

AMERICAN SOCIETY  
FOR  
LEGAL HISTORY



Historia Omnium Legum

1997

Twenty-Seventh Annual Meeting  
Regal Minneapolis Hotel  
Minneapolis, MN  
October 16-18, 1997



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## PROGRAM

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### Registration

Thursday, October 16  
2:30 p.m. - 6:00 p.m.

Friday, October 17  
8:30 a.m. - 4:30 p.m.

Saturday, October 18  
8:30 a.m. - 10:00 a.m.



## SUMMARY OF PROGRAM

Friday, October 17

8:45 a.m.

Land, Law and Politics in 19th Cent. British Colonies	Legal Scholarship in Cyberspace
Insanity and Responsibility in 19th Cent. American Law	Deviants & Marginalized Peoples 17th Cent. Confucian Legal Culture

10:30 a.m.

The Significance of John Reid's Scholarship
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1:30 p.m.

American Constitutional History in Colleges	Legal Reform in 19th Cent. Russia
Child, Family, State in Modern America	Dissenting Speech in the Early American Republic

3:15 p.m.

Freedom of Contract and the State	Corporation Law in Late 19th/ Early 20th Century U.S.
Paths to Equality in the 1960's	Ancient Legal History

5:30 p.m. Annual Lecture

"Women within Minnesota Legal History" Judge Diana Murphy, U.S. Court of Appeals, Eighth Circuit
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Saturday, October 19

8:30 a.m.

Construction of Indians in 19th Cent. American Law	Law and Authority in the Pre-Progressive City
Legal Construction of Employment Relations	Medieval Property Transfers

10:15 a.m.

Children and Law in Early America	American Legal Innovations, 1787-1850
New Deal "Constitutional Revolution"	Identifying, Rewarding, Punishing in German Law

1:45 p.m.

History of the California Supreme Court	Murder, Lynching & Capital Punishment
Slavery & Property in Antebellum Law/Literature	Rape & Domestic Violence in England & South Africa

3:30 p.m.

Comparative Constitutional History	Law & Economic Development
Litigating Race in the U.S.	Ethnic Identity & National Loyalty

Thursday, October 16, 1997

Board of Directors Meeting

7:30 p.m.

Avenue 5

Friday, October 17, 1997

Complimentary Continental Breakfast

7:45-8:30 a.m.

Land, Law, and Politics in Nineteenth Century  
British Colonies: Australian and Canadian Episodes

8:30-10:00 a.m.

South Forum

Paul Kens, Chair  
Southwest Texas State University, Political Science

Panel: "The Origins of Australian Property: English Assumptions  
and Colonial Expectations in Nineteenth Century New  
South Wales"

Andrew Buck  
University of Newcastle, New South Wales, Economics

"Leasehold Tenure and Freehold Ideology in Nineteenth-  
Century Prince Edward Island"

Margaret McCallum  
University of New Brunswick, Faculty of Law

"Liberal Thoughts on Property"

Thomas G. Johnson  
York University, Osgoode Hall Law School

Commentator:

Paul Kens

**Friday, October 17, 1997**

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**Legal Scholarship in Cyberspace**

8:30-10:00 a.m.

Center Forum

Christopher Waldrep, Chair  
Eastern Illinois University, History

Panel: "Don't Mourn, Organize: Printed Scholarly Journals and the Internet"

Christopher L. Tomlins  
American Bar Foundation

"The Net, is it a Friend or a Foe to Traditional Historical Publishing?"

Charles Zelden  
Nova Southeastern University, Liberal Arts

"Goodbye to Law Reviews? New Models of Scholarly Publishing in the Age of Cyberspace"

Bernard John Hibbitts  
University of Pittsburgh, School of Law

Commentator:

Christopher Waldrep

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**Mental Competence, Insanity and Responsibility in  
Nineteenth-Century American Law**

8:30-10:00 a.m.

