LAPA publishes this series of occasional reports highlighting aspects of its work at Princeton. This is the final edition of this series for the 2015-16 academic year. We present below excerpts from the research conducted by LAPA-affiliated scholars, in particular three of this year’s LAPA Fellows and a Ph.D. candidate in History who participates in LAPA’s Law Engaged Graduate Students (LEGS) seminars. LAPA wishes all its readers an enjoyable summer and looks forward to your engaging with our programming in the coming academic year.

NEW DEAL LAWYERS
by DANIEL R. ERNST
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When constitutional historians debate why the Supreme Court voided statutes passed during the first hundred days of Franklin D. Roosevelt’s presidency but upheld those passed two years later, at some point they usually get around to the drafting of the legislation. “Internalists” argue that inexperienced New Dealers made fatal mistakes in the early bills but learned from them in writing later legislation. “Externalists” believe that FDR’s landslide re-election in 1936 or Court-packing plan of 1937 persuaded swing justices to vote for the New Deal. They point out that some very able lawyers helped draft the “Hundred Days” bills. For example, the drafters of the National Industrial Recovery Act (NIRA) included Jerome Frank, a masterful corporate lawyer, and John Dickinson, the author of a penetrating book on administrative law. Neither camp examines the drafting of particular bills in much detail.

Earlier in the chapter from which this excerpt is drawn, I describe how Frank and Dickinson, working with Agriculture Undersecretary Rexford Tugwell, drafted a bill to control American industry, unaware that another drafter was at work elsewhere in the administration. Not only would their rival prevail in the drafting of NIRA, he would also direct the agency created to implement it, the National Recovery Administration, which the Supreme Court would strike down in May 1935.

Hugh Samuel Johnson entered the New Deal under the aegis of Bernard Baruch, a legendary financier who had chaired the War Industries Board (WIB) during World War I. His financial contributions to Roosevelt’s presidential campaign and those of dozens of congressmen made him a power within the party. Baruch had discovered Brigadier General Hugh S. Johnson when the West Point-trained, legally educated cavalry officer served as the Army’s liaison with the WIB. After the war, Baruch hired Johnson to investigate businesses and perform other financial chores but kept him on a short leash, aware that his alcoholism, a legacy of his cavalry service, could erupt in incapacitating bouts of drinking. Profane, irascible, given to florid obscenities but also flights of exalted rhetoric, Johnson lived in a world peopled with villains and victims, much like characters in the tales of military life he published in popular magazines. As “Baruch’s man,” he developed a shrewd business sense and a “gift for condensing complex problems into simple lines of action” that made him a useful addition to the Brains Trust during FDR’s presidential campaign, after the financier bought access with a huge contribution. Labor Secretary Frances Perkins thought him “slightly unstable at times” but also “touched with genius,” “a driver and able.” She was surprised when Baruch later called Johnson “a well-developed bully.” Johnson was a good “number-three man,” Baruch told her, but as a “number-one man” he would be disastrous.

A good number-three man sufficed for a harried Raymond Moley, when, while casting about for an industrial control bill, he ran into Johnson in the lobby of a hotel. The two former Brains Trusters had recently discussed the subject on a train ride to the capital. Now Moley told “the General” that his
experience at WIB made him the man of the hour and asked him to produce a bill. After clearing it with Baruch, Moley dispatched Johnson to an overheated office with a staffer charged with bringing him up to speed. “Before I could open my mouth,” the staffer recalled, Johnson “was making a speech. The speech began with his clothes on and ended, by stages, [with him] taking off his coat, his tie, and his shirt until he was finally walking up and down in his undershirt.” Twenty-four hours later, the General emerged with a one-paragraph bill to suspend the antitrust laws and institute federal licenses requiring higher wages and shorter hours, enforced with a ten-percent tax on a violator’s gross revenue.

Before long, the Dickinson-Frank-Tugwell group and Johnson started meeting together. The sessions did not go well. In part, the differences were substantive: Johnson insisted on the federal licensing of business; Dickinson thought licensing unworkable and unconstitutional. Personalities intruded as well. Johnson considered Tugwell “a damned Communist” because of his advocacy of planning in agriculture. Dickinson spoke in great rounded periods, taking “the most obvious platitudes as a starting point” in “a pompous, almost grotesque, manner.”

