

LAW STUDENT COLLOQUIUM 2012



Law School,
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Dublin 2.

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Speaking Schedule & Programme of Abstracts

10:00

Constitutional Law

David Kenny - *Facial and As-Applied Constitutional Challenges: The Case for a New Type of Constitutional Action in Ireland* (Trinity College Dublin)

Andrea Mulligan - *The Case for a Constitutional Right to Know One's Genetic Parents* (Trinity College Dublin)

Kai Leung - *The Impact of Devolution on the State Integrity of the United Kingdom* (The University of Cambridge)

Criminology & Penology

Kevin Charbel - *Born from prejudice, has it grown into a science? Modern risk assessment* – (Dublin City University)

Yvonne Kennedy - *Inside the Mind of a Criminal: The phenomenon of Thought Crime and its potential impact on the trial process* - (University College Dublin)

Jill Griffin - *No Future? - The Influence of Adolescent Rebellion on Youth Crime* (Trinity College Dublin)

Medical Law

Eimear O'Brien - *Surrogacy Law in Ireland* (Trinity College Dublin)

Sarah Fulham McQuillan - *"Case without a cause?": The Relevance of the "But For" Test in Medical Negligence litigation* (Trinity College Dublin)

Colm Scott Byrne - *A Time to Rethink the Law on Euthanasia and Assisted Suicide in Ireland* (University College Dublin)

Recent Developments in Commercial Law

Deekshah Namah - *The Privacy and Electronic Communications Directive 2011- "Cookie" Law: A Legal Reality or Just a Controversy?* (University of Liverpool)

Sean McGuinness - *Conditional Payment Clauses in the Irish Construction Industry: Sections 5 and 6 of the Construction Contracts Bill 2010.* (University of Oxford)

Darragh Hyland - *Sports Insurance: A Civil Alternative* (Trinity College Dublin)

11:30

Tea & Coffee Break in the University Philosophical Society's Conversation Room, Graduates' Memorial Building

12:30

Philosophical Foundations of the Common Law

Paul Behan - *A Consideration of the Cracks in the Moral Justification of the "Egg Shell Skull Rule"* (Trinity College Dublin)

Kevin Flanagan - *Re-thinking Crime and Punishment: Looking Back, Going Forward* (Dublin City University)

Stephen Britain - *Democracy and Treaty Interpretation in the Legal Order of the European Union* (Trinity College Dublin)

Feminist Perspectives on Criminal Law

Mr Conor Campbell - *In sickness and in health?-the need for reform of Marital Rape in Ireland* (Dublin City University)

Ms Charlotte Kelly - *"Mother's here to hel"p: Applying the Ethics of Care to the Duty to Rescue* (University of Cambridge)

Amy Deane - *"Women commit much less crime than men do" is a statement that has achieved the status of a truth universally acknowledged.* (Trinity College Dublin)

International Law: Procedural Questions

Usman Hameed - *Need for adjustment of due process rights in cases involving international terrorism to promote the cause of state cooperation* (University of Glasgow)

Alvaro Paúl - *Highlighting Principles: Evidence Before the Inter-American Court of Human Rights* (Trinity College Dublin)

Emma Fenelon - *The Role of Third Party interventions before the CJEU & ECtHR* (Harvard University)

Comparative Law

Elodie Vilchez - *Judicial Review of Administrative Decisions in France and in Ireland: So Similar? The impact of the Courts having Jurisdiction* (Trinity College Dublin)
Philip McDonald - *Exploring the Relationship between Rules of Precedent and Statutory interpretation in Civil and Common Law Systems* (University of Cambridge)
Jonathan McCully - *Privacy and Rehabilitation: "To what extent can we forget the past?"* (Trinity College Dublin)

14:00

Sandwiches and Coffee in the University Philosophical Society's Conversation Room, Graduates' Memorial Building