North Forum

Thomas A. Green, Chair  
University of Michigan Law School

Panel: "Tears, Bitter Tears: Sympathy, Insanity, and Murder in the McFarland-Richardson Trial"

Melissa Ganz, Law Clerk to the Honorable William H. Yohn, Jr., U.S. District Judge (E.D.PA)

"The Duress of the Delusion: Mental Capacity and the Rules of Responsibility in Nineteenth-Century American Law"

**Friday, October 17, 1997**

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Susanna Blumenthal  
Yale University, History

Commentators:

Martha Merrill Umphrey  
Amherst College, Program in Social Jurisprudence

John Carson  
Cornell University, History

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**Deviants and Marginalized Peoples in Seventeenth  
Century Confucian Legal Cultures**

8:30-10:00 a.m.

Avenue 5

Ann Waltner, Chair  
University of Minnesota, History

Panel: "Barbers, Prostitutes and Sodomites in Seventeenth Century China"

Vivian Ng  
SUNY at Albany, History

"The Treatment of the Poor in Seventeenth Century Japanese Law"

Thomas Keirstead  
SUNY at Buffalo, History

Commentator:

Daniel Foote  
University of Washington, History

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**The Significance of John Reid's Scholarship**

10:15-11:45 a.m.

South Forum

Dirk Hartog, Chair  
Princeton University, History

Panel: "John Reid's Claim that Legalism Exists and How Law Defines Choices and Induces People to Act"

## Friday, October 17, 1997

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Laura Kalman  
University of California at Santa Barbara, History

"Reid's Work Within the Context of Eighteenth Century  
Historical Literature of the United States"

Jack P. Greene  
The Johns Hopkins University, History

"Reid's Work Within the Context of Eighteenth Century  
England with Particular Emphasis on Ireland"

Martin Flaherty  
Fordham University School of Law

"Reid's Work Relating to the West and Nineteenth Century  
United States"

Stanley N. Katz  
Princeton University, Woodrow Wilson School of Politics

Commentator:

Audience Participation

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### Dissenting Speech in the Early American Republic

1:30-3:00 p.m. South Forum

Aviam Soifer, Chair  
Boston College Law School

Panel: "The Conflict Between Sedition and the Right to Criticize  
Government in the Early Republic: The Alien and Sedition  
Act Crisis of the 1790s"

Whitman J. Ridgway  
University of Maryland, History

"The Sedition Act of 1798 and the Original Understanding  
of the First Amendment"

James P. Martin  
University of Texas, Government

"Free Speech in the Early Republic"

## Friday, October 17, 1997

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John Wertheimer  
Davidson College, History

Commentators:

Aviam Soifer

Steven Wilf  
Chicago-Kent Law School

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### The Child, the Family, and the State in Modern America

1:30-3:00 p.m. Center Forum

Norma Basch, Chair  
Rutgers University at Newark, History

Panel: "Saving Other People's Children: The Legal Reconstruction  
of Childhood in America, 1870-1930"

Michael Grossberg  
Indiana University, History

"Socializing the Hearth: Policing and Provision in the  
Chicago Court of Domestic Relations, 1911-1930"

Michael Willrich  
Rice University, History

"Employable Mothers, Civil Rights and the Courts"

Joanne Goodwin  
University of Nevada at Las Vegas, History

Commentator:

Norma Basch

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### American Constitutional History in the Colleges

1:30-3:00 p.m. North Forum

Herbert A. Johnson, Chair  
University of South Carolina School of Law

Panel: "A Law School Perspective on American History and  
American Constitutional History"

## Friday, October 17, 1997

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Herbert A. Johnson  
University of South Carolina School of Law

"Should Constitutional History Go Beyond Supreme Court History?"

Sandra Van Burkleo  
Wayne State University, History

Sanford Levinson  
University of Texas School of Law

"Can You Mix Legal and Constitutional History Successfully?"

