Ways of Knowing:
Epistemology & Law

Final Programme & Abstracts

One-day International Conference

School of Law, University of Westminster, London, in association with Institute of Advanced Legal Studies, University of London

9.45am-5.30pm, Thursday
31 May 2018

Invited speakers

Professor Maria Drakopoulou, *University of Kent*
Professor Peter Goodrich, *Cardozo Law School*
Professor Geoffrey Samuel, *University of Kent*
Professor Boaventura de Sousa Santos, *University of Coimbra*
endword by Professor Andreas Philippopoulos-Mihalopoulos

Academic co-ordinators

Dermot Feenan, Associate Research Fellow, *Institute of Advanced Legal Studies*
Professor Andreas Philippopoulos-Mihalopoulos, *University of Westminster*

Purpose and Context

The Conference will provide a forum for presentations and discussion on the place, significance, and further potential of epistemology within socio-legal studies.

There has been little exploration of epistemology in legal scholarship generally, including in journal and book publications – with some notable exceptions. There are infrequent and sporadic references to epistemology in socio-legal studies.

Epistemology, the branch of philosophy concerned with what is knowledge and how it is accessed (which includes, typically, topics such as fact, truth, evidence, justification, and memory) might seem, to some, removed from the social concerns of socio-legal studies. Such a view is misplaced: epistemology deserves greater attention in the field.
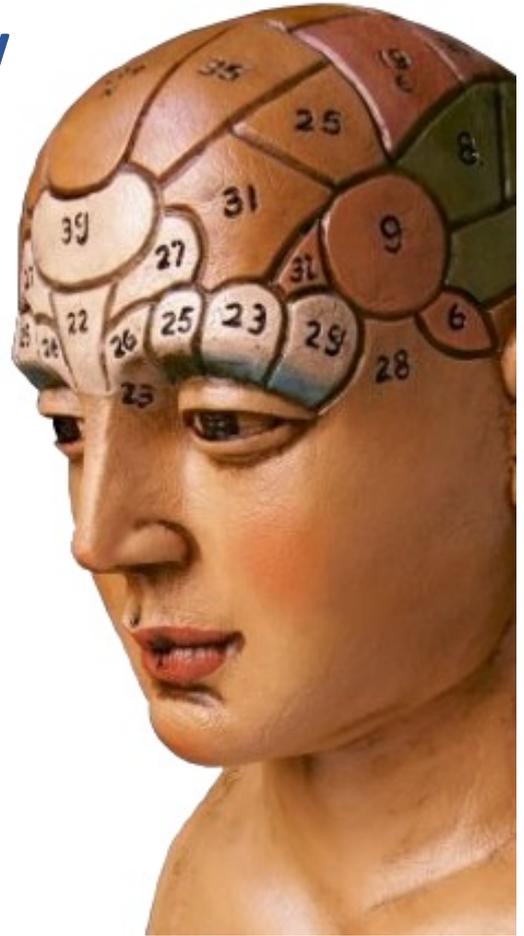
The sporadic attention that epistemology has received in socio-legal studies belies its importance in informing the understanding of well-established concepts in legal studies, such as legal personhood, legal consciousness and agency, and issues of obedience and resistance.

Epistemology complements theory. As Powell observes: 'If theory provides intellectual frameworks for establishing and evaluating factual claims and relating them to one another, epistemology provides frameworks for constructing, evaluating, and organizing theoretical claims'. It is also widely recognised, typically outside legal research, that epistemology bears upon methods. Important, too, is the role of praxis in knowledge production, and its relationship to epistemology.

There remains a need for socio-legal counterpoints to traditional formalist accounts of law that eschew the social dimensions of knowledge. Recent political shifts globally underline the importance of analysing epistemology with especial reference to race and class, and to historically subordinated or vulnerable epistemic communities.

Questions/issues

The Conference will seek to address a range of questions/ issues, including:

i. How has epistemology informed legal studies?
ii. How might diverse approaches to epistemology be understood collectively in relation to their contribution to socio-legal studies?
iii. What continuing relevance, if anything, can epistemology have for socio-legal studies?
iv. How should the concept of epistemology be understood in respect of, and if necessary distinguished from, broader concepts such as knowledge construction?
v. How specifically can epistemology inform socio-legal theory, methods and praxis?

Booking

Admission by ticket or invitation only. Book ticket, here (via Online Store, University of Westminster).

Cost:

£89 (Full)

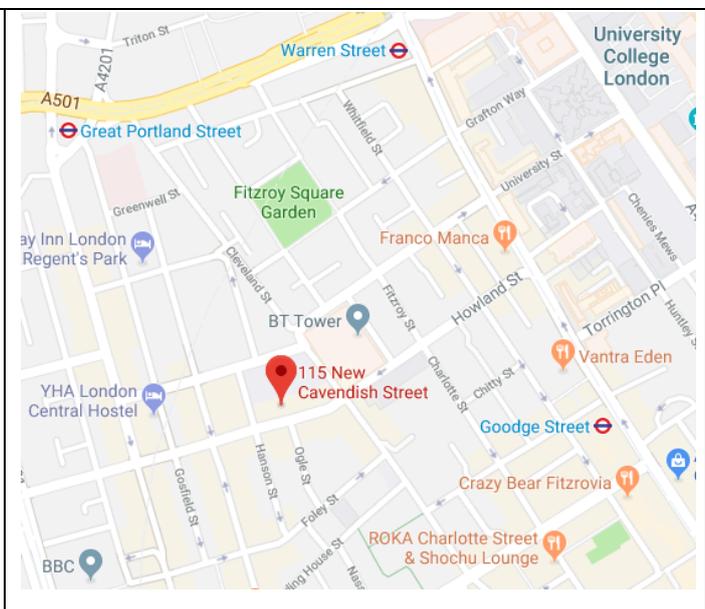£35 (Student/Unwaged/Other concession – contact academic coordinators)

Free to staff and students of the University of Westminster

Venue

The Pavilion
University of Westminster
Cavendish Building
115 New Cavendish Street
London W1W 6XH, UK
mapped here, with directions

Registration desk open outside The Pavilion, first floor, Cavendish Building

9:15hrs—9.45hrs.