15:00

Intellectual Property

David Kiernan - *Raising the Threshold for Copyright Protection: The Need to Revise the Originality Requirement in Copyright Law* (Trinity College Dublin)
Denise Moran - *Ambush Marketing at the London 2012 Olympics – "Let the Games Begin!"* (Trinity College Dublin)
Colm Kinsella - *"TRIPS, Pharmaceutical Patents and Their Effect on Developing and Least Developed Countries"* (Trinity College Dublin)

International Law

Maria-Alejandra Calle – *The Scope of Environmental Concerns for the purposes of GATT Art XX: An Overview from the WTO Trade Disputes* (University College Cork)
Stuart MacLennan - *Fiscal Sovereignty* (Trinity College Dublin)
Sam Goodman - *The Law of State Responsibility: Have the International Tribunals got it Wrong?* (University of Cambridge)

Human Rights and Humanitarian Law

Fletch Williams - *Placing Men in a Position of Unique Vulnerability: Cases of Male Rape in War, and Gender Narratives in Legislation* (University of Durham)
Stephen Kirwan - *Rethinking the Norm of the Responsibility to Protect: Towards a Better Use of Chapter VII* (Trinity College Dublin)
C Starla Hagrita - *The Effect of Natalist Welfare and Employment Laws on Women's Quality of Work* (University of Cambridge)

Banking Law

Robert Wyse Jackson - *Europe's Regulatory Response to Rating Agencies after the Financial Crisis: A Critical Review of the New Supervisory System* (London School of Economics)
Faiza Ismail - *Eurozone Debt Crisis: Ireland and Islamic Finance* (University of Ireland, Maynooth)

17:00

Wine Reception in the University Philosophical Society's Conversation Room, Graduates' Memorial Building

18:00

The First Annual Brian Lenihan Memorial Address – The Chamber of the Graduates' Memorial Building

Chairperson: Mr Paul Gallagher SC (former Attorney General of Ireland)

Keynote Speaker: The Hon. Mr Justice Bryan McMahon

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Constitutional Law

David Kenny - Facial and As-Applied Constitutional Challenges: The Case for a New Type of Constitutional (Trinity College Dublin)

The speaker will propose that as-applied constitutional challenges as well as facial challenges should be adopted into Irish constitutional law. The speaker will also examine how the *jus tertii* rule, double construction rule and severance rule facilitate as-applied challenges and how such a challenge aptly fits with the text of Article 15.4. Detailed consideration will also be given to the host of benefits that would arise from embracing this type of challenge.

Andrea Mulligan - The Case for a Constitutional Right to Know One's Genetic Parents (Trinity College Dublin)

The speaker will propose that the Constitution protects the right to know one's genetic parents and that, as a result, the policy adopted by the legislature must not permit anonymous gamete donation. The speaker will trace the development of the right of a child who has been placed for adoption to know its natural mother, and, in particular, will examine the case of *I'OT v B* to support her proposal. The speaker will also analyse the objections and complications that pertain to the recognition of the right to know one's genetic parents as a constitutional right.

Kai Leung - The Impact of Devolution on the State Integrity of the United Kingdom (The University of Cambridge)

The speaker will examine the "democratic deficit" concerns that have arisen in the United Kingdom and to what extent devolution has strengthened the State's integrity and legitimacy. The speaker will then examine devolution along three axes: autonomy, stability and the responsiveness of the constitutional framework to democratic demands. The speaker will focus on the impact of these three aspects on devolution with reference to Scotland, Northern Ireland and Wales respectively.

Criminology and Penology

Kevin Charbel - Born from prejudice, has it grown into a science? Modern risk assessment (Dublin City University)

The speaker will examine the specific measures used by psychiatric institutions and rehabilitative programs to prevent individuals from committing future offences, as well as the risk assessment techniques used to calculate the likelihood of an individual re-offending. The speaker will then consider whether these methods are trustworthy and if the reasoning behind them is still based on a form of prejudice, in particular considering the ethical issues involved in a social worker or judge having the power to decide whether or not a person satisfies the threshold for reintegration into society.