When Roosevelt could wait no more, he dispatched Perkins to investigate. She found a half dozen or so principals crowded around a table, assistants scattered behind them, in an overheated room beneath the mansard roof of the State, Navy and Army Building. She tried to follow the discussion, turning on a close reading of the Supreme Court’s antitrust opinions, without success. But Johnson was riveting. “He was just ready to scream, he was so impatient,” she recalled. “He squirmed around in his chair like a restless child.” Coatless, Johnson would stand up, walk about, run his hands through his hair, and return to his seat. Finally, he “pulled his legs up” into his chair and thrust his torso over the table, balancing on his elbows, fists clenched. He had “a curiously restless, uncontrolled, undisciplined” expression, as if he were “chewing his face to pieces.” At last, when he could stand it no longer, he accused the others of wasting time while “people in this country are starving” and “industry has gone to pot.” Their “law stuff” was irrelevant, he exclaimed, because whatever they proposed would cure unemployment long before a case could reach the Supreme Court. By that time, “nobody will care” what the justices thought.

**STUDYING LAW IN FRAGILE STATES**
*by Mark Fathi Massoud*
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This essay for Law@Princeton is adapted from the forthcoming article, “Field Research on Law in Conflict Zones and Authoritarian States,” by Mark Fathi Massoud, *Annual Review of Law and Social Science, Volume 12* (2016).

Law and public affairs scholars since the 2000s have been challenging the conventional wisdom that law and courts in authoritarian states are, at best, the tools of dictators and that law fails to matter in places riven by violence or warfare. Instead, legal tools, techniques, and practices in these places—for instance, building courts and law schools, allowing grievances to be aired publicly, promoting human rights and order, or empowering judges with independence to rule against wayward officials or the regime itself—matter in meaningful ways that illuminate law’s power in non-democratic and democratic societies alike.

Less discussed is how this expansive body of research is carried out in conflict zones and authoritarian states. These unlikely places illuminate law’s power in unexpected ways and close-to-the-ground methods—ethnographic, interview-based, and archival—generate new hypotheses for law and social science research.

There is, as yet, no clearly defined “field” of fieldwork on law and courts in fragile states. But new work is beginning to constellate such a field. This work illuminates how the study of law and law-like practices in fragile states—perhaps more acutely than in stable environments—is shaped by a cluster of personal and professional factors, including the clarity of the research question under investigation; the author’s approach, interests, identities, disciplinary audiences affiliations, and ability to access relevant people and materials; and the social, political, economic, and historical context shaping the author’s background and study.
The challenges related to field research on law, particularly in conflict-affected and authoritarian (herein, “fragile”) states are many: developing trust, ensuring safety, minimizing and disclosing conflicts of interest, being sensitive to power relations and positionality, and ultimately translating contingent findings into readable accounts that build social theory and contribute to social policy.

Despite these challenges, fieldwork has been indispensable for research on law and courts in conflict zones and authoritarian states. Mindful that much socio-legal work in this area is still to come, this essay offers three broad suggestions.

First, as law and society scholarship globalizes, consider targeted training on fieldwork in fragile states. Especially important is promoting a question-driven adoption of qualitative methods, rather than a dependence upon qualitative methods due to, for instance, a lack of skill or training in quantitative methods. Training may also amplify the intersectionality of race, gender, religion, and law. A planned syllabus repository at the US-based Law and Society Association may help to promote focused methodological training in this field.

Second, hold conferences and events in the global South and earmark additional funding for scholars from fragile states. The U.S.-based Law & Society Association is holding its first-ever meeting in Africa in late 2016, and Harvard Law School’s Institute for Global Law and Policy also held its first-ever regional meetings in Latin America (in 2015) and in Africa (in 2016), allowing scholars from these regions to interact with, learn from, and teach scholars from North America and Europe.

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As research and communication across national boundaries continues to globalize, these events, along with collaborative research networks and related conference panels, are likely to increase in number, content, and scope.

