Second, Québec’s archives—whether trial records, notarial records, or parish registers—present powerful evidence against the claim that there were no lawyers in early Canada. In addition to providing the names of seventy-six men who identified as legal practitioners from 1670 to 1763, this chapter shows that legal practitioners were more mobile, both professionally and geographically, than we might expect. Dr. Havrylyshyn (Robbins Postdoctoral Research Fellow, 2018-2020) relied in part on sources at the Robbins Collection to write this chapter. She thanks the Collection for the support and archival guidance needed to publish this work.

For more than a century, historians have, to varying degrees, clung to the myth that there were no lawyers in New France. This chapter investigates that claim specifically as it applies to early Canada, or the French colony centering around the Saint Lawrence River Valley. The French monarchy laid claim to this geographic space between 1534, when Jacques Cartier first began exploring the Saint Lawrence River, to 1763, when King Louis XV ceded the colony of Canada to Britain as part of the Treaty of Paris to end the Seven Years’ War. Today, early Canada is known as the province of Québec. Although French speakers had also settled in the places we now call Maine, New Brunswick, Nova Scotia, and Prince Edward Island, the French monarchy referred to that region as “Acadia,” to distinguish it from “Canada.”

One of the first historians of the Canadian legal profession confidently declared in 1897 that under the French regime, “il n’y avait pas d’avocats.” This historian, indeed, argued that the Canadian legal profession only began to exist with the transition to British rule in 1763. A recent study, published in 1997,

dates the origin of the Québec Bar Association to 1779, and fails to explicitly reject the claim that there were no lawyers in New France.

The assertion that there were no lawyers in early Canada, however, rests on a misreading of primary sources. First, the myth depends upon a narrow and anachronistic definition of the lawyer as a university-educated legal expert who belongs to a professional bar association. It is true that in 1678, three members of the colony’s highest court, or Sovereign Council, reported that “in this country neither advocates, attorneys, nor practitioners are to be found.” Advocates (avocats), attorneys (procureurs), and practitioners (praticiens) might today all be known as lawyers, but in early Canada and in Ancien Régime France they constituted three distinct categories of professional legal representatives. Professional here means both experienced in and paid for one’s services. To clump advocates, attorneys, and practitioners all together into the modern Anglo-American category of “lawyer” obscures cultural and historical differences. Indeed, one goal set in this chapter is to elaborate on

the meanings of these terms with-in their socio-historical context and ensure that we impose neither early modern English nor modern categories of legal practice.

To understand what the members of the Québec Sovereign Council meant by the categories of advocate, attorney, and practitioner, I first consult Ancien Régime French legal dictionaries. University-educated advocates ranked above formally-trained attorneys, who in turn ranked above informally-trained legal practitioners. Appreciating the variety of legal representatives in Ancien Régime France expands the definition of “lawyer,” thereby helping to dispel the myth that there were no lawyers in New France. Just as historians have identified many legalities in colonial North America, we can identify many modalities of legal representation in New France, where a mixture of paid and unpaid, trained and untrained individuals did the work of representing people in court. This is not to say that the categories of advocate, attorney, and practitioner functioned the same way on the books as they did on the ground, or that they operated in Canada the same way as they did in France. Disentangling these terms, however, allows us to begin to describe more precisely the hierarchy of legal representation in the French colony of Canada.

The myth that there were no lawyers in New France further springs from a misreading of the Sovereign Councillors’ remark, in 1678, that “it is even to the advantage of the colony not to allow any [advocates, attorneys, or practitioners].” Historians have wrongly extrapolated from these words that the administration of New France officially banned French lawyers from immigrating to the colony of Canada. However, the primary source merely states a policy recommendation, and should not be taken as evidence of a policy that was actually implemented. The councillors reasoned that the colony would be better off without these various kinds of Ancien Régime legal representatives, not only because of the inexperience of judges and process-servers, but also because of the difficulty of travelling during winter months. As in other colonial spaces, this suggests that judges travelled from place to place to perform their duties. Furthermore, the councillors described the colonial inhabitants as both ignorant and impoverished. Greedy lawyers, the councillors insinuated, could easily persuade colonial inhabitants to undertake frivolous lawsuits, and this would increase the cost of justice in a colony whose administrative resources were already scarce.

In the end, the councillors never did ban advocates, attorneys, or practitioners from the colony. Thus Canada dif-

fers from French Caribbean colonies such as Martinique and Saint Domingue, where royal ordinances and colonial decrees explicitly prohibited advocates and attorneys from even making the transatlantic journey. In fact, Canadian authorities explicitly recognized the profession of the attorney in 1693 and 1732. Furthermore, the claim that there were no lawyers in New France fails to account for change over time. Although advocates, attorneys, and practitioners may have been scarce or even absent in 1678, this changed with time. By 1740, one-third of claimants hired someone who identified himself as an attorney or legal practitioner to represent them before the Québec Provost Court.