Yvonne Kennedy - Inside the Mind of a Criminal: The phenomenon of "Thought Crime" and its potential impact on the trial process (University College Dublin)

The speaker will propose that brain-mapping and associated practices be introduced in Ireland as part of the evidence that can be used in determining whether or not someone had the requisite *mens rea* for a crime. The speaker will draw on experiences from other jurisdictions, in particular India and the US, to illustrate how such practices advance the justice of the criminal justice system for both victims of crime and those who commit them. Consideration will also be given to the possible advantages and barriers to introducing brain mapping practices in the Irish Courts.

Jill Griffin - No Future?: The Influence of Adolescent Rebellion on Youth Crime

The speaker will examine the close links that archetypal forms of rebellion have to juvenile delinquency with particular focus on three types of teenage rebellion: aggression and disregard for authority, under-aged alcohol and substance abuse and youth gang crime. The speaker will then look at the current problems of the Irish Youth Justice System and, through drawing on a better understanding of the reasons for teenage rebellion, will make recommendations for reform. She will also make a suggestion as to how the urge to rebel could be channelled into something more positive.

Medical Law

Eimear O'Brien – Surrogacy Law in Ireland (Trinity College Dublin)

The speaker will discuss the absence of legislation pertaining to surrogacy in Ireland, in particular considering the rights of all parties involved in the surrogacy arrangement and the issues surrounding the citizenship of the child in cross-border arrangements. The speaker will also refer to the UK development of surrogacy law and make suggestions as to how the UK approach could be adopted in this jurisdiction.

Ms Sarah Fulham McQuillan - Case without a Cause?: The Relevance of the "but for" Test in Medical Negligence Litigation (Trinity College Dublin)

The speaker will discuss the relevance of the "but for" test in medical negligence litigation, both in light of the number of "tools" that have been implemented through case law to supplement or replace it and in light of alternative tests that have been proposed in academic commentary. In analysing the courts' departure from a strict causation framework, the speaker will explore the application of the "but for" test in both Ireland and other common law jurisdictions.

Colm Scott Byrne - A Time to Rethink the Law on Euthanasia and Assisted Suicide in Ireland? (University College Dublin)

The speaker will propose that the Irish government should rethink the current law and legalise assisted suicide and voluntary euthanasia in this jurisdiction. Through examining the impact of euthanasia in other jurisdictions, the speaker will explore the arguments for and against the introduction of the practice in Ireland. The speaker will also consider the ongoing morality and ethical debate with this issue.

Recent Developments in Commercial Law

Deekshah Namah - The Privacy and Electronic Communications Directive 2011- "Cookie" Law: A Legal Reality or just a Controversy? (University of Liverpool)

The speaker will discuss the implications of the use of 'Cookies' on Internet sites and how they can breach privacy controls. The speaker will also consider the potential impact of the new Cookie Law in the EU Privacy and Electronic Communication Directive 2011, and in the legislation already implemented in the UK, Denmark and Estonia. The speaker will then consider how the right to privacy is to be balanced with the commercial interests of those using the 'Cookie' data, in particular in relation to the online advertising industry.

Sean McGuinness - Conditional Payment Clauses in the Irish Construction Industry: Sections 5 and 6 of the Construction Contracts Bill 2010 (University of Oxford)

The speaker will discuss the changes proposed to conditional payment clauses under the Construction Contracts Bill 2010 that will render partially illegal any clause in a construction contract that would make a right to payment, or timing of such dependent on the act of another. The speaker proposes the definition of a 'construction contract' as one worth upwards of €200,000, and the fact that this provides an obvious loophole that will permit the compartmentalisation of a project into smaller contracts which individually fall below this value, thereby undermining the very purpose of the legislation.

Darragh Hyland – Sports Insurance: A Civil Alternative (Trinity College Dublin)

The speaker will examine the application of law in sport, in particular analysing how the FAI, GAA and IRFU handle the issue of civil liability for incidents on the playing field. The speaker will consider the potential alternatives to litigation-based solutions and whether legal intervention in realm of sport is really desirable.

