Inland Northwest Philosophy Conference

PRAGMATISM, LAW, & LANGUAGE

March 23-24 | Moscow, Idaho

Keynote Speaker

ROBERT BRANDOM

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ABSTRACTS

Arden Ali (MIT): Making Legal Pragmatism Practical

ABSTRACT: Both proponents and detractors of legal pragmatism have been ready to accept that pragmatism in the law is a mostly uncontroversial and non-radical view of legal decision-making. Richard Rorty himself takes pragmatism to be "banal in its application to law" and Richard Posner is happy to say that pragmatism is "nebulous," "banal" and "modest." In this paper, I challenge this conception of legal pragmatism. I do so by first pointing out that pragmatism appears banal only insofar as we take pragmatism to be opposed to some kind of legal formalism. If we reject this view of pragmatism, as we should, then there is room for a more interesting and controversial pragmatist thesis. What might that thesis be? I propose we adopt a pragmatic attitude toward certain distinctive legal concepts, such as 'reasonableness,' 'impairment,' 'good faith consideration,' 'compelling interest' and similar notions. The non-pragmatist thinks that these concepts can be given an analysis, or description, that can be used in reasoning about cases. The chief example is a version of interpretivism, according to which legal concepts have a description which can be stated independently of just stating the cases in which the concept applies. The pragmatist, I argue, thinks that no such description can be given; we can only describe these concepts by describing cases in which the concept applies. The practical upshot is, while the interpretivist judge mainly looks to prior cases in which these concepts applied in order to deliver verdicts on current cases, the pragmatic judge does not.

Charles Barzun (Virginia Law): The Quietist Turn and Twentieth-Century Legal Thought

ABSTRACT: Recently, the philosophers Richard Rorty, Huw Price, and David Macarthur have all embraced a "quietist" position that seeks to replace metaphysical debates about whether and how the terms of a given discourse "hook up" with the world with ones that ask anthropological questions about the functions that particular terms or whole vocabularies serve in human social life. This meta-metaphysical stance may appeal to philosophical pragmatists for its capacity to combine a skepticism about the value of metaphysical debate with a confidence that talk of mental states and moral truths may continue, only now in a spirit consistent with philosophical naturalism. In this paper, I offer a critique of metaphysical quietism, though one made from a pragmatist perspective sympathetic to many of the quietists' philosophical aspirations. Its aim is to cast doubt on both the possibility and desirability of dissolving the traditional philosophical questions and replacing them with anthropological genealogies. Using an extended example from legal discourse, which has long been understood in functional terms, I show how the functional accounts envisioned by quietists generate the same kinds of metaphysical questions the quietists seek to avoid. I further argue that such questions are not only natural and perhaps inevitable but are also worth asking, and that the pragmatist should welcome the disputes they engender, not remain quiet about them.

David Boersema (Pacific): Pragmatism v. Originalism: A Mistrial

ABSTRACT: Judicial interpretation is fundamental to the nature and working of law. The doctrine of originalism holds that judicial interpretation is best informed by adhering to the original intent or understanding of the framers of the law. In this paper, I will look at arguments both for and against originalism. I will then claim that, although there are very strong pragmatist arguments against originalism (in large part because of a faulty view of language), the two are not necessarily at odds. This will not be an endorsement of originalism, but, rather, a claim that, for all its flaws, originalism is not necessarily antithetical to pragmatism.

David Boutland (Calgary): On the Limits of Free Expression: Exposing the Disanalogies between Pornography and Hate Speech Concerning Justifiable Censorship

ABSTRACT: In his book *The Hateful and the Obscene*, L.W. Sumner assesses the limits of free expression with regard to two controversial forms of expression: pornography and hate speech. In an attempt to strike a balance between two often conflicting ideals of political liberalism – equality and liberty – Sumner develops a harm-centered, evidence-based normative framework for considering challenges to controversial forms of speech and expression. Though his focus is primarily on the issue of legal pornography, Sumner draws the same conclusion regarding the legislation of both pornography and hate speech: a harm-based justification of censorship regarding either form of expression is empirically and legally unwarranted. By demonstrating why legally produced pornography should not be subject to censorship laws, and drawing the analogy between pornography and hate speech, Sumner dismisses hate speech legislation on the same grounds. My intention in this paper is to challenge Sumner's assertion that pornography should be treated as legally analogous to hate speech. By analyzing the two forms of expression together, Sumner is making the claim that we cannot consistently legalize pornography and criminalize hate speech; that we cannot legally distinguish the obscene from the hateful. I argue there are important disanalogies between pornography and hate speech, including the nature of each form of expression, the context within which the production, distribution, and consumption of each takes place, and the potential for harm each phenomenon poses. Sumner draws the analogy between legally produced pornography and hate speech in such a way that the issue of censoring the former is treated as equivalent to the latter, without recognizing some fundamental differences between the two. Indeed, far from any worry of inconsistency, I hope to demonstrate that there appears to be strong reason to allow the legalization of pornography while supporting hate speech legislation.