Third, write about research processes and methods, both in substantive work and in discrete books and articles. A surprising number of works using archival, interview-based or ethnographic methods offer little or no discussion of research processes, leaving open to the reader to interpret how the author spent his or her time in the field, and how productive it actually was. Fieldwork, and writing about it, can be among a scholar’s most challenging and rewarding experiences. Debates over methods may also help to historicize socio-legal fieldwork and the ways it potentially reflects policy goals and power interests. Prominent discussions of methods will ultimately allow fieldwork-based studies of law in fragile states to have greater impact on the global diversity and outlook of socio-legal studies, and the kinds of research questions that can be asked and answered by scholars interested in centering or decentering law’s power in public affairs and daily life.
In late 1963, the United States Department of State prepared for renewed international criticism of Southern race relations. During the early 1960s, as newly independent nations joined the United Nations and as the U.S. civil rights movement escalated, many U.N. delegates questioned the U.S.’s ability to lead a racially diverse world. Few U.N. organs caused State Department officials more consternation than the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission). The Sub-Commission was a fourteen-member body comprised of racial experts from across the world. Given the Sub-Commission’s explicit racial mission, the Sub-Commission often transformed into a forum where foreign officials shamed U.S. delegates for proclaiming the U.S.’s commitment to democracy abroad while denying African-Americans democracy at home.

But federal officials had devised a plan to help rebrand the image of U.S. democracy. The State Department selected lawyer Morris Abram, known for “the leadership that he is taking in the field of civil rights in the South,” as the next U.S. member on the Sub-Commission. Abram was no ordinary civil rights lawyer. In the early 1960s, Abram was an attorney for the movement’s most recognizable figure, Dr. Martin Luther King. Abram, like King, was an Atlanta resident, and the civil rights lawyer served as a trustee at King’s alma mater, Morehouse College, and had personal ties to movement giants, like Roy Wilkins, Benjamin Mays, and Whitney Young. According to the New York Times, the University of Chicago-trained lawyer had built a national reputation “as an attorney in crucial cases dealing with major civil rights and civil liberties issues.” Abram was founding member of the Lawyers’ Committee for Civil Rights and had waged a protracted battle for black voting rights in the South, which culminated with a landmark, U.S. Supreme Court decision recognizing the “one person, one vote” principle. Abram chaired the board of the American Jewish Committee and later served the organization’s national president. State Department officials were very pleased with their choice for the Sub-Commission. In Abram, they had found a “trouble shooter” both “familiar with civil rights developments here” and “willing to undertake the United Nations assignment.”

State Department officials then named Clyde Ferguson, an African-American attorney widely considered “one of the best civil rights legal brains in the country,” as Morris Abram’s alternate to the Sub-Commission. Ferguson’s credentials were virtually unrivaled. He was an honors graduate of Harvard Law School, taught on the Harvard general and Rutgers Law faculties, and served as a board member of the NAACP Legal Defense Fund. In 1962, Ferguson was appointed General Counsel of the U.S. Commission on Civil Rights. Black America reveled in Ferguson’s singular feat. Writers across the country heralded him for being “the first member of his race to serve as chief legal officer for a federal agency.” And in the fall of 1963, Ferguson was named Dean of the Howard University School of Law—the civil rights citadel that produced Thurgood Marshall. In his capacity on the Sub-Commission, Ferguson would negotiate with U.N. working parties, assist with drafting international legislation, and surrogate as the U.S. member in Abram’s absence. The State Department had selected one of the premier representatives of the race.

The State Department’s personnel decisions were groundbreaking. Both Abram and Ferguson were immensely talented, but they offered much more than their considerable intellectual abilities to the U.S. delegation to the Sub-Commission. State Department officials recognized that civil and human rights were not simply moral issues; they were also foreign policy issues. The State Department had tapped two high-profile, civil rights lawyers to champion
The fire had erupted on a Wednesday night. That Saturday, a large public meeting in City Hall appointed a seven-man committee “with power to make application to Congress for relief.” Five days later, the committee mailed their nine-page memorial to New York City’s congressional representatives, spelling out the relief they sought: the remission of duties paid on goods destroyed in the fire. To make their case, the memorialists employed the novel argument that New York’s importing merchants were asking not for charity, but rather for money they were owed as a matter of right.