Philosophical Foundations of the Common Law

Paul Behan - A Consideration of the Cracks in the Moral Justification of the "Egg Shell Skull Rule" (Trinity College Dublin)

The speaker will discuss the injustice associated with the "egg shell skull" rule and will question whether the rule really has the effect of deterring potential malefactors. The speaker will then consider the rule *qua* a principle of retributive justice and will highlight the injustice of the rule insofar as it operates against those lacking *mala fides*. He will thus propose that the application of the rule should be limited to instances of malicious intent rather than applying in the wider set of negligence and strict liability cases.

Kevin Flanagan - Re-thinking Crime and Punishment: Looking Back, Going Forward (Dublin City University)

The speaker will discuss the rationales for imprisonment and the social utility of such a regime. He will argue that Brehon Laws, under which a system of imprisonment did not exist, is of relevance for modern society. In light of Brehon Law principles, the speaker will argue for an extension of the Atkinian neighbour principle to the criminal domain. He will also make a suggestion as to how the principles of restitution and compensation can be used to create a more just and utilitarian society.

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Stephen Britain - "Democracy and Treaty Interpretation in the Legal Order of the European Union"

The speaker will discuss what democracy means in the EU. In contrast to the methodology of political scientists studying the EU, who move from democratic theory to prescriptions for making the EU more democratic, the speaker will accept the EU's claim, in Article 10 TEU, that it is already a fully-fledged democracy, and will examine how the theory of consociational democracy offers an accurate fit for the EU as it is currently organised. He will then examine the implications of this for Treaty interpretation in the EU.

Feminist Perspectives on Criminal Law

Conor Campbell - *In Sickness and in Health?: The Need for Reform of Marital Rape in Ireland* (Dublin City University)

The speaker will trace the history of the legislation surrounding marital rape and propose radical reform in this area, arguing that it should come by abolishing the present law and introducing an amendment to the 1981 Act. The speaker will also explore the approach taken in other jurisdictions, particularly the US, and how the proposed amendment would fit with theories such as Classicism, Bentham's Model and Beccaria's Model.

Charlotte Kelly - *Mother's here to help: Applying the Ethics of Care to the Duty to Rescue* (University of Cambridge)

The speaker will discuss how criminal liability arising from a duty of care lacks a feminist legal perspective. They will then argue that applying one can bring new insight into an area which disproportionately affects women. The speaker will also consider how women more generally form a "care-giver" relationship with victims of criminal omission, and why this makes women, in particular, more likely to be penalised. The speaker will also examine the broader debate regarding the ethics of care.

Amy Deane - "Women commit much less crime than men do" is a statement that has achieved the status of a truth universally acknowledged." (Trinity College Dublin)

The speaker will discuss the criminological construction of the female offender, with particular regard to the writings of the seminal positivist, Lombroso. They will then go on to question whether justice is a gender-based concept, arguing that the defences provided by the criminal law are not sufficiently accommodating of women's experiences. They will also examine how defences to murder are distinctively catered for the criminal man and male models of behaviour. Finally, the speaker will consider defences to murder in terms of their effectiveness and applicability to women.

Comparative Law

Elodie Vilchez - *Judicial review of administrative decisions in France and in Ireland: So similar? The Impact of the Courts having Jurisdiction* (Trinity College Dublin)

The speaker will conduct a comparative analysis between the seemingly similar Irish *ultra vires doctrine* and the French "recours pour excès de pouvoir" (the pleas of *ultra vires*). While both operate to control the legality of an administrative decision, the speaker will consider how the French system is more effective by reason of specialist administrative tribunals that have a specific jurisdiction to carry out reviews of administrative action. The speaker will also examine how the obligation to pay due deference has largely frustrated the ability of the Irish Courts to review administrative action.