Michael Les Benedict  
Ohio State University, History

Stephen B. Presser  
Northwestern University School of Law

Commentator:

Audience Participation

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### Legal Reform in Nineteenth Century Russia

1:30-3:00 p.m. Avenue 5

William G. Wagner, Chair  
Williams College, History

Panel: "The Judicial Reform of 1864 and the Role of Medical Expertise in the Russian Courtroom"

Elisa M. Becker  
University of Pennsylvania, History

"The Judicial Reforms of 1864: An Overview"

Cheri C. Wilson  
University of Minnesota, History

"The Languages of Punishment and the Limits of Reform: The Russian Autocracy and the 1863 Amelioration of Corporal Punishment"

## Friday, October 17, 1997

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Abby M. Schrader  
Franklin & Marshall College, History

Commentator:

Jane Burbank  
University of Michigan, History

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### Freedom of Contract and the State

3:15-4:45 p.m. South Forum

Harry N. Scheiber, Chair  
University of California at Berkeley School of Law

Panel: "Contract and the Common Law in English Legal History"

John Orth  
University of North Carolina at Chapel Hill, School of Law

"Freedom of Contract, Labor, and the Administrative State in America"

Arthur F. McEvoy  
University of Wisconsin at Madison, School of Law

Commentator:

Robert W. Gordon  
Yale Law School

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### Theory and Practice of Corporation Law in Late Nineteenth and Early Twentieth-Century America

3:15-4:45 p.m. Center Forum

Linda Przybyzewski, Chair  
University of Cincinnati, History

Panel: "The Political Background of Virginia Corporation Law Reform, 1870-1902"

J. Gordon Hylton  
Marquette University School of Law

"The Court and the Corporation: The Jurisprudence of Localism"



**Friday, October 17, 1997**

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Gregory A. Mark  
Rutgers Law School at Newark

"No Fiction, No Symbol: Corporate Personality and the Legal  
Construction of Identity"

J. O. Allen Douglas  
Rutgers University, History

Commentator:

James W. Ely  
Vanderbilt University School of Law

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**Paths to Equality in the 1960s**

3:15-4:45 p.m. North Forum

Barbara Holden-Smith, Chair  
Cornell Law School

Panel: "The Civil Rights Revolution Comes to Immigration Law: A  
New Look at the Immigration and Nationality Act  
Amendments of 1965"

Gabriel J. Chin  
Western New England College of Law

"Participation and Equality at the Federal Communications  
Commission, 1960-1969"

Amy Lyn Toro  
University of California at Berkeley, Jurisprudence and Social  
Policy Program

"Birmingham, Addis Ababa, and the Image of America:  
Managing the Impact of Civil Rights on Foreign Relations  
During the Kennedy Years"

Mary L. Dudziak  
University of Iowa College of Law

Commentator:

Devon Carbado  
University of California at Los Angeles School of Law

**Friday, October 17, 1997**

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**Ancient Legal History**

3:15-4:45 p.m. Avenue 5

Bernard John Hibbitts, Chair  
University of Pittsburgh School of Law

Panel: "Law Before Lawyers"

Raymond Westbrook  
The Johns Hopkins University, Near Eastern Studies

"The Origins of Modern Contract Law, Roman or Israelite?  
A New Investigation"

F. Rachel Magdalene  
University of Denver, Iliff School of Theology

"Biblical Law in America: Historical Perspectives and  
Potentials for Reform"

John W. Welch  
Brigham Young University, J. Reuben Clark Law School

Commentator:

George A. Sheets  
University of Minnesota, Classical and Near Eastern Studies

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**ANNUAL LECTURE**

"Women within Minnesota Legal History"  
Hon. Diana Murphy  
U.S. Court of Appeals, Eighth Circuit

5:30 p.m. Ceremonial Court Room  
U.S. Courthouse, Minneapolis

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**ANNUAL RECEPTION**

6:45 p.m. Ceremonial Court Room  
U.S. Courthouse, Minneapolis

**Saturday, October 18, 1997**

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**Complimentary Continental Breakfast**

7:45-8:30 a.m.