In making this claim of right, the memorialists were well aware that precedent was against them. Since 1801, Congress had steadfastly refused to remit duties on destroyed goods, reasoning that establishing such a precedent could prove “infinitely dangerous to the Revenue of the United States.” To overcome this prudential concern, the memorialists employed the novel argument that New York’s importing merchants were asking not for charity, but rather for money they were owed as a matter of right.

The United States, like Britain, they explained, taxed its citizens indirectly, raising its revenue from consumers of imported goods, and thereby saving the government from “the odium and impositions of direct taxation.” In this scheme, the memorialists reasoned, the importer acted as an agent of government, advancing to the Treasury the taxes of his future consumers through his own duty payments. In exchange for this advance, the importer was given...
“a reasonable time, or the ordinary opportunities,” to sell his goods and thereby collect his consumers’ share of the duties, promising nothing more than to exercise “ordinary vigilance and activity in the sale of the commodity,” and the “usual precautions of safety in the interim.” New York’s importers had held up their side of this arrangement, the memorialists went on, but the fire had rendered them, through no fault of their own, unable to realize their compensation through the sale of their goods. To refuse to remit the importer’s advance in such a circumstance would be to turn the importer from the government’s agent, acting on the promise of a chance to sell his goods and recoup his advance, to its insurer “against all risks whatever,” a role that was in no way part of the importer’s original undertaking. What’s more, it would force the importer, who had lost all, to make up to the Government a loss that would prove only temporary, as the fire had made inevitable “fresh and increased importations,” all dutiable, to replace the goods that had been lost.

The merchant, whose “acknowledged probity and uprightness,” together with “the value he places upon an unsuspected reputation in his dealings,” would be a check against foul play.

Having made the case for a right to remission and the feasibility of such relief, the memorialists concluded their letter by underscoring the centrality of New York’s merchants to the nation’s commercial wellbeing:

[I]t is but just to consider [] that of all the importations of foreign goods into the United States, nearly two-thirds are imported into the port of New York; and that, therefore, from a wise regard to the interests of other parts of the Union, and to its own future revenue, it would be the interest of the Government to afford such facilities as will invigorate so important a source of the national means.

The foreboding tones of these concluding lines are unmistakable. Not only are New York’s merchants entitled to relief, the passage suggests; their commercial prominence means that failure to come to their aid will imperil the Union as a whole. With this dark premonition, the committee closed, “with that firm reliance which an American citizen is proud to repose upon the wisdom, justice, and liberality of the Legislature of the Union.” Wisdom, justice, liberality: each justified bailing out the richest residents of the nation’s richest city.

With this elegant display of private law logic, the memorialists turned a request for largesse into a matter of right. The possibility of fraudulent remission claims need not be an obstacle, they assured: the government should simply deem all goods destroyed while still in their original packing eligible for relief, as having not yet entered the “consumption of the country.” The burden of proof would lie with
A Glance Back at this Past Year—LAPA’s Major Programs

For a full listing of past programs visit http://lapa.princeton.edu/event-archive

LAPA SEMINARS

Our Constitutional Metaphors: The Architecture of Post-Apartheid South African Constitutionalism
Elizabeth S. Anker, Cornell University School of Law; Commentator: Sherally Munshi, LAPA/Perkins Fellow

Authors at Work: Writing for Hire in Twentieth Century Film, Television, and Advertising
Catherine Fisk, University of California, Irvine School of Law; Commentator: Daniel R. Ernst ’89, LAPA Fellow

Immigration, Imperialism, and the Legacies of Indian Exclusion
Sherally Munshi, LAPA/Perkins Fellow; Commentator: Desmond Jagmohan, Princeton University

The Rise of the Constitution
Aziz Rana, Cornell Law School; Commentator: Keith Whittington, Princeton University

Protected Class Rational Basis Review: A (Re)New(ed) Approach to Race and Gender Justice Under the Constitution
Katie Eye, Rutgers University School of Law – Camden; Commentator: Dara Strolovitch, Princeton University

