PROGRAM FOR LAW AND LOVE COLLOQUIUM
Hosted by the Humanities Research Centre, ANU
Convenors: Renata Grossi & Joshua Neoh
Date: 5 December 2014

10.00–10.15am  Introduction

10.15–11.15am  Love in Law
  1. Patrick Parkinson – The Marriage Revolution and The Future of Family Regulation
  2. Dilan Thampapillai – What Becomes of the Broken-Hearted?

11.15–11.45am  Morning Tea

11.45–12.45pm  Law like Love
  3. Renata Grossi – Are Law and Love Opposites?
  4. Michelle Worthington – ‘Law, Like Love’: Exploring WH Auden’s Concept of Law

12.45–1.45pm  Lunch

1.45–2.45pm  For the Love of God I
  5. Joshua Neoh – Law and Love: (Re)turn to Paul
  6. Alex Bruce – Law as Love's Liberation

2.45–3.00pm  Divine Intermission

3.00–4.00pm  For the Love of God II
  7. Neville Rochow – Charity as the Normative Ideal
  8. Tristian Delroy – Love and Obedience to the Law

4.00–4.30pm  Afternoon Tea

4.30–5.30pm  Law in Love
  9. Luis Romero – Between Love of Revolution and Hatred of Injustice, or, the Erotic Jurisprudence of Ernesto ‘Che’ Guevara
  10. Alecia Simmonds – Regulating Desire: Breach of Promise, Criminal Conversation and Seduction Cases in Early Colonial Australia

5.30pm  Drinks & Dinner
1. THE MARRIAGE REVOLUTION AND THE FUTURE OF FAMILY REGULATION

Patrick Parkinson, University of Sydney - patrick.parkinson@sydney.edu.au

Alex and Kim are in love. They are a young professional couple with options for employment in a number of the great cities in the world. Where they will live together, and for how long in any one place, will depend upon their various career choices, decisions, and the vicissitudes of life. At the commencement of that partnership, their options for family formation depend to a great extent on which city they choose to live in, and so too do the rights and obligations that accompany those choices. One of the issues that they may need to deal with as their lives unfold, and in particular if their partnership unfolds, is that the relevant laws governing their relationship may, like the game of musical chairs, depend entirely on where they happen to be when the music stops.

This paper explores the different forms of family formation available to Alex and Kim (who may be a heterosexual or same sex couple) in London, Amsterdam and Sydney. This analysis is used to reflect upon possible futures for marriage as a legal form, with one option being to limit the role of the State to the registration – and deregistration where necessary - of private commitments that take their meaning from the religious, cultural or social milieu of the couple, rather than from the law.

2. WHAT BECOMES OF THE BROKEN-HEARTED? UNCONSCIONABLE CONDUCT IN THE ARMS OF CONTRACT AND COMMERCIAL LAW

Dilan Thampapillai, ANU - dilan.thampapillai@anu.edu.au

In John Osborne’s play Look Back in Anger, the working class protagonist Jimmy leaves his upper class wife Alison for her friend Helena. The infidelity impoverishes them both and their reconciliation only occurs after tragedy befalls Alison. There were many themes running through Look Back in Anger. For the most part the sense of dislocation created by social change and the failure of that change to delivered its promised rewards to the protagonist dominates the play. The play was written for the late 1950’s and it conveyed a sense that old ideas had seen out their time, but that the path forward was still blocked. A similar predicament presently faces the doctrine of unconscionable conduct. The doctrine began life as a creature of equity. It was crafted to protect expectant heirs in the 17th and 18th centuries from the deceptions and manipulations of those who would cheat them of their fortunes. The doctrine reached its high point in three cases: Commercial Bank of Australia v Amadio; Louth v Diprose and Bridgewater v Leahy. Louth v Diprose is the famous case of the lovesick lawyer who pledges more money than he can afford to his cold muse. When she deceived him, he bought her a house. Later when he came to understand the extent of her contempt for him he sued for recovery of that which he had given her. He won a decisive victory in the High Court.
Yet, more recently, the courts have begun to push back against the doctrine of unconscionable conduct. In *Kakavas v Crown Casino* the High Court decided that a high roller who repeatedly gambled with Crown could not rely on unconscionable conduct notwithstanding his troublesome gambling habit. There was no love lost in *Kakavas*. As the High Court noted both parties engaged in a pastime where the goal was to inflict ‘injury’ upon each other. Yet, the Crown’s business model is based on meeting the gambling habits of its customers. *Kakavas* fell afoul of that business model to the tune of millions of dollars. Yet, his wealth and commercial experience outweighed any claim that he could make to special disadvantage on the basis of his gambling habit. Similarly, in earlier cases such as *ACCC v Berbatis* and *ACCC v Samton*, the High Court and Federal Court respectively, decided that harsh and unfair bargains would stand and were simply part of commercial life.