Philip McDonald - *Exploring the Relationship between Rules of Precedent and Statutory Interpretation in Civil and Common Law Systems* (University of Cambridge)

The speaker will examine the doctrine of precedent in a comparative context, with specific reference to rules of statutory interpretation in England and France. The speaker will then trace the differing role of precedent in both the common and civil law systems, before highlighting how there is a move towards convergence so that in each system uncertainty is minimised except where it is necessary to prevent injustice. The speaker will also discuss the parallel development of purposive interpretation of legislation in England and France and the differences between the two systems that remain.

Jonathan McCully - Privacy and Rehabilitation: "To what extent can we forget the past?" (Trinity College Dublin)

The speaker will examine the constitutional tort protecting one's right to privacy in Ireland and consider to what extent it protects one's ability 'to forget the past'. In particular, the speaker will explore the importance of rehabilitation in relation to criminals and whether the public interest is really served by bringing up past convictions that could destroy the successful outcomes of rehabilitative programmes. In analysing this balancing act, the speaker will draw on the theory of Ruth Gavison about the importance of recognising the right to privacy where it is clear society cannot disregard prejudices.

Intellectual Property

David Kiernan - Raising the Threshold for Copyright Protection: The Need to Revise the Originality Requirement in Copyright Law (Trinity College Dublin)

The speaker will examine the originality requirement of copyright law and will propose that the copyright threshold in Ireland be raised so as to protect 'real' creativity and originality. The speaker will then trace the development of copyright law and assess copyright legislation in other jurisdictions as a means to considering the different levels at which the thresholds in other jurisdictions stand. They will then consider whether these thresholds should be adopted in this jurisdiction.

Denise Moran - Ambush Marketing at the London 2012 Olympics: "Let the Games Begin!" (Trinity College Dublin)

The speaker will examine the practice of ambush marketing and how intellectual property protection has been unsatisfactory in curtailing and attempting to combat this activity. The speaker will then analyse the Olympic anti-ambush marketing laws that must be enacted in host countries, focusing on the London Games and Paralympic Games Act, 2006. The speaker will then explore the far-reaching powers extended to the London Organising Committee in this Act through its creation of an intellectual property right to associate specifically with the London Games – the "London Olympics Association Right".

Colm Kinsella - TRIPS, Pharmaceutical Patents and Their Effect on Developing and Least Developed Countries (Trinity College Dublin)

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is easily the most divisive WTO Agreement to date, and the global IP system has undergone radical harmonisation and expansion with its implementation. The speaker will argue that TRIPS is not as clear or as courageous as necessary to secure a fair balance between the needs of developed countries and developing or least-developed countries in relation to access to pharmaceuticals and medicines for public health matters. The area of pharmaceutical patents is that where the problems with TRIPS are most acute; particularly as regards the effects that the obligation on developing countries to implement and enforce TRIPS provisions has. There have certainly been consequences for these nations in terms of public health and development and these will be discussed and analysed.

International Law

Maria-Alejandra Calle - The Scope of Environmental Concerns for the purposes of GATT Art XX: An Overview from the WTO Trade Disputes (University College Cork)

The speaker will discuss the tensions between trade and environmental concerns in the context of GATT Art XX, and, in particular, the role of the Dispute Settlement System of the WTO in this area. The speaker will provide an overview of the challenges that have been taken against environmental concerns, both under the GATT (1948-94) regime and the WTO Dispute Settlement System. The speaker will then examine the jurisprudence that has emerged from these cases to determine whether environmental protection can operate as a legitimate aim to restrict trade.

Stuart MacLennan – Fiscal Sovereignty (Trinity College Dublin)

The speaker will argue that fiscal sovereignty is a mere academic construct, designed to place special significance on the importance of fiscal authority to nation states. In doing so, the speaker will consider the three aspects of sovereignty: the territorial element, the personal element and the functional element and how these aspects overlap and operate to demarcate sovereignty. The speaker will also examine the inadequacy of customary rules of international law as a means to preventing overlapping of fiscal jurisdiction and how double taxation is a consequence of this.