Summary Schedule

Time	Venue	Item	Title
09:15	Outside The Pavilion	Registration & refreshment	
09:45	The Pavilion	**Dermot Feenan**, Associate Research Fellow, IALS, University of London	Welcome & Introduction
10:00	The Pavilion	**Professor Geoffrey Samuel**, University of Kent (35 minutes)	Epistemology and the Socio-Legal: What is the Relationship?
10:35	The Pavilion	Discussion (20 minutes)	
10:55	C1.15-1.16	Refreshments & biscuits (20 minutes)	
11:15	The Pavilion	**Professor Peter Goodrich**, Cardozo Law School (35 minutes)	Post-Law
11:50	The Pavilion	Discussion (20 minutes)	
12:10	(see p. 4)	**Parallel Sessions – Strand I** (see Parallel Sessions, below: includes rooms) (55 minutes)	
		Parallel Session 1 – *The Body and Knowledge* – ROOM C1.01	
		Parallel Session 2 – *Testimonial Injustice* – ROOM C1.02	
		Parallel Session 3 – *Judges and Judging* – ROOM 1.108	
		Parallel Session 4 – *Systems + Risk* – ROOM 1.112	
13:05	C1.15-1.16	Lunch (40 minutes)	
13:45	(see p. 5)	**Parallel Sessions – Strand II** (see Parallel Sessions, below: includes rooms) (85 minutes)	
		Parallel Session 5 – *Agents and Interests* – ROOM C1.01	
		Parallel Session 6 – *3Ms: Memory, Modes, Mechanization* – ROOM C1.02	
		Parallel Session 7 – *Social Knowledge, Reason and Language* – ROOM 1.108	
		Parallel Session 8 – *Institutions and Practices* – ROOM 1.110	
15:10	C1.15-1.16	Refreshments (20 minutes)	
15:30	The Pavilion	**Professor Maria Drakopoulou**, University of Kent (35 minutes)	On Technique and Justice: Reflections on Some New and Not so New Questions
16:05	The Pavilion	**Professor Boaventura de Sousa Santos**, University of Coimbra (35 minutes)	Law and the Epistemologies of the South
16:40	The Pavilion	**Professor Andreas Philippopoulos-Mihalopoulos,** University of Westminster (50 minutes)	Endword: 'Sensing Epistemologies', and Plenary Discussion
17:30	The Pavilion	Thanks & Close	

Parallel Sessions (with rooms)

12:10	**STRAND I**
	Parallel Session 1 – The Body and Knowledge – ROOM C1.01 *Chair: Professor Peter Goodrich* Nicole Zilberszac **Taking '4EA Cognition' Seriously: Remodelling Legal Objectivity Based on the Concept of Embodied, Embedded, Extended and Affective Cognition** David Moon **Epistemology as Natural Philosophy: Legal Knowledge as Animal Knowledge**
	Parallel Session 2 – Testimonial Injustice – ROOM C1.02 *Chair: Professor Maria Drakopoulou* Shannon Fyfe **Truth and Testimonial Injustice in International Criminal Law** Helene Love **Measuring Testimonial Injustice in the Judicial Assessment of Witnesses**
	Parallel Session 3 – Judges and Judging – ROOM 1.108 *Chair: Dermot Feenan* Miriam Rocha **Feminist Theory and Legal Reasoning: is There a Feminist Way of Judging?** Marie Kerin **When Judges Disagree: Understanding Judges as Epistemic Peers**
	Parallel Session 4 – Systems + Risk – ROOM 1.112 *Chair: Professor Andreas Philippopoulos-Mihalopoulos* Emer Hunt **A Systems-Theoretical Approach to a Triangular Interest in Tax Rulings: Apple, Ireland and the European Commission** Daniele D'Alvia **Between Risk and Uncertainty: Venturing Beyond the Epistemology of Financial Risk**

14:00	**STRAND II**
	Parallel Session 5 – Agents and Interests – ROOM C1.01 *Chair: Professor Boaventura de Sousa Santos* Felipe Figueroa-Zimmermann **Mapping Conceptual Change through Disciplinary Controversies: The Case of Ownership in Law and Economics** Matthew Windsor **Advisers and International Legal Epistemology** Aurora Voiculescu **Transitions that Never Happen: Business and Human Rights as a Weak-Weak Legal Answer to Chronic Epistemological Injustice**
	Parallel Session 6 – 3Ms: Memory, Modes, Mechanization – ROOM C1.02 *Chair: Professor Peter Goodrich* Thomas Giddens **Law as Multimodal Epistemology** Mirosław Michał Sadowski **Memory, Law, Philosophy: In Search of the Lost Future** José C. Vegar Alves Velho **The study "Predicting Judicial Decisions of the ECHR: a Natural Language Processing Perspective" – Prediction or Justification?**
	Parallel Session 7 – Social Knowledge, Reason and Language – ROOM 1.108 *Chair: Dermot Feenan* Siobhán Airey **How does Law 'Know'? Reflections on Law's Interface with Social Knowledge** Péter Cserne **Knowledge Claims in Socio-Legal Studies: Gaps and Bridges between Theoretical and Practical Rationality** James Rothwell **The Role of Conceptual Analysis in Research**
	Parallel Session 8 – Institutions and Practices – ROOM 1.110 *Chair: Professor Geoffrey Samuel* Tony Ward **Expertise, Trust and Criminal Evidence** Dimitrios Tsarapatsanis **An Institutional Epistemology for Dworkinian Interpretivism** Dr Giuseppe Maglione **Drawing a Historical Epistemology of the Legal and Policy Representations of Restorative Justice**

Invited Speakers' Abstracts and Bios (in order of presentation)

Dermot Feenan, Academic Co-coordinator

Introduction and welcome

Bio

Dermot Feenan is an Associate Research Fellow, Institute of Advanced Legal Studies, University of London. He has held a number of university appointments in the UK and USA, plus visiting appointments worldwide, including at the American Bar Foundation, Columbia, Cornell, London, Melbourne, Oxford, and Trinity College Dublin. He is convenor of the Law and Compassion Research Network, and co-convenes the Law, Politics and Ideology theme at the annual conferences of the Socio-Legal Studies Association. He is a member of the Socio-Legal Studies Association, of which he was a member of the Executive Committee, 2006-2012, and was admitted to the Royal Society of the Arts in 2015.

Professor Geoffrey Samuel

Epistemology and the Socio-Legal: What is the Relationship?