Likewise, *Mackintosh v Johnson* [2013] VSCA 10 is one of the more puzzling cases to have emerged in recent years. The facts of *Mackintosh* are rather salacious. A divorced woman repeatedly offered and then withdrew her affections to a wealthy older man. He offered her gifts to woo her back. He succeeded at trial in claiming unconscionable conduct. Yet, the Victorian Supreme Court of Appeal decided against him. If a man who pledges $400,000 to his paramour while recuperating on his sick bed after having had heart surgery, can lay no claim to the doctrine of unconscionable conduct then something is truly amiss. The parallels between *Louth v Diprose* and *Mackintosh v Johnson* are unmistakeable. The only real difference lies in the wealth of the late Richard Johnson and the modest financial means of Louis Diprose. In the wake of *Kakavas* and *Mackintosh* the doctrine of unconscionable conduct now offers less protection to the gullible, foolhardy and vulnerable against those who are cynical and manipulative.

The thrust of recent cases is such that the value of *Louth* and *Bridgewater* as precedents must now be reconsidered. What has likely happened is that the standards set by *Louth* and *Bridgewater* are inconvenient in a world where the doctrine of unconscionable conduct must play a role in the commercial sphere. Unlike equity, commercial law has jurisprudential ideas that are less tender and wholly unsentimental. These ideas require that the courts must withdraw from the outer boundaries of unconscionable conduct and towards a position that would allow commercial life to prosper. Some contagion effect must be expected from the judicial retreat and equity has not been immune. As the Australian Consumer Law and contract law draw heavily on the unconscionable conduct cases that have been decided in equity, any further pushing of the boundaries in equity in favour of the ‘lovelorn’ would stress contract law and commercial law. What we now have is a law that no longer makes sense. Within the boundaries of equity unconscionable conduct was a coherent idea. However, contract law demands that agreements should be honoured. Likewise, commercial law strives to be a facilitator of commerce. In this context bargains can rarely be overturned. Promises should be kept. The imperatives of commerce are causing unconscionable conduct to fail to keep faith with the promises of equity. As unconscionable conduct exists as a doctrine in all three areas of law it must meet the base principles underpinning each area of law. This is an unenviable task. To keep with the theme of the colloquium it is pertinent to observe that it is more likely than not that online dating and introduction services may present some future battleground where the norms of contract, commercial law and equity may yet collide. There are other areas of commerce as well where the distinction between private affairs and individual responsibilities and the strictures of commerce are now collapsing.
3. **ARE LAW AND LOVE OPPOSITES?**

Renata Grossi, ANU - renata.grossi@anu.edu.au

Zenon Bankowski has challenged the popular view that law and love are opposites. Instead he has argued they are ‘entangled’, ‘necessary’, and even ‘dependant’ on each other. Together they form the ‘unity’ that is required for us to live a lawful life. The opposition of law and love, even more than being wrong, he has argued, constitutes a ‘moral and cognitive failure’. But his argument raises questions about how we are to understand ‘law’ and ‘love’. When talking of love, there is some slippage between erotic romantic love and other forms of love such as *philia* and *agape*. And when talking of law, it may be that his ideas reflect *only yet* another critique of positivism.

4. **‘LAW, LIKE LOVE’: EXPLORING W H AUDEN’S CONCEPT OF LAW**

Michelle Worthington, ANU - michelle.worthington@anu.edu.au

In the concluding stanza of his 1939 poem ‘Law, Like Love’ W H Auden draws a rather startling analogy; Law, he claims, is of all things most like Love. Initially the comparison seems not only unconventional but uncomfortable. What conception of Law must he have had to allow this comparison? What conception of Love? The poem itself is not particularly instructive. While the bulk of the text is given to description of what ‘others say’ about the law, Auden’s own thoughts are comparably ambiguous, not least because they are articulated only fleetingly, and only via analogy at the close. If we move beyond the poem itself to the circumstances of its composition, however, Auden’s likening of Law and Love emerges as an unambiguously rational choice. As a gay man living within a legal framework in which homosexuality was criminalised, the intersection of Law and Love was for Auden overt and immutable. Understood in this way, the wisdom of Auden’s analogising Law and Love lies, somewhat paradoxically, in the difference between the two concepts. Ultimately, I argue that the poem should be understood as an acerbic critique of Law, and in particular, its dehumanising and disempowering potential.
5. LAW AND LOVE: (RE)TURN TO PAUL