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**Pueblos and Primitivism: Construction of Indians in  
Nineteenth Century American Law**

8:30-10:00 a.m.

South Forum

Jo Carrillo, Chair

University of California at Hasting College of Law

Panel: "Of Pastoralism and Pueblos: Nineteenth Century Legal  
Cases Constructing Pueblo Peoples as Non-Indians"

Jo Ann Woodsum

University of California at Santa Cruz, American Studies

"Federal Indian Law and the Anthropology of the Primitive"

Ronald L. Steiner

Chapman University, Political Science

Commentator:

Jay Kanassatege

Minneapolis, MN

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**Social Histories of Law and Authority in the  
Pre-Progressive City**

8:30-10:00 a.m.

Center Forum

Victoria Saker Woeste

American Bar Foundation

Panel: "The People v. Zephyr Davis: Law and the Public Sphere,  
Chicago, 1888"

Elizabeth Dale

Clemson University, History

"Before the Juvenile Court: Gender and the Policing of  
Children in Late-Nineteenth-Century Urban America"

**Saturday, October 18, 1997**

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Sharon E. Wood

University of Chicago, History

"The Anti-Progressive Impulse: A Personal Crusade Against  
an Infamous Juvenile Law"

David Spinoza Tanenhaus

University of Nevada at Las Vegas, History

Commentator:

Victoria Saker Woeste

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**Legal Construction of  
Employer/Employee Relationships**

8:30-10:00 a.m.

North Forum

Daniel R. Ernst, Chair

Georgetown University Law Center

Panel: "The Fuel of Interest and the Fire of Genius: Law and the  
Employee Inventor, 1830-1930"

Catherine Fisk

Loyola Law School of Los Angeles

"Defining Discrimination in Employment, 1933-1972"

Paul Moreno

St. Thomas Aquinas College, Social Sciences

Commentator:

Davison M. Douglas

College of William and Mary, Marshall-Wythe School of Law

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**Medieval Property Transfers**

8:30-10:00 a.m.

Avenue 5

Constance B. Bouchard, Chair

University of Akron, Department of History

Panel: "Private Documents on Non-Monetary Land Transfers in  
Late Medieval Russia"



## Saturday, October 18, 1997

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Elena Pavlova  
University of Chicago, History

"Motives for Property Transfers in the Medieval Rhineland"

Jonathan Rotondo-McCord  
Xavier University of Louisiana, History

"Diversity and Continuity: Inheritance in the Chartrain,  
1000-1200"

Amy Livingstone  
Maryville College, History

Commentator:

Constance B. Bouchard

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### Children and the Law in Early America

10:15-11:45 a.m. South Forum

Holly Brewer, Chair  
North Carolina State University, History

Panel: "Children, Law, and Society: Legal Constructions of  
Childhood in Seventeenth-Century Anglo-America"

Carol J. Gibson  
Ohio State University, History

"Young People at Work: The Legal Oversight of Orphans by  
Eighteenth-Century Massachusetts Probate Courts"

Sharon Braslaw  
Harvard University, History

"A College of Crime: Minors and the Criminal Law in Post-  
Revolutionary Connecticut"

Nancy Hathaway Steenburg  
University of Connecticut, History

Commentator:

Holly Brewer

## Saturday, October 18, 1997

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### American Legal Innovations, 1787-1850: Perspectives from Intellectual History

10:15-11:45 a.m. Center Forum

R. Kent Newmyer, Chair  
University of Connecticut, History

Panel: "The Federalist Prism: Creating Constitutional Law in  
New York"

Daniel Hulsebosch  
Harvard University, History

"Reviews of Case Reporters and the Conception of the  
Common Law in Early Nineteenth Century America"

Dennis Duffey  
Columbia University Law School and Department of History

"Legal Science and Law Reform in the Nineteenth Century"

Howard Schweber  
Cornell University, History

Commentator:

R. Kent Newmyer

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### Making Sense of the New Deal "Constitutional Revolution"

10:15-11:45 a.m. North Forum

G. Edward White, Chair  
University of Virginia School of Law

Round Table Discussants:

Barry Cushman  
St. Louis University School of Law

Neal Devins  
College of William & Mary, Marshall-Wythe School of Law

William Nelson  
New York University School of Law

**Saturday, October 18, 1997**

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Melvin Urofsky  
Virginia Commonwealth University, Center for Public Policy

Richard E. Polenberg  
Cornell University, History

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**Identifying, Rewarding, and Punishing in German Law**

10:15-11:45 a.m. Avenue 5

Carl Caldwell, Chair  
Rice University, History

Panel: "Recognition and Redistribution in Citizenship Law"

David Abraham  
University of Miami School of Law

"'Transferred to the Custody of the Hitler Youth': Hitler Youth in the Juvenile Courts of Frankfurt and Wiesbaden"

Gabriel Finder  
Susquehanna University, History

"The High Dignity of the Judicial Office: Judges, the State, and Civil Society in the Legal Reforms of Frederick the Great, 1740-1806"

Kenneth F. Ledford  
Case Western Reserve University, History

Commentator:

Carl Caldwell

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**ANNUAL LUNCHEON**

12:00 p.m. Loring Room

"The State of the Society"  
President Laura Kalman

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**A History of the California Supreme Court**

1:45-3:15 p.m. South Forum

**Saturday, October 18, 1997**

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Harry N. Scheiber, Chair  
University of California at Berkeley, School of Law

Panel: "History of the California Supreme Court, 1880-1910"

Gordon M. Bakken  
California State University at Fullerton, History

"The California Supreme Court in the Progressive Era"

Lucy E. Salyer  
University of New Hampshire, History 1911-1934

"The Achievement and Legacy of the Gibson Court, 1940-1964"

Charles McClain  
University of California at Berkeley School of Law

Commentator:

Lawrence Friedman  
Stanford Law School

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**Muder, Lynching, and Capital Punishment:  
Justice Within Pluralistic Societies**

1:45-3:15 p.m. Center Forum

Raymond T. Diamond, Chair  
Tulane University School of Law

Panel: "Murder They Wrought: Cross-Cultural Justice on the Maine Frontier"

David L. Ghere  
University of Minnesota, General College

Alvin H. Morrison  
SUNY College at Fredonia, History

"Legislation, Legal Practice, and the Death Sentence: The Illinois State Penitentiary at Joliet, 1858-1877"

Melinda D. Schlager  
Loyola University of Chicago, History

**Saturday, October 18, 1997**

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Commentator:

Raymond T. Diamond

Robert J. Cottrol

The George Washington University National Law Center

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**Conscience and Constitutionalism: Slavery  
and Property in Ante-Bellum Law and Literature**

1:45-3:15 p.m.

North Forum

Lou Falkner Williams, Chair  
Kansas State University, History

Panel: "The Worldview of Thomas Ruffin: Before State v. Mann"

Sally E. Hadden  
Florida State University, History

"Humanity, Utility and Logic in Southern Legal Thought:  
Harriet Beecher Stowe's Vision in Dred: A Tale of the Great  
Dismal Swamp"

Alfred L. Brophy  
Oklahoma City University Law School

"Sympathy for Rebels Whom They Style Brethren: The  
Second Confiscation Act and the Defense of Property"

Daniel W. Hamilton  
Harvard University, History

Commentators:

William W. Fisher, III  
Harvard Law School

Stephen Siegel  
DePaul University College of Law

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**Recasting Women's Charges of Abuse: Case Studies  
of Rape and Domestic Violence Prosecutions in  
England and South Africa**

1:45-3:15 p.m.