What is it to have knowledge of law? What constitutes law as a discipline? And how should one approach these kinds of questions? What seems evident is that one might start from the position of epistemology as a subject in itself (or at least a sub-division within the discipline of philosophy) and such a starting point will mean embracing the literature in the epistemology both of the natural sciences and of the social sciences. Another starting point, one perhaps that is more 'internal' to the discipline of law, is to pose this question. What has the discipline of law been? Yet another – synchronic as opposed to diachronic – approach might be examine what is actually taught in the law schools (including professional courses) not just in the UK but internationally. Taken together this is a vast project, especially when one embraces all the sub-questions that these broad issues provoke. Is legal knowledge cumulative? Have there been scientific revolutions in law? Is legal reasoning a special kind of reasoning? What is the status of the concepts and notions used by lawyers and jurists? (And so on.) It is evident that all of these questions cannot be broached in much less than a largish monograph. And so what might be useful for the moment is to consider just the relationship between what might be termed an internal view of law, as reflected in the teaching manuals and syllabi, and the external view of an epistemologist of the social sciences looking at the practice and teaching of law.

Bio

Geoffrey Samuel. Born in 1947 in England, Geoffrey Samuel is currently Professor of Law at the University of Kent and Professor *affilié* at the École de droit, Sciences Po, Paris. He received his legal education at the University of Cambridge and holds doctoral degrees from the Universities of Cambridge, Maastricht and Nancy 2 (*honoris causa*). He has also held many visiting posts in France, Belgium and Switzerland. Geoffrey Samuel is the author of many books, articles and book chapters on contract, tort, remedies, legal reasoning and legal epistemology. His most recent books are *An Introduction to Comparative Law Theory and Method* (Hart, 2014), *A Short Introduction to Judging and to Legal Reasoning* (Edward Elgar, 2016) and *Rethinking Legal Reasoning* (Edward Elgar, forthcoming). His areas of specialisation are the law of obligations, civilian legal history, comparative law, epistemology and legal reasoning.

Professor Peter Goodrich

Post-Law

The world is linked and much as the monumental and unmoving facades of the courthouses would wish to intimate otherwise the sedentary and sedimented practices of law have become virtual and viral. Prisoners and witnesses appear in court on video link and judges and lawyers enter the carceral regime and the prison cell on television screens, as digital visages – bald heads, torsos, rears, part objects – and not as bodies or as the flesh, blush and brine of presence. This virtuality of interaction, the simultaneous distancing and immediacy of subjects, trial in a floating world, is a radically different event to the viscera

and affects of actual interactions in what is legally termed 'the presence of the court' (*in praesentia curiae*). The intervention of video and the leakage out of the courtroom and into the world undoes, as our case examples show, the fiercely guarded but ineluctably unsuccessful closure of the court and the rigidity of the places, the hierarchy and ritual of legal monologue. The boundaries of the law are broken by new technologies and the symbolic statuses and assigned places of the participants are unleashed and subject to revision, review and rectification in the new era of internet avatars and blogosphere remediation and relay. By the same token the textuality of law and doctrine, the vellum of legislative enactment and the carefully bound volumes of reports, has also been cut loose and set adrift in the fragmentary and unedited dominions of hashtag relay and tweet. Justice which needs not only to be done but to be seen to be done is now, increasingly, without administrative filter, being seen and its doing is open to question.

Bio

Peter Goodrich is Professor of Law, and Director, Program in Law and Humanities, Cardozo Law School, USA. He was the founding dean of the department of law, Birkbeck College, University of London, where he was also the Corporation of London Professor of Law. He has written extensively in legal history and theory, law and literature and semiotics and has authored 12 books, including Oedipus Lex: Psychoanalysis, History and Law. He is managing editor of Law and Literature, and was the founding editor of Law and Critique. He is author of His most recent book is Legal Emblems and the Art of Law (Cambridge University Press, 2013).

Professor Maria Drakopoulou

On Technique and Justice: Reflections on Some New and Not so New Questions

Abstract – unavailable at time of publication.

Bio

Maria Drakopoulou is Professor of Law at Kent Law School, the University of Kent, UK, and prior to her academic career, practiced criminal law at the Athens bar. She is a Law and Humanities scholar with special interest in the fields of feminist theory and jurisprudence, Roman Law, critical legal studies, history, and political theory. Her current research, entitled "Of Critique, Bio-politics and Sexual Difference", is a feminist intervention in the bio-political theories of Foucault, Agamben and Esposito. She is a member of the editorial board of the feminists@law e-journal, and co-director of the University's interdisciplinary Centre for Critical Thought, and the KLS Paris Summer School in Critical Theory. Professor Drakopoulou's publications include: 'Feminist Historiography of Law: An Exposition and Proposition'; *The Oxford Handbook of Legal History* (2018); *Feminist Encounters with Legal Philosophy*, Routledge (2014); and 'Women's Resolutions of Lawes Reconsidered: Epistemic Shifts and the Emergence of the Feminist Legal Discourse', *Law and Critique*.

Professor Boaventura de Sousa Santos

Law and the Epistemologies of the South

In my book *Toward a New Legal Common Sense*, I included a chapter titled: "Can law be emancipatory?". I answered with a very conditional yes. Since then I have been invited to discuss the fate of legal reformism. Are we witnessing the end of legal reformism? Aren't we witnessing instead the rise of legal counter-reformism if not of legal counter-revolution? I have come to the conclusion that this type of questioning is not addressing the core issue, the issue of the types of knowledge we rely on to speak about law and reformism or revolution. I am convinced that we need an epistemological interruption which I call the epistemologies of the south. I propose a new epistemological foundation for law, one that focuses on the knowledges born in struggle against the three main forms of modern westerncentric domination: capitalism, colonialism and patriarchy.

Bio

Boaventura de Sousa Santos is Professor of Sociology, University of Coimbra (Portugal), and Distinguished Legal Scholar at the University of Wisconsin-Madison. He earned an LL.M and J.S.D. from Yale University and holds the Degree of Doctor of Laws, *Honoris Causa*, by McGill University. He is director of the Center for Social Studies at the University of Coimbra and has written and published widely on the issues of globalization, sociology of law and the state, epistemology, social movements and the World Social Forum. He has been awarded several prizes, most recently the Science and Technology Prize of Mexico, 2010, and the Kalven Jr. Prize of the Law and Society Association, 2011. His most recent books in English

are: *Decolonising the University: The Challenge of Deep Cognitive Justice* (2017), and *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South* (2018).

Professor Andreas Philippopoulos-Mihalopoulos, Academic Co-coordinator

Endword: 'Sensing Epistemologies', followed by Plenary Discussion

Andreas will be summarising the day, picking on notions and gestures that might be relevant to construct a brief sketch on *sensing epistemology*, namely a sensorial mode of knowing, different from traditional empiricism, moving instead towards the aesthetics of affective immersion. This is a preconscious, atmospheric and synaesthetic mode of knowing that challenges standard phenomenological notions of subject/object, human/nonhuman, and material/immaterial.