We Cannot Live Our Dreams: Lawyers and Professional Authority in the National Recovery Administration
Daniel R. Ernst ’89, LAPA Fellow; Commentator: Meg Jacobs, Princeton University

H. Timothy Lovelace, LAPA Fellow; Commentator: Tanya Hernandez, Fordham University School of Law

Where Did All the White Criminals Go?: Reconfiguring Race and Crime on the Road to Mass Incarceration
Khaliq Gibran Muhammad, Schomburg Center for Research in Black Culture; Commentator: H. Timothy Lovelace, LAPA Fellow

The Failure of Arab Constitutional Tradition: On the Absence of Social Solidarity and its Consequences
Zaid Al-Ali, LAPA Fellow; Commentator: Menaka Guruswamy, Yale Law School

Islamic Law, Politics, and Human Rights Discourse: The Case of Somalia
Mark Fathi Massoud, LAPA Fellow; Commentator: Amaney Jamal, Princeton University

Reinvention of Citizenship in the European Union
Dimitry Kochenov, LAPA Fellow; Commentator: Peter Van Euzewege, University of Ghent

MEET THE AUTHORS: LAW-RELATED BOOK TALKS SERIES

Mr. Smith Goes to Prison: What My Year Behind Bars Taught Me About America’s Prison Crisis
Jeff Smith, The New School

The Workplace Constitution From the New Deal to the New Right
Sophia Z. Lee, University of Pennsylvania Law School

Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage
Stephen Macedo, Princeton University

LAW AND TECHNOLOGY SERIES

Privacy and Security for the Internet of Things
Sarthak Grover, Doctoral Student, Computer Science, Princeton University; Cora Han, Senior Attorney, Division of Privacy and Identity Protection, Federal Trade Commission; Nick Feamster, Princeton University (moderator)

Online Censorship
Ryan Budish, Senior Researcher, Berkman Center for Internet & Society, Harvard University; Roya Ensafi, Postdoctoral Research Associate, Princeton University Nick Feamster, Princeton University (moderator)

Online Privacy in Europe Versus the United States
Sharon Goldberg, Associate Professor of Computer Science, Boston University; Joel Reidenberg, Fordham University School of Law; Solon Barocas, CITP Fellow and Postdoctoral Research Associate, Princeton University (moderator)

CASE OR CONTROVERSY SERIES

The Future of Public Employee Labor Unions: The case of Friedrichs v. California Teachers Association
Janice Fine, Rutgers University; Benjamin Sachs, Harvard Law School; Dorian Warren, Roosevelt Institute; Paul Frymer, Princeton University (moderator)

Full Court Press Ill: The Supreme Court, the Media, & Public Understanding
Jess Bravin, Supreme Court correspondent, The Wall Street Journal; Adam Liptak, Supreme Court correspondent, The New York Times; Dahlia Lithwick, Slate.com Senior editor and legal correspondent; Jeffrey Toobin, CNN Legal Analyst; Paul Starr, Princeton University (moderator)

LAPA-RUTGERS CRIMINAL JUSTICE WORKING GROUP

Conditions for Reversing Successful Degradation: Ceremonies in Criminal Justice
Shadd Maruna, Rutgers University - Newark, School of Criminal Justice

The Shifting Landscapes of Adulthood, Masculinity, and Crime: A Case Study of a High-Recidivism Community
Jamie J. Fader, Temple University

Graduate Student Works in Progress
Grace Howard, Rutgers; Mary Imperato, Rutgers; Heath Pearson, Princeton

SPECIAL PROGRAMS

DONALD S. BERNSTEIN ’75 LECTURE AND COLLOQUIUM

Criminal Justice Reform and the (Almost) Absolute Power of the American Prosecutor
Emily Bazelon, Truman Capote Fellow for Creative Writing and Law, and Lecturer in Law, Yale Law School
SPECIAL PROGRAMS (Continued)

The Politics of Disaster Response and Reconstruction: The Case of Nepal (Workshop)
Raju Malla-Dhakal, Executive Director of South Asia Center for Policy Studies, Katmandu, Nepal