This chapter, finally, dispels the myth that there were no lawyers in New France by looking beyond the official regime of licensing that operated in France, and instead at what individuals actually did in their communities. While emerging literature on the legal profession sheds light on notaries and attorneys, I focus on the Ancien Régime’s lowest-ranking representatives: legal practitioners (*praticiens de droit*). Trial records, notarial records, and sacramental records reveal that at least seventy-six men in early Canada identified as professional, but informally-trained legal practitioners before 1764, the first full year of British rule. Although these lowest-ranking representatives lacked formal training, they professed proficiency in legal practice and were paid for their services. The names of these seventy-six men present further evidence weighing against the claim that lawyers emerged in Canada only with the British Regime. Perhaps the history of early Canadian legal practitioners has been underwritten because many did not settle or die in the colony. Telling their full life stories will require conducting research beyond Canada, whether in the former French Empire or elsewhere. Attorneys and legal practitioners are worth studying because they facilitated access to justice for the ordinary people of early Canada.

¹Alexandra Havrylyshyn, “Practising Law in the ‘Lawyerless’ Colony of New France,” in eds. Lyndsay Campbell, Ted McCoy, and Mélanie Méthot, *Canada’s Legal Pasts: Looking Forward, Looking Back* (Calgary: University of Calgary Press, 2020), 115-148. The following excerpt is reproduced under a Creative Commons license, the terms of which are available here: <https://creativecommons.org/licenses/by-nc-nd/4.0/>

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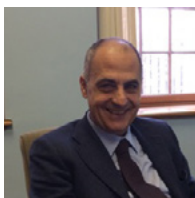
Alarico Barbagli is now a Researcher at the University of Pisa, Department of Law, in Italy. His book, *Profili giuridici del fallimento nel pensiero dei commentatori*, was published by Torino in 2019.



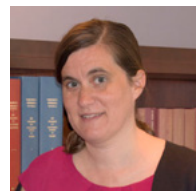
Calum Carmichael is the editor of *The Cambridge Companion to the Bible and Literature* (Cambridge, 2020), which includes his introduction and an essay, “Biblical Law and Literature.”



Since 2018 Marta Cerrito has been a post-doctoral researcher in Legal History at the University of Palermo for the ERC project, “Documenting Multiculturalism.” Her forthcoming book, *Pena negoziata e arbitri iudices*, is about criminal transactions in the Kingdom of Sicily from the 13th to 15th centuries.



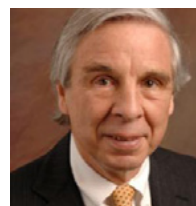
In 2019 Emanuele Conte was a Visiting Fellow at Columbia University in New York, and in 2018 was a Visiting Fellow at Wolfson College at Oxford. He was co-editor of *A Cultural History of Law in the Middle Ages*, published in 2019 by Bloomsbury Academic.



Agnès Desmazières is maître de conférences in church history and systematic theology at the Centre Sèvers-Facultés jésuites de Paris. Her latest book, *Le dialogue pour surmonter la crise: Le pape réformateur du pape François* (Salvator, 2019), examines how dialogue, a central theme in Pope Francis's thought, is crucial to overcome both social and the church's crises. In line with her first book, *L'inconscient au paradis: Comment les catholiques ont reçu la psychanalyse* (Payot, 2011), she has embarked on a new project on the transformations of priestly identity, focusing on the impact of human and social sciences.



In 2017 Gero Dolezalak's and Isabelle Dolezalak's essay, “Las Siete Partidas (um 1265)” was published in *Transolcations. Anthologie. Eine Sammlung kommentierter Quellentexte zu Kulturgutverlagerungen seit der Antike*, edited by Bénédicte Savoy and Robert Skwirbli. In the same year Gero's article “Manuscript Vat. Lat. 14094: consilia by juriconsults and pleadings by advocates before the Rota Romana (ca. 1500–1542)” was published in *Codex Studies 1*.



Richard Helmholz's new book, *The Profession of Ecclesiastical Lawyers: An Historical Introduction*, was published by Cambridge University Press in 2019.



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In October 2019 Randall Lesaffer was appointed as Professor of the History of Public Law at the Katholieke Universiteit Leuven in Belgium, where he has also been a Professor of Legal History since 1999. He is also the co-editor of *International Law in the Long Nineteenth Century (1776–1914): From the Public Law of Europe to Global International Law*, part of the Studies in the History of International Law Series, published by Brill/Nijhoff in 2019.



In 2019 Luigi Nuzzo became a full Professor of Legal History and International Law at the Law School of the University of Salento, in Italy. His essay, “Quando la guerra è finita. Quale diritto per una pace giusta?” will appear in *Alberico Gentili e lo jus post bellum. Prospettive tra diritto e storia*, forthcoming from Edizioni Università di Macareta in 2020.



Jacqueline Ross was a Robbins Visiting Professor of Law in Spring 2019. Professor Ross has most recently had her chapter, “Betrayal by Bosses: Undercover Policing and the Problem of Upstream Defection,” published in *The Oxford Handbook of Criminal Process* by Oxford University Press in 2019.

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