Bio

Professor Andreas Philippopoulos-Mihalopoulos is Professor of Law & Theory and Director of **The Westminster Law & Theory Lab**, an international research centre in London, which hosts events, publications, internships and research clusters. Andreas's research interests are radically interdisciplinary and include critical legal theory, sociolegal studies, autopoiesis, philosophy, psychoanalysis, architecture, geography, art, ecophilosophy, object-oriented ontology, theology, phenomenology, and their critical instances of confluence. He has been invited to talk about his research in various institutions around the world. He is author of numerous publications, including 'Epistemologies of Doubt'.

Abstracts (Parallel Sessions) (in order of presentation)

Parallel Session 1 – The Body and Knowledge

Nicole Zilberszac
Univ. Ass. (prae-doc), University of Vienna, Austria

Taking '4EA Cognition' Seriously: Remodelling Legal Objectivity Based on the Concept of Embodied, Embedded, Extended and Affective Cognition

On the whole, the cartesian model of consciousness based on the claim that body and mind can be separated is not an epistemic cornerstone of neuroscientific and psychological research. In contrast, science assumes that cognition and emotion are inseparable, that bodily experiences, memories, desires inform our knowledge and that knowledge therefore is inherently embodied, embedded, extended and affective (4EA).

The paradigm of scientific objectivity is traditionally based on the idea that knowledge should be free from subjective elements and thus free from an individual's embodied perspective. This would only be possible under two conditions: either one could have a disembodied mind which is free from perspective; or it is possible to find conditions under which everyone could see an object from the same viewpoint.

Legal formalists design their methodological provisions to meet this second condition. By doing so, the embodied process of perceiving, knowing and judging remains unconsidered. Legal education and methodology remain widely uninformed about the influence of our bodily experiences and of the speaker's epistemic position in terms of race, class and gender. Taking '4EA Cognition' seriously demands reconsidering our epistemological and hence also our methodological approach to legal science. In my presentation, I will discuss the risks, the benefits and the possible implications of remodelling the paradigm of legal objectivity on the basis of '4EA Cognition'.

David Moon
PhD candidate at the University of Adelaide, Australia

Epistemology as Natural Philosophy: Legal Knowledge as Animal Knowledge

Despite the proliferation of socio-legal studies, the conventional approach to law still treats the field of legality as separate and distinct from society. This legal formalism defines its borders to exclude all social forces from its explanations. Legal rationality is understood to be a sufficiently rich system to explain all legal phenomena.

For a full re-appraisal of epistemology in socio-legal studies, I argue that the bodily, natural character of human knowledge also must be brought into the picture. To redress the imbalance and adequately challenge the narrow view of law, we must consider not just the *social* construction of legal knowledge, but also the *bodily* construction of legal knowledge.

To do so, I engage with the contemporary work of second-generation cognitive science, pioneered in large part by George Lakoff and Mark Johnson. This work focuses not just on the plurality of epistemological strategies available, but on their common grounding in the human imagination.

I will outline their findings and locate them in the broad history of modern epistemology in the Western tradition. Gone is the rationalist search for an ultimate philosophical foundation, upon which certainty can be built, and upon which the formalist view of law tacitly rests. Instead, the question has become, how can we account for 'our knowledge of the external world … when we think of ourselves not as having God-given insight into it, but as being human animals penetrating it with the physical gifts we possess' (Bronowski, The *Origins of Knowledge and Imagination*, 1978, 21).

This framing seeks to understand law as part of society, *and* both law and society as part of nature. Legal knowledge needs to be understood within this context.

Parallel Session 2 – Testimonial Injustice

Shannon Fyfe
PhD candidate in Philosophy, Vanderbilt University, USA

Truth and Testimonial Injustice in International Criminal Law

Epistemology can help us ground the relationship between truth and testimony in international criminal law, and also understand the danger of perpetrating further injustices on survivors of mass atrocities. In any criminal court, fact-finders must balance goals of presenting the most relevant, truth-apt testimonies, with the goal of obtaining justice for all of the relevant parties. International criminal courts face additional language and cultural barriers that can frustrate the aims of ensuring accurate fact-finding and voicing the experiences of witnesses. For instance, the preference for live testimony in international criminal courts is supported by the epistemological assertion that in-person testimony will allow fact-finders better access to the truth. Yet social epistemology can help explain why international criminal institutions are at risk of perpetrating testimonial injustice on international witnesses, which both frustrates the truth-seeking mission and perpetrates further harms on victims.

I begin my presentation by exploring the epistemological foundations of truth and testimony. I then introduce the concept of testimonial injustice, and present a plausible account of how hearers can avoid perpetrating this injustice on speakers. Next, I turn to criminal law and consider how truth and testimony function under different procedural systems and contribute to the legal goals of truth and justice. In the final section, I assess the susceptibility of international criminal courts and tribunals to the two harms of testimonial injustice. I argue that the overwhelming variety of social identities in international criminal courtrooms renders them particularly susceptible to perpetrating testimonial injustice, but fact-finders and other actors can mitigate the harms to victims and the truth-seeking mission by practicing testimonial justice. I conclude that while truth and justice are crucial goals of international criminal law, they are not the only goals, and thus we should not abandon international criminal law in favour of alternative justice mechanisms.

Helene Love
SJD candidate, University of Toronto, Canada

Measuring Testimonial Injustice in the Judicial Assessment of Witnesses

In recent years, much has been written about testimonial injustice - where stereotypes about individuals or groups can lead to distortions in the amount of belief that is attributed to a speaker. These theories of testimonial injustice have obvious practical implications in common law trials, where all evidence is admitted through witnesses. Whether a judge chooses to believe or disbelieve a witness effects whether a piece of information is admitted and the probative weight it is given; which shapes the trial's fact-finding process, the outcome of individual disputes, and the administration of justice. Despite its fundamental importance, little is known about whether and the extent to which testimonial injustice is actually perpetrated in courtrooms. In particular, how witnesses' personal characteristics affect the ways judges assess testimony within the complex legal and factual framework of the common law trial.