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Mr Sam Goodman - The Law of State Responsibility: Have the International Tribunals got it Wrong? (University of Cambridge)

The speaker will discuss Article 8 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, and will consider the “control” test employed by international tribunals in determining whether or not the wrongful conduct was attributable to an external power. The speaker proposes that the failure of the ICJ, ECtHR and International Criminal Tribunal to form a unified formulation of control undermines the utility of Article 8 and therefore that an authoritative “overall control” test should be adopted as it is appropriate to current challenges in the international community and the theory behind state responsibility.

Human Rights and Humanitarian Law

Fletch Williams - Placing Men in a Position of Unique Vulnerability: Cases of Male Rape in War and Gender Narratives in Legislation (University of Durham)

The speaker will discuss the ramifications of the non-inclusion of men in legislation pertaining to rape and sexual crimes, in particular by examining cases from Rwanda, Democratic Republic of Congo, Uganda and the Serb-Bosnian War. The speaker will examine the position of male rape victims within society, their ability to get redress and whether the legal status of their victimhood is important to them personally and to wider society. The speaker will also explore how the feminist construction of rape has impacted the status of male victims and how this gender-discriminatory law has led to a societal view of rape as a crime unique to women.

Stephen Kirwan Rethinking the Norm of the Responsibility to Protect: Towards a Better Use of Chapter VII? (Trinity College Dublin)

The speaker will examine the right of States to use force in order to protect civilians from atrocities committed by their own governments, with particular focus on the ‘Responsibility to Protect’ principle. The speaker will discuss the origins of ‘R2P’ in the context of Iraq and Kosovo and its development with particular reference to the recent conflict in Libya. The speaker will consider the criticisms of ‘R2P’ as well as argue that this principle forms the basis for the establishment of a UN ‘standing army’ and the UN as a residual power-making body in contexts where the Security Council refuses to exercise power to intervene in a situation of humanitarian need.

C Starla Hagrita - The Effect of Natalist Welfare and Employment Laws on Women’s Quality of Work (University of Cambridge)

The speaker will examine the introduction of natalist law and policy in the UK Labour environment. The speaker will discuss how the goal of natalist law is to produce a stable population while also increasing women’s participation in the labour market. The speaker will draw on empirical evidence to demonstrate that although women’s participation does increase, the adoption of such policies does not advance women’s quality of employment and work-life balance. Consideration will also be given to the impact of deregulated labour policies that keep women in lower paid jobs and casual labour.

Banking Law

Robert Wyse Jackson - Europe’s Regulatory Response to Rating Agencies after the Financial Crisis: A Critical Review of the New Supervisory System (London School of Economics)

This paper will review the first European regulatory initiatives for Credit Rating Agencies, as established by Regulation 1060/2009, and as amended by Regulation 513/2011. It will analyse how effective the new European supervisory system will be in remedying Credit Rating Agencies’ failures prior to the crisis by reviewing the system against three fundamental criticisms of the CRA industry, notably (1) conflicts of interest (2) lack of competition and (3) incorporation of credit ratings into regulatory practise. The speaker will argue that the new supervisory system is fundamentally incomplete, as it fails to address satisfactorily the three criticisms noted above and will consider what additional regulatory measures will be necessary in Europe if the new supervisory system is to ensure that the mistakes of the crisis are not repeated

Ms Faiza Ismail - Eurozone Debt Crisis: Ireland and Islamic Finance – (University of Ireland, Maynooth)

The speaker will examine the increasing influence of Islamic Finance in Ireland. The speaker will then argue for the need to introduce more regulations into the Irish financial system in order to attract investment from Islamic financial institutions thus boosting the much needed Foreign Direct Investment in this country and reducing the

burden of foreign debts on both Ireland and the Eurozone. The speaker will also explore the suitability of the Irish and European infrastructure to facilitating the Islamic financial industry.