Joshua Neoh, ANU - joshua.neoh@anu.edu.au

Paul, in his Letter to the Romans, proudly proclaims that Christ is the end of law. The new Christian community promises to be a community sustained not by law, but by love. Paul has been called the apostle of love. His ode to love in his Letter to the Corinthians is a staple lectionary reading for marriage liturgies. His zeal for love reinforces his proclamation of Christ as the end of law, for love is lawless, literally outside of law. In contrast to Moses who establishes the rule of law on Mount Sinai, Paul proclaims the power of love over law and asserts the inherent lawlessness of love. Legal rules predict human behaviour; but love makes human actions unpredictable. Legal rules dictate outcomes; but love is, by definition, free. However, inasmuch as love is free, love is also fleeting. According to Paul, Christianity marks the end of law and the dawn of love, but it does not take long for the first church council to be formed and decrees to be issued. The promise of a lawless community ends up with codes of canon law. The modern political state carries with it this ancient theological baggage. We inherit from Paul a particular cognitive dissonance: we dream in the language of love, but speak in the language of law. Notwithstanding the ascendancy of the rule of law today, the radical ideal of love as the ultimate negation of law remains a powerful eschatological vision in our theo-political imaginary. Law may dominate, but it can never eliminate, love.

6. LAW AS LOVE’S LIBERATION: THE PARADOX OF LOVE IN BUDDHISM AND CHRISTIANITY

Alex Bruce, ANU - alex.bruce@anu.edu.au

Both Christianity and Buddhism propose a teleological trajectory to human existence involving the attainment of love. In the Christian tradition, whether expressed as agape, hesed or emet, the attainment of this love fulfils Jesus' two-fold commandment of love of God and neighbour (Mark 12: 28 - 32). In the Tibetan Buddhist Tradition, the practitioner aspires to develop the mind of enlightenment (Bodhichitta) characterised by the aspiration to attain enlightenment for the benefit of all sentient beings. However, both the Christian and Buddhist traditions insist that in attaining this love, the spiritual practitioner requires radical inner and outer freedom from ignorance, sin and negative behaviour. This is where the role of law, expressed as truth becomes crucial. This is because freedom is directly related to the "truth", recalling Jesus' recognition that the "truth will make you free" (John 8:32). Both the Eastern Orthodox and Western Roman Catholic Christian traditions have long established paths available to Christians who, through God's grace, may attain to freedom from sin and ignorance and to the unconditional love of God and neighbour.

In the Buddhist tradition, the systematic development of wisdom and compassion and the concomitant elimination of, and thus freedom from afflictive and cognitive obscurations to enlightenment is the very foundation of spiritual progression.
For both traditions therefore, the radical freedom necessary to attain to love is not possible without the role of law. Paradoxically, the law therefore liberates love for the purposes of spiritual fulfillment. In this presentation, I want to explore how the primacy of the qualities of law expressed as truth is necessary to attain to the inner and outer freedom thereby enabling the development of unconditional love.