This paper seeks to bridge the gap between theory and practice by describing one method of testing theories of testimonial epistemology: through the quantitative analysis of written judgments. Judgements are a largely unexplored source of information about how judges go about deciding who to believe and the other information that they use to make these decisions. By defining the different ways judges assess witnesses and then quantifying their relationship with a

witness's personal characteristics (e.g. age, gender, SES), case characteristics, and the types of memories drawn on; this project can see if, over hundreds of witnesses, social groups who are subject to identity prejudice are actually more susceptible to unjust credibility assessments. Or, if in the alternative, the trial process goes some way towards correcting testimonial injustices that believed to occur in society more broadly.

Parallel Session 3 – Judges and Judging

Miriam Rocha
Junior Researcher at JusGov – Research Centre for Justice and Governance; Assistant Lecturer at University of Minho Law School; PhD candidate at University of Minho Law School, Portugal

Feminist Theory and Legal Reasoning: is There a Feminist Way of Judging?

Feminist studies have drawn attention to the fact that our language, concepts, and systems of knowledge were shaped throughout history by a male-centred point of view that inevitably impacts the way we think and know, perpetuating patriarchal structures of power. Considering that such structures promote women's oppression, feminists have developed various theories that attempt to unveil and overcome those structures of power towards a more inclusive and situated knowledge viz. standpoint epistemology, postmodernism, empiricism, pragmatism, and positionality. These epistemic stances are behind a set of methods that feminist theory claim to be specific to feminist inquiry.

The topic of this paper addresses particularly the feminist epistemologies' implications in legal theory and judgement (an act that comprises both knowing and valuing). Legal feminists uphold the existence of a feminist legal reasoning that entails specific methods, such as "asking the woman's question", uncovering law's gender bias and consciousness-raising, making substantive equality happen and valuing women's experiences and their contexts. By advocating the merits of feminist legal methods and legal reasoning, feminists also argue for a more diverse judiciary, stating that it would lead to fairer judgements.

This paper will argue that feminist legal methods that support legal reasoning and judging are, in fact, one way of addressing the core method of law, which is hermeneutics and that, in doing so, feminist legal methods are no different from other approaches.

Marie Kerin
Lecturer in Law, and PhD candidate, University of Kent, UK

When Judges Disagree: Understanding Judges as Epistemic Peers

The 'Epistemology of Disagreement' (ED), now an established focus in epistemology, is concerned with the exploration of what one should do when one finds oneself in disagreement with a 'peer'. This 'ED question' can be formulated as follows: where A and B are considered 'peers', and A and B come to different conclusions over X, should A (or B) alter their belief over X? Although the literature makes reference to law, notably disagreement in a jury, little has been done by way of employing ED to inform or develop our understanding of disagreement in the legal sphere. This paper seeks to bridge this gap by utilising disagreement between judges as a case study for ED's application. The presumption that judges are peers in the legal hierarchy, coupled with the arguable nature of legal cases, makes disagreements in judicial decisions of great importance to society, and an excellent test for ED theory.

I begin by outlining ED's fundamental principles; what a peer is, the instances of disagreement utilised, and the main posited answers to the 'ED question'. Through application to judicial disagreements, I demonstrate significant limitations of the literature. Specifically, it is argued that the construction of 'peer' advanced by ED is problematic for a robust application to law. However, through an exploration of ED limitations I argue that we can come to better understand the nature of disagreements in courts, their significance, and the role they can play in forming judicial precedents. In so doing, not only is pressure put on the idea that judges are 'peers', but, more significantly, whether it is in fact desirable that they are deemed so in the context of a socially unrepresentative court system.

Parallel Session 4 – Systems + Risk

Emer Hunt
Lecturer/ Assistant Professor, School of Law, University College Dublin, Ireland

A Systems-Theoretical Approach to a Triangular Interest in Tax Rulings: Apple, Ireland and the European Commission

The study observes the permeability of the boundary between the legal system and its environment. This is set against a theoretical understanding (Luhmann et al*., Law as a Social System*, 2004) of the legal system as an autopoietic social system.

The research context is the response of the legal system to the tax practices of Apple in Ireland, and the finding by the European Commission that Ireland granted illegal state aid.

State aid and taxation are creatures of legislation, conceptualised and captured in the legal system through an approximation of language to economic and social activity. A constructionist epistemology (Teubner, 'How the Law Thinks', 1989) views the legal system as the epistemic subject and enables a focus on the communicative practices of law. A second-order observation of those observing the Apple, Ireland and European Commission triangle draws on a constructivist epistemology to look at the process – the 'how' of what happened, the timing of what happened and the social context in which issues of tax avoidance, fiscal secrecy and national sovereignty irritated the legal system to construct a tax ruling as illegal state aid.

The research methodology exploits a distinction between an internal and external view of law to observe an internal construction, through doctrinal analysis, and an external construction, through qualitative interviews of experts, of how the legal system is mobilised, using state aid to classify tax rulings as illegal. The dual methodology of the study was developed to ensure a tight fit between three elements of research: theory, methodology and the phenomenon under consideration (Ziegert, 'Systems Theory and Qualitative Research', 2005).

The doctrinal analysis will recognise contingency; an epistemological awareness that a particular legal decision is not inexorable, but is instead 'argumentative communication' (Luhmann, 'Legal Argumentation', 1995) designed to convince the legal system of its coherence.

Daniele D'Alvia
PhD candidate, Birkbeck, University of London, UK

Between Risk and Uncertainty: Venturing Beyond the Epistemology of Financial Risk

This paper aims at arguing how the possible limits related to an epistemological discourse on financial risk should be re-interpreted in consideration of the role that uncertainty plays in financial markets. Indeed, the epistemological discourse on financial risk can be complex. If there is risk, there must be something unknown or something that produces an unknown result. Therefore, knowledge about risk is knowledge about a lack of knowledge. The hendiadys of knowledge and lack of knowledge can constitute a limit itself that does not explain the nature of risk, and the reason for its existence in financial markets. Such limit has been recognised also by Keynes through the distinction between the 'knowable-in-principle' and 'necessarily-unknowable' as forms of objective and subjective features of financial risk. For this reason, the epistemological discourse on risk must be re-interpreted on the basis of the distinction that Knight made between risk and uncertainty. Indeed, the discourse on financial risk from the point of view of uncertainty is based on the knowledge of expectations to control the future course of events. We blame uncertainty in modern economies because it is uncontrollable; that is, investors' expectations or opinions are necessarily unknowable – as Keynes argued. Nonetheless, according to Knight money-creation processes are underpinned rather than undermined by uncertainty. Without uncertainty there is no profit. As a result, the fundamental role of uncertainty in the market seems to justify the existence of financial risk as a natural form of engagement into markets' operations. Essentially, the knowledge of risk – at least in financial markets – is not based on a pure lack of knowledge because otherwise the theoretical and practical distinction between risk and uncertainty would be eliminated.