Jon B. Wellinghoff, former Chairman of the Federal Energy Regulatory Commission; Cosponsored with the Program in Science, Technology and Environmental Policy (STEP)

Accidental Activists: Victim Movements and Government Accountability in Japan and South Korea (Workshop)
Celeste Arrington, George Washington University; Cosponsored with Qualitative Methods Workshop, Department of Politics

The Loyal Opposition: Is It Time for the Nationalists to Put Up or Shut Up? (Seminar)
Heather Gerken, Yale Law School

Protecting Media Pluralism via European Law? The Centro Europa 7 Case and Beyond
Roberto Mastroianni, University of Naples-Federico II; Discussants: Dimitry Kochenov, LAPA Fellow; Kim Lane Schepple, Princeton University

Human Rights Day Observance
Juan E. Méndez, UN Special Rapporteur on Torture; Address upon receipt of 2015 Stevenson Award from Princeton-Trenton Area Chapter of the United Nations Association of the USA (UNA-USA)

PROGRAMMING FOR STUDENTS

LA W IN THE PUBLIC SERVICE: NOT JUST FOR LA WYERS (Public Policy Students)

The Road to Marriage Equality in New Jersey: A Supreme Court Justice’s First-Hand Account
The Honorable Barry Albin, Associate Justice, Supreme Court of New Jersey

Two Perspectives on the Declaration and Conduct of War: Law and Ethics
Program 1: Ethical Considerations in Asymmetrical Warfare
Michael Walzer, Institute for Advanced Study, author Just and Unjust Wars

Program 2: A Look at the Law of War and International Humanitarian Law
Col. David Wallace, United States Military Academy, Department of Law

U.S. Energy Policy and Energy Markets in a World of Climate Change and Disruptive Technologies
Jon B. Wellinghoff, former Chairman of the Federal Energy Regulatory Commission

The American Criminal Injustice System in an Age of Mass Human Caging
Alec Karakatsanis, Attorney, Equal Justice Under Law

The Future of Labor Unions and Workers Rights
Dorian Warren, Roosevelt Institute; Janice Fine, Rutgers University

LA W-ENGAGED GRADUATE STUDENTS [LEGS] (Ph.D. Students)

Sovereign Debt Restructuring and Default
Ben Johnson & Amanda Kennard

Grounding the Rule of Law: Supranational Rules, Subnational Practices, and Political Authority in the E.U.
Tommaso Pavone

Justice and Sovereignty in International Investment Law
Ardevan Yaghoubi

Transnational Perspectives on Comparative Legal History
Katharina Isabel Schmidt

Party to the Suit: The Differing Adjudicatory Reactions to Medicare and the Affordable Care Act
James Sasso

The Great New York Fire of 1835 and its Role in the Evolution of America’s Antebellum Political Economy
Jane Manners

Dialogue and Domination: Republicanism and ‘Weak-Form’ Judicial Review
Geoffrey Sigalé

Like Cases
Ben Johnson

Thinking Inside the Box: The Development, Meaning, and Implications of Washington D.C.’s “Ban the Box” Legislation
Brandon Hunter

Interdisciplinary Research Methodologies
Zaid Al-Ali, Daniel Ernst, Tim Lovelace, Mark Massoud (LAPA Fellows)

UNDERGRADUATE SPECIAL PROGRAMS

Lunch with Nancy Duff Campbell, President, National Women’s Law Center

Exploring Public Service: The Arthur S. Liman Public Interest Law Fellowship Experience (Roundtable)
Ariel Futter ’16, Duncan Hosie ’16, Cydney Kim ’17, Lawrence Liu ’16, Andrew Nelson ’16, Safeyah Quereshi ’16, Jessica Zou ’16

Law-Related Theses in Progress Workshop for Princeton Seniors with LAPA Fellows and Graduate Students

Visit to U.S. Court of Appeals for Second Circuit and Meeting with Judge Denny Chin ’75

From Top to Bottom: Emily Bazelon; Full Court Press Panel; Nancy Duff Campbell; Dan Ernst and Meg Jacobs; Public Employee Unions Panelists; Sophia Lee; Khalil Gibran Muhammad