Avenue 5

**Saturday, October 18, 1997**

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James Oldham, Chair  
Georgetown University Law Center

Panel: "Rape and Malicious Prosecution in Eighteenth-Century  
England"

Laura Edelstein  
New York, New York

"Representations of Domestic Violence in the  
Mid-Nineteenth Century Cape Colony, South Africa"

Pamela Scully  
Kenyon College, History

Commentators:

Donna Schuele  
Law Clerk, Court of Appeals for the Ninth Circuit

James Oldham

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**Lessons of Comparative Constitutional History**

3:30-5:00 p.m.

South Forum

DeLloyd Guth, Chair  
University of Manitoba Faculty of Law

Panel: "Property in the American Constitutional Order:  
From Locke to Rehnquist"

William M. Wiecek  
Syracuse University College of Law

"Reciprocal Influences in Comparative Constitutional  
History: Lessons From the American-Australian Connection"

James A. Thomson  
Office of the Attorney General  
West Perth, Western Australia

Commentator:

David Schneiderman  
University of Alberta, Centre for Constitutional Studies



**Saturday, October 18, 1997**

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**The Law and Economic Development in Nineteenth-Century United States**

3:30-5:00 p.m.

Center Forum

Peter Karsten, Chair  
University of Pittsburgh, History

Panel: "Blood on the Tracks: Turn of the Century Streetcar Injuries, Claims, and Litigation in Alameda County, California"

Thomas D. Russell  
University of Texas, School of Law and Department of History

"How the Interstate Railroad Changed the South: The Power of Retainers, Settlements, and Arbitrations"

William G. Thomas, III  
University of Virginia, History

"Legislatures, Courts, and Nineteenth Century Negligence: Political and Constitutional Conflict over Standards of Liability"

James L. Hunt  
Mercer University School of Law

Commentators:

Rande Kostal  
University of Western Ontario Faculty of Law

Barbara Welke  
University of Oregon, History

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**Litigating Race in the United States**

3:30-5:00 p.m.

North Forum

Peggy Pascoe, Chair  
University of Oregon, History

Panel: "Litigating Color: Trials of Racial Determination in the Nineteenth-Century South"

Ariela Gross  
University of Southern California Law School

**Saturday, October 18, 1997**

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"It's All Worked By...Relations: Courtroom Dialogues About the Criteria of Indian Identity"

Alexandra Harmon  
University of Washington, American Indian Studies Center

"Protecting Whiteness: State Appeals Courts and Custody Disputes Involving Interracially Married White Women in the United States, 1945-1985"

Renee Romano  
Wesleyan University, History and African-American Studies

Commentator:

Peggy Pascoe

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**Ethnic Identity and Loyalty in Eighteenth and Nineteenth Century Legal Campaigns**

3:30-5:00 p.m.

Avenue 5

Edward Farmer, Chair  
University of Minnesota, History

Panel: "Expropriation, Miscegenation, and Feud: The Miao Substatutes and the Polyethnic Society of Eighteenth Century West Hunan China"

Donald S. Sutton  
Carnegie-Mellon University, History

"Flags and Aliens: The Commission of Inquiry into the Loyalty of the Dalmatian Gumdiggers in Northland, New Zealand, 1916"

Judith Bassett  
University of Auckland, History

Commentator:

Rebecca R. French  
University of Colorado School of Law

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## AMERICAN SOCIETY FOR LEGAL HISTORY

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Michael Griffith, Office of the Clerk, U.S. District Court, Northern  
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DeLloyd J. Guth, University of Manitoba  
Maeva Marcus, Supreme Court Historical Society  
R. Michael McReynolds, National Archives  
Rayman L. Solomon, Northwestern University  
Marsha Trimble, University of Virginia Law Library

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## Studies in Legal History

- C.H.S. Fifoot, *Frederick William Maitland: A Life*. (1971)
- Raoul Berger, *Impeachment: The Constitutional Problems* (1973).
- The Autobiographical Notes of Charles Evans Hughes*, edited by David J. Danielski and Joseph S. Tulchin. (1973)
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