Parallel Session 5 – Agents and Interests

Felipe Figueroa-Zimmermann
PhD candidate in Sociology, University of Warwick, UK

Mapping Conceptual Change through Disciplinary Controversies: The Case of Ownership in Law and Economics

This paper argues that to know a legal system is to understand the distinctions used to organize and express the norms and principles that constitute it. At the same time, understanding legal concepts is a prerequisite for elucidating the praxis of competent agents when using or engaging with the legal system. This is important since concepts are neither abstract nor static entities. They exist insofar as they are used by concrete (and fallible) agents. In consequence, this paper claims that investigating conceptual change requires identifying and studying the relevant agents, their goals and contexts, the controversies in which they were involved and the conceptual changes that (intendedly or unintendedly) resulted from the use they have made of concepts.

The paper will show how controversies about disciplinary boundaries offer a privileged epistemological standpoint for mapping conceptual change: these controversies provide a context in which conceptual frameworks are deployed and used by agents that do not share the same epistemological assumptions. To illustrate this, this paper will investigate how change in legal concepts can arise from boundary controversies between law and other disciplines.
A combination of the methods of Intellectual History, Begriffsgeschicthe and Social Epistemology will be used to show how changes in the concept of ownership arose from disciplinary controversies between law and economics in the U.S. during the 20th century. Three key aspects of these controversies will be taken into consideration: (i) the similarities and differences between the knowledge claims made by each discipline; (ii) changes in epistemic authority between the competing disciplines (and the reasons for the shift); and (iii) the strategies used to combine the research of both disciplines and the resulting conceptual scheme.

Matthew Windsor
Junior Research Fellow in Law, Hertford College, University of Oxford, UK

Advisers and International Legal Epistemology

This paper attempts to provincialise knowledge production on the role of advisers in international legal thought. Examining issues of epistemology in international law catalyses an awareness that international law does not exist apart from its 'knowers and their idiosyncrasies and interests' (Focarelli 2012). Knowledge about advisers has largely been generated by 'insider accounts', penned by role occupants based on their professional experience, typically in either the UK Foreign and Commonwealth Office or the US State Department (Part I). The issue of cultural bias in knowledge production is addressed by historically situating the emergence of an Anglo-American interest in the advisory role at the intersection of decolonisation and Cold War geopolitics in the early 1960s (Part II). The production of insider accounts, on a 'West-to-Rest' conveyor belt, was a means to influence the advisory practice, institutional design and ideological trajectory of newly independent states. Despite the appearance of technical assistance and beneficent comparative exchange, I read the insider accounts as a concerted effort to discipline future mandarins, and as an exercise in development managerialism. The pedagogic and socialising subtext of the insider accounts is further explored through a case-study pertaining to the inauguration of the Government Legal Adviser's Course at IALS in 1964, described by its convenor as a 'cause as well as a course' (Part III). The picture that emerges is of Anglo-American advisers as postcolonial administrators, engaged in the reinstatement of 'international pecking orders' (Pouliot 2016). The insider accounts they have continued to produce reflect contingent balances struck between knowledge and power – a celebration of commitment among a coalition of the liberal internationalist like-minded – rather than revealing immutable truths about the advisory encounter. Through its analysis of knowledge production on the advisory function, the paper seeks to provoke critical reflection on the politics of epistemology in global socio-legal enquiry.

Aurora Voiculescu PhD
Senior Lecturer, Westminster Law School, and Law and Theory Lab, University of Westminster, UK

Transitions that Never Happen: Business and Human Rights as a Weak-Weak Legal Answer to Chronic Epistemological Injustice

Human rights are supposed to offer strong, universally valid, answers to the difficult problems and questions of the world. However, as Santos argued, we live instead in a time of strong questions and weak answers (Santos, 2009). The silver lining, Santos suggests, is that in the context of the present economic (and social) crisis, this combination of strong questions and weak answers could be sign of a paradigmatic change. Stemming from this expectation for change, this paper will analyse the epistemological conflicts within the business and human rights (BHR) discourse. With a particular focus on the knowledge, practice and discourse-generation within the UN Forum for Business and Human Rights across almost a decade, the paper throws light on epistemological conflicts that, it is argued, ushered in a process not of paradigmatic change but rather of colonisation by business of the search for social justice.

The main catalyst of knowledge-creation and meaning in relation to the complex social processes associated with BHR in the past years have been the UN Protect, Respect and Remedy Report, that sets out a framework for BHR and the associated UN Guiding Principles for Business and Human Rights. Looking into the way in which knowledge and understanding are produced via these instruments within the BHR discourse, and engaging critically in particular with the 'business case for corporate social responsibility' approach to BHR, the paper evaluates critically the expectation for a radical change of the epistemological paradigm, change that would save human rights and rehabilitate business.

What answer does the framework and the Principles give to the strong question of social justice at the confluence of human rights with business? Building on the analysis of the produced discourse and reflecting the epistemological claims being made, this analysis argues that the new model of business responsibility developed in the past decade largely testifies to the status quo and for a 'weak-weak answer' to the existing chronic social – and epistemological, as one implies the other – injustice.

Parallel Session 6 – 3Ms: Memory, Modes, Mechanization

Thomas Giddens PhD
Senior Lecturer, St Mary's University, Twickenham, UK

LAW AS MULTIMODAL EPISTEMOLOGY

The thing about law is that it tends to be written down.
The primary (and dominant secondary) sources of legal study are
typically articulated in a textual format, using typed letters to produce
a readable text that is then read by those who use, study, and produce law
and legal knowledge. The way legal texts look is not something that is studied,
but rather it is the contents of that text that is generally of interest—what it
says, what it can be said to say, what it contains or indicates, or the effects its
reading does or might have in the contexts of its application. But to attend to the
visual appearance of law-as-text opens legal thought up to a range of significant
questions. To approach law (or, should I say, law) as a multimodal phenomenon
that is visual as well as textual means not only thinking law's content, but also
its appearance. Its appearance as text, as institution, as epistemic form.
Attending to legal type approaches law's epistemic horizons: it is a legal
aesthetics, which is always a questioning of the way law is encountered
through the senses, the way it is articulated as a formal object: an
aesthetics of law is an aesthetics of legal knowledge. Indeed, codifying
and articulating reality or its ideal form is a leading legal mode;
law is not something to be known, but is itself a way of knowing,
a means of presenting, a structuration and making-visible of social,
communal, and political life. As a phenomenon that appears as
text as much as it does via other multimodal forms
(gowns, courtrooms, figureheads, documents),
law is a multimodal epistemology.