FOR THE LOVE OF GOD II

7. CHARITY AS THE NORMATIVE IDEAL

Neville Rochow, Notre Dame Law School & Adelaide Law School - nrochow@hzc.com.au

Legal philosophy and sociology have sought to provide a rational structure of relational norms that explain how a community may, first, survive and, secondly, thrive. The proximate legal and social utility of these normative structures is to provide constitutional frameworks for communities that accept them. Within these frameworks, laws are made, construed and implemented. Each of these structures has two potential dimensions: the vertical and the horizontal. These dimensions combine in communities where there is acceptance of the structure. Vertical norms define the individual’s relationship with deity. Horizontal norms define the relationships of individuals with each other and with their community in general. Locke, Habermas, Waldron, Rawls, Dworkin, Finnis and Smith have all devised normative narratives that attempt to harmonise optimally the vertical and the horizontal. Post-modern accounts dwell largely upon the horizontal structure. This is an error. Both dimensions are critical. When there is mutual agreement on both the vertical and horizontal norms within a community, the structure is strengthened by that agreement. There are latent vices in extreme normative positions in both the vertical and the horizontal position. Extremity in the vertical relational normative position, at the expense of horizontal norms, over-emphasises the individual’s relationship with deity. This form of extremism is evident in what is referred to as religious fundamentalism. Extremity in the horizontal relational norms, at the expense of vertical norms, leads to extreme forms of secularism. This is evident in totalitarian regimes and in the dystopias depicted in literature. It is only in a condition of mutual acceptance of both vertical and horizontal relational norms that the vices of both types of extremism are avoided. The optimum relationship of the two normative dimensions is evident in the narratives of Genesis 1 and 2 and Milton’s Paradise Lost. The norms defining the relationship between humanity and God and between the genders of humanity were instituted to create a paradise, Eden. It was only by transgression of these norms that paradise was lost. This is depicted in theological writings as the Fall, suggesting that all other normative relations fall short of the Edenic ideal. All normative structures since the Fall represent attempts to recreate some form of paradise within the respective communities. A simple statement uttered by Jesus of Nazareth, reiterating the Law of Moses, captures the two dimensions optimally by connecting them through love. “…Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets.” (St. Matthew 22: 37-40, KJV) St. Paul expanded upon the relationship between vertical (“thou shalt love the Lord thy God”) and horizontal (“thou shalt love thy neighbour as thyself”) norms in his first letter to the Corinthians in which he made plain that the reason for obedience to the law was love
of God and love of man. (See 1 Corinthians 13:3-13) St. Paul labelled this form of love that is directed both to God and to man as ‘charity’ or ‘the pure love of Christ’. This concept of ‘charity’ has been powerful in the way that it has informed theology and Christian conduct since the First Century AD. It has been a powerful influence on Western society. Both equity and the common law have endeavoured to maintain some concept of ‘charity’ that maintains at least the horizontal relation, often with a tacit acceptance of its vertical relation. This paper examines the content of normative structures and their utility in constitutional and political applications by reference to four examples. The first three, from political history, are those of John Winthrop in his ‘A Model of Christian Charity’ speech; Thomas Jefferson’s original drafts of the Declaration of Independence and his First Inaugural; and Abraham Lincoln’s Second Inaugural. These examples have been described as displaying ‘civic charity’ by Matthew Holland. The last example is the City of Enoch, which lived in such harmony of love for God and fellow man that it had to be removed from the earth by God. From these examples, it will be argued that charity is the ideal normative structure. It will be further argued that unless two dimensions are kept in harmonious balance, the resultant structure will be less than ideal and unstable. Obedience to law as an expression of love of both deity and community underlies the most stable of normative structures.

8. LOVE AND OBEEDIENCE TO THE LAW

Tristian Delroy, ANU - tristian.delroy@anu.edu.au

This paper delves into the interplay of law, sovereignty and love in our imagination. It does so by examining a narrative from the Hebrew Bible, in which God commands Abraham to sacrifice his son, Isaac (Genesis 22). The text is brief and open to different interpretations. Rather than clear up these ambiguities, I want to embrace them, for they appeal to, heighten, and reveal our imaginings.

The narrative is the climax in the developing relationship between God and Abraham. Initially, God apparently considered allowing his rule to be evaluated by Abraham according to standards of justice. Yet he seems to abandon this idea. God will not be restrained, and demands unconditional obedience. God commands Abraham to sacrifice his son, whom he loves. That is, to do what is: unjust, immoral, unbearable, contrary to God’s prohibition of murder, and destructive of their covenant, in which God promised to bless Abraham’s descendants.

There are important issues here about God’s reluctance to limit his power, and his failures as a sovereign. But I want to focus on the situation of Abraham, as he holds the knife in hand. Abraham may be filled with fear, for God can punish disobedience severely. But could Abraham not only fear, but also love God? Simon May, for instance, has argued that Abraham loves God as the ultimate source of being and value, of grounding in the universe or ‘ontological rootedness.’ To disobey would mean, then, severing his connection with God.

An angel of the Lord appears to Abraham, and tells him not to kill his son. But what happened on the mountaintop? Was Abraham so determined to do the deed that he had to be almost forcibly restrained by the Angel? Did he falter at the last minute? Or was the angel a voice from within? All these possibilities are imaginable. We can see our fears of unconditional obedience or hopes of unfaltering faith; our fears of
faltering faith or hopes of conditional obedience. Isaac perhaps faces a similar conflict in his relationship with his father.