Mirosław Michał Sadowski
LLM candidate, University of Wrocław, Poland

Memory, Law, Philosophy: In Search of the Lost Future

In the 21st century we focus on the question of memory so intensely as never before. Perhaps this is because in the era of instant information so little of memory is left, as Pierre Nora duly noted some years ago. In a time of 'fake news' one has to agree with Duncan S. A. Bell, who remarked that "as the idea of an Archimedean Truth has slowly and painfully withered under the assault of various anti-foundational epistemologies, memory seems to have claimed Truth's valorised position as a site of authenticity, as a point of anchorage – albeit an unsteady one – in a turbulent world stripped of much of its previous meaning. In memory we trust." But how did law and philosophy respond to this issue? Or did they, perhaps, in a way cause this profound shift? The purpose of this paper is to search for an answer to these questions by examining the relationship between memory, law, and philosophy. In the first part of the paper, the author ventures to define collective memory, critically analysing the three main theories explaining this phenomenon – halbwachsian, pre-halbwachsian, and post-halbwachsian – and the concepts of *lieux de mémoire*, *mnemotopoi*, cultural trauma, and collective forgetting. The second part of the article is devoted to the analysis of the relationship between philosophy and memory. The author introduces the views of, *inter alia*, Paul Ricœur, Henri Bergson, Giorgio Agamben, Emmanuel Levinas on this subject, and ventures to establish a common factor between various theories of epistemology of memory. In the third part of the paper the author focuses on the intersections between memory, law, and philosophy, starting from the viewpoint that both disciplines are 'perpetually in search of the past', and moving to the concept that there are rather perpetually in search of the future.

José C. Vegar Alves Velho
Assistant Lecturer, School of Law of the University of Minho; Portugal Junior Researcher, The Research Centre for Justice and Governance (JusGov); PhD candidate, School of Law of the University of Minho, Portugal

The study "Predicting Judicial Decisions of the ECHR: a Natural Language Processing Perspective" – Prediction or Justification?

The methodological studies in Law that have been produced in the last decades have sought to offer a new epistemological impulse focused mainly on the placement of Law in general practical discourse or in underlining aspects of the specific rationality of legal practice. Such attempts have stimulated wide-ranging debates at the core of our science, not only taking into consideration the canonical logical forms of legal reasoning, but also, in a more hermeneutical approach, its argumentative and external foundation and its topical threads.

The multidisciplinary opening that has been observed in Law has also challenged the jurist, now capable of broader and more plural observations on legal phenomena. This trend, together with the technological innovations that the world has been witnessing, seems to open a new "expanding universe" of information that is relevant to legal meditation. I am referring, specifically, to the recent advances in the fields of artificial intelligence and in other forms of creative mechanization, where the final goal is precisely to be the genesis.

In October 2016, a study named "Predicting Judicial Decisions of the ECHR: a Natural Language Processing Perspective" was published, in which such type of models were able to successfully predict judicial decisions on average in 79% of the cases, when compared with the decisions made by the human judges in the sample. The analysis carried out took the form of textual analysis, namely in consideration of linguistic similarities/patterns as the founding criterion of the prediction. It seems, however, that a thorough reflection on its methods and conclusions serves as a good motto for the figuration of some aspects of classic topics of legal methodology: the representation of facts in a judicial context and its justification in decision making.

Parallel Session 7 – Social Knowledge, Reason and Language

Siobhán Airey
PhD candidate, Faculty of Law, University of Ottawa, Canada; Marie Skłodowska-Curie Fellow, University College Dublin, Ireland

How does Law 'Know'? Reflections on Law's Interface with Social Knowledge

One of the puzzles animating critical legal theory is how law 'knows' or engages with social knowledge such that ideas from social knowledge are incorporated into law itself. The converse of this is how social knowledge configures itself such that it becomes recognisable to and adopted by law. In this paper, I explore the potential of the 'signature' as a conceptual tool and a method to trace the points of relevance and intersection of legal and social knowledge through juridical precepts and practices across time. I draw on ideas from Agamben's (2009) work on the concept of 'the signature' to frame and conceptualise how certain kinds of social knowledge become knowable to law, become adoptable by law, and, in doing so, become central to law's power of meaning-making and ordering. I link this to insights from legal philosophy on the nature of jurisdiction (as 'juris dictio') to suggest ways in which a mutual 'knowing' between law and social knowledge is created. This approach suggests a method of capillary-like exploration in order to trace the evolution of, and connection between, particular ideas and their modes of presentation across relevant documents, governance arenas and eras. For critically-oriented legal scholarship, this approach may be helpful towards revealing the conditions and connections between law and social knowledge necessary to produce certain ordering effects, while simultaneously suggesting possible points of disruption.

Péter Cserne PhD
Senior Lecturer, School of Law and Politics, University of Hull, UK

Knowledge Claims in Socio-Legal Studies: Gaps and Bridges between Theoretical and Practical Rationality

At the level of legal doctrines, the 'legal construction of reality' is a mixture of common sense factual beliefs and scientific knowledge, moral intuitions and metaphysical claims. While largely satisfactory for the everyday operation of the law, when confronted with the epistemological standards of social and behavioural sciences, this 'legal worldview' turns out to be strangely problematic.

Legal scholarship has a tendency to take a certain distance from law as institutional practice. According to HLA Hart, a key task of legal theory is to provide a 'rational and critical foundation' for legal doctrines. Legal scholarship comprises 'conceptual clarification', moving legal doctrines towards a certain epistemic ideal of objectivity, 'enlightenment' about empirical facts and 'demystification' in the form of substantive normative, including moral, argumentation. What is the role of socio-legal studies (SLS) in this context?

The aim of this paper is to reflect on the types of knowledge various projects in SLS can produce, with special emphasis on the age-old divide between theoretical and practical knowledge (rationality).

The epistemic credentials of the social sciences have been debated throughout their history; Durkheim's social facts and Weber's *Verstehen* in sociology or the trichotomy of positive science, normative science, and art in economics are classic examples. It seems that the dynamics of these meta-theoretical debates do not fully determine how corresponding debates are carried out within SLS. As an interdisciplinary field of research, SLS has not only inherited some controversies from its parent disciplines but raises new questions associated with its epistemic aspirations, as well as its relation to legal practice. The paper will conclude by reflecting on the impact of these meta-theoretical debates on knowledge claims within SLS.

James Rothwell
MA candidate in Philosophy, University of Kent at Canterbury, UK

The Role of Conceptual Analysis in Research

Well-defined concepts are essential for any epistemic investigation: They enable us to prevent category mistakes; make clear the conditions under which evidence is apt and inapt; and provide a justifying framework. One natural reaction to this is to stipulate a definition of the concept, encompassing those elements which are of interest to the theorist and excluding those they believe irrelevant. A second reaction is to resort to empirical investigation, surveying the population and collating our intuitions about various subjects into a quantified definition of the concept in question.

Following the linguistic phenomenology of J.L. Austin and L. Wittgenstein, I argue that it is description of the proper use of language, and not stipulation or survey of intuition, which enables conceptual knowledge. Through the example of 'the social' and closely-related conceptions, non-descriptive conceptual definitions will be demonstrated to both be commonplace throughout the legal literature (often due to a lack of clarity about what, exactly, is being described) and to necessarily suffer from a lack of ontological foundation which robs such arguments of both analytic and critical power. Following this, the method of Ordinary Language Philosophy and its associated benefits of description will be shown, with a particular focus on displaying the clear conditions of apt knowledge and knowledge-generation arising from any properly defined concept.

Finally, a brief defence against one of the most obvious flaws of ordinary language philosophy will be offered. The problem of conceptual conservatism will be addressed, firstly from a social justice perspective which questions whether the concepts discovered are inherently oppressive, and secondly in light of the shifting linguistic and scientific discoveries of the modern world.

Parallel Session 8 – Institutions and Practices

Tony Ward
Professor in Law, Northumbria University, UK

Expertise, Trust and Criminal Evidence

Behind the formal rules of evidence law lie the 'ways of knowing' that Sheila Jasanoff (*Designs on Nature*, 2005) calls 'civic epistemology' – the practices by which citizens come to know things in common as a basis for public decision-making. While Jasanoff frames her analysis of civic epistemology as a descriptive exercise, comparing the epistemic norms of different political cultures, her method is not far removed from Dworkinian 'constructive interpretation', an interpretation of a community's epistemic practices which puts them in their best light as rational processes of knowledge acquisition.

This paper discusses the implicit epistemology behind the reception of expert evidence in the criminal courts. It delineates two competing epistemologies, which involve different levels of trust in expertise. The first relies on an assessment of expert witnesses as more or less trustworthy individuals on the basis of their experience, qualifications, demeanour etc. The second requires experts to furnish the courts with intelligible scientific reasons why (and to what degree) their evidence can be relied upon, while trusting experts to provide honest assessments of the reliability of their own methods.

From a normative point of view, the second interpretation of the law appears much superior in terms of its 'fit' with, and justification of, the case law and the increasingly elaborate body of 'soft law' surrounding expert evidence. The limited evidence available, however, suggests that the actual practice of the courts may be closer to the first model. An adequate socio-legal approach to this issue requires both empirical studies of the actual epistemic practices of the courts (and other legal decision-makers) and attention to the normative epistemology which can justify the acceptance of expert findings as reliable public knowledge.

Dimitrios Tsarapatsanis PhD
Lecturer in Law, University of Sheffield, UK

An Institutional Epistemology for Dworkinian Interpretivism

The paper first presents an epistemological challenge to Dworkin's version of interpretivism, which makes the law's content depend on a constructive interpretation of the entire political history of the legal system to which some judges belong. If that were the case, how could the law be epistemically accessible to judges with actual (as opposed to ideal) and resource-constrained (as opposed to unlimited) cognitive capacities? The aim of the paper is to develop a workable answer to this question that salvages a version of interpretivism. The answer builds on the epistemic dimension of Dimitrios Kyritsis's recent institutional recasting of interpretivism (*Shared Authority*, 2017) in two ways. In very rough outline, Kyritsis urges that interpretivism move away from a court-centric view of law and towards a systemic understanding of the joint project of governing. The paper builds on Kyritsis's idea in two ways. To begin with, I show that institutional interpretivism allows for a division of epistemic labour whereby some officials systematically rely on the epistemic contributions of others in the identification of the truth-values of propositions of law, using devices such as deference or 'under-enforcement' judicial doctrines. Indeed, I argue that on an institutional epistemic reading, we might think that something like the 'model of rules', Dworkin's initial target, may well survive as a more-or-less reliable epistemic heuristic used by resource-constrained actors

even if it fails as a metaphysical explanation of the grounds of the law. Second, I contend that the selection of epistemic norms thus identified has itself to be justified by recourse to reasons of political morality and, more specifically, by a combination of reasons of content and considerations of institutional design pinpointed by Kyritsis. These reasons thus depend on a specification of the officials' duties within the joint project, which is what institutional interpretivists should begin exploring.

Giuseppe Maglione PhD
Lecturer in Criminology, School of Applied Sciences, Edinburgh Napier University, UK

Drawing a Historical Epistemology of the Legal and Policy Representations of Restorative Justice

Over the last 40 years, restorative justice has attracted scholars, reformers and practitioners' interest, reaching the point of being hailed as one of the most significant developments in Western criminological theory and penal policy. During the last three decades restorative justice has also been increasingly subjected to legal and policy regulation, especially in Europe and the US. Whilst the socio-legal literature abounds in studies on how restorative justice 'works', there is a lack of theoretically-informed and historically-documented works on the social and political underpinnings of the legal and policy regulation of restorative justice. Additionally, studies on the ways of thinking and knowing upon which law and policy on restorative justice hinge, are particularly uncommon.

This paper analyses the styles of reasoning which inform the most common representations of restorative justice encapsulated into law and policy documents produced in England and Wales over the last 30 years. It also investigates the material – especially social and political – circumstances under which those styles of reasoning have penetrated law and policy.

The paper draws upon a range of methodological approaches and conceptual tools developed by Michel Foucault, Ian Hacking and Arnold Davidson, at the intersection between historical epistemology and historical sociology, and seeks to apply in an original way applies originally such apparatus to legal and policy documents on restorative justice.

The overall goal pursued by this paper is to provide a critical scrutiny of the styles of reasoning encapsulated in law and policy accounts of restorative justice in context, as well as the circumstances which fed into their development, whilst identifying new directions for future socio-legal research.

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