Is this conflict between fear, love and the desire to preserve connection, and the horrific demands this entails, also imaginable in our modern politics? (Abraham is, after all, literally the father of nations). Scholars like Paul Kahn suggest we can imagine sacrifice for, and love, the state. Equally, one may reject that we can or should love a political community. But if we can imagine ourselves loving our community, and wishing to remain bound to and part of it, but also that community unyieldingly demanding the unthinkable, then we find ourselves in Abraham’s tragic predicament.

LAW IN LOVE

9. BETWEEN LOVE OF REVOLUTION AND HATRED OF INJUSTICE, OR, THE EROTIC JURISPRUDENCE OF ERNESTO ‘CHE’ GUEVARA

Luis Gómez Romero, University of Wollongong - lgromero@uow.edu.au

Ernesto ‘Che’ Guevara famously claimed that ‘the true revolutionary is guided by great feelings of love.’ According to Slavoj Žižek, this assertion should be read together with his much more problematic statement on revolutionaries as ‘effective, violent, selective, and cold killing machines.’ Guevara regarded relentless hatred of injustice as a binding force between love and violence that pushes guerrilla combatants beyond their natural limitations in the struggle against capitalism, whose mechanisms and interests he plainly characterized as ‘a brutal enemy.’ Guevara’s view of erotic fulfilment is therefore deeply political as it upholds a love for revolution that bypasses, undermines and subverts capitalist social hierarchies. In other words, Guevara conceives love as a transformative power based on the violent assertion of universal equality.

Žižek argues that Guevara’s conception of love is grounded in the domain of pure violence which is neither law-founding nor law-sustaining. This paper will challenge this contention by overlapping Guevara’s paradoxical conception of love with Walter Benjamin’s well-known distinction between ‘divine’ and ‘mythic’ forms of violence. Whereas mythical violence, says Benjamin, is law-making; divine violence is law-destroying. Mythical violence sets boundaries, creates guilt and retribution and is structured over threat; divine violence, on the contrary, destroys boundaries, demands expiation and plainly strikes those who challenge it. Mythical violence is mediated by law; divine violence is pure power and truthful sovereignty.

Guevara’s erotic jurisprudence is permeated with the uncontainable danger of subjective violence. Nonetheless, as Friedrich Hölderlin once stated, where the danger is, grows also what can save us. Guevara’s wrathful love continues to interpellate a world that is increasingly turning objectively violent. Benjamin’s categorization precisely translates Guevara’s erotic jurisprudence into the articulation of a radical political space between mythical and divine violence through the reconstruction of the old notion of agape into a category of struggle that constitutes the unconditional, egalitarian love for one’s neighbour into the foundation for a new social order.
This paper will explore the relationship between love and law, and narrative and emotion through a series of breach of promise, criminal conversation and seduction actions heard in the early Australian Court of Civil Jurisdiction and, after 1823 in the Supreme Court.

The paper will be divided into two parts. Firstly, I will examine these cases as part of a broader campaign launched by colonial authorities to impose an official model of marriage on a working class population. Although private in nature, promises of marriage were of serious public consequence in a society where sanctified and legitimate heterosexual unions were considered to be the foundation of the moral and social order.

The second part of the paper will examine how the social and economic foundations of these actions structured, and were structured by, cultural narratives of love. The lawyers and the participants in breach of promise, criminal conversation and seduction actions contributed to and contested each other's versions of a love narrative, which explained how the lovers attempted and ultimately failed to reach a marital harmony. They offered their opinions on the social and legal meaning of romantic words, incorporated community gossip about love into legally comprehensible narratives and structured their stories according to their expectations of rules of law. To this extent these cases provided a forum for discussion and contestation over appropriate, or alternatively transgressive, expressions of emotion and narratives of love. Sexual and emotional feelings, words and behaviour were given meaning through stories created by lawyers and witnesses who drew upon the existing repertoire of nineteenth-century romance novels, tropes and popular customs in the hope of winning a favourable outcome. In rewarding certain love narratives and punishing others, the court was able to turn private tragedies into public cautionary tales. The law did not recoil at the unearthing of sordid facts about people's emotional and sexual lives, rather it attempted to publicly and punitively channel them into what authorities considered to be socially appropriate forms.