Tom Burke (South Carolina): Truth, Justice, and the American Pragmatist Way

ABSTRACT: Throughout his many writings Peirce occasionally presented examples of how to use the pragmatist method of defining one's terms, having insisted that pragmatism is just that: a methodological stance concerning how best to clarify one's terminology. One of the more remarkable examples is his definition of the word 'reality' with the corollary definition of the word 'truth' (Peirce 1878). I argue below that this definition also supplies for free a corollary definition of the word 'knowledge'. Moreover, the same type of definition (involving a long-run perfectionist ideal of some sort) can be given for the words 'democracy' and 'justice'.

Brian Butler (UNC Asheville): Law as a Democratic Means: The Pragmatic Jurisprudence of Democratic Experimentalism

ABSTRACT: In this paper I investigate law in relationship to Dewey's demand that within a truly democratic society the means, as well of the ends, of society need to be democratic as well. The standard conception of law is that of a system that gives final decision making and antimajoritarian authority to an unaccountable and oligarchic judiciary, a judiciary following rules set down by the "dead hand" of the past in order to rule democratic governance. This seems to reinforce the idea that democracy ultimately necessarily rests upon the use of undemocratic means. In this paper I will attempt to outline a conception of law that is democratic in both means and end, and that therefore is true to Dewey's demand. First, a conception of Deweyan democracy will be offered in combination with an ideal conception of "democratic law" found in Dewey's works. Then, an attempt to live up to the aims of a truly democratic legal procedure will be made by using Dorf and Sabel's article "A Constitution of Democratic Experimentalism." From this conception of law a decision making model for the Deweyan judge will be analyzed. Finally, the picture of jurisprudence constructed in the first part of the paper will be used to notice how much of legal philosophy is attached to a conception of law and legal reasoning that could be seen as an arbitrary product of historical contingencies and tools developed for specific times that have only limited relevance for the contemporary world. If successful, the construction of a conception of law as a democratic *means* will have both strong implications for the philosophy of law in general as well as for the possibility of actualizing a democratic form of governance as demanding as Dewey's.

Ayşegül Çakal (Boğaziçi University): From Semantics to Pragmatics: A Comparison in Philosophy of Language

ABSTRACT: Like many matters in philosophy, there is no consensus on the matter of dividing Wittgenstein's philosophy into periods. Indeed, this is a highly controversial issue. Although there are philosophers such as A. Stroll, Moyal-Sharrock and von Wright claiming that Wittgenstein's philosophy consists of three periods, the contention usually goes between the two famous main streams: On one hand, there is this view that argued, for example, by Russell, D. Pears, W. Stegmüller, J. Hartnack, implying his dual philosophy, whilst some disagreements on the manner of the division; on the other hand, there is the other view that argued by A. Kenny, K. Wutscherl, A. Hübner, J./M.B. Hinttika and C. Diamond, claiming that it is not expedient to divide his philosophy into periods. According to them, the inspiration –or the motivation- of Vienna Circle and logical positivist view, Wittgenstein's *Tractatus Logico-Philosophicus* (hereafter *TLP*), has been misunderstood, misconstrued, even not been understood. As a critical approach to this view, in this paper, I will endorse the former view by claiming his philosophy consists of two opposite periods; thereby try to show Witgenstein's evolved philosophy on the basis of the notion of 'meaning' in parallel with the two opposite approaches on meaning in analytic philosophy, i.e., *semantic approach*, which is also known as *absolute objective approach*, and *pragmatic approach*. To this aim, I will correlate the views expressed in *TLP*, as the representative of Wittgenstein's first period, with semantic approach and the views expressed in *Philosophical Investigations*, as the representative of his second period, with pragmatic approach.

Paul Davies (William and Mary): Our Evolving Concept of 'Voluntariness': A Test Case

ABSTRACT: According to the Model Penal Code, section 2.01, criminal liability accrues only for acts that are 'voluntary'. 'Voluntariness' is characterized mostly negatively as physical movements caused not by hypnosis, sleepwalking, etc. but simply by "effort" or "determination". This lack of specificity in the concept of voluntariness is unproblematic so long as citizens generally know and can identify acts due to an agent's "determination". If judges, jurors, etc. reliably succeed in distinguishing acts that belong to the agent from those that do not, then the lack of specificity may allows for flexibility of application. If, by contrast, citizens generally do not know or cannot reliably discern the difference between acts determined by the agent and acts determined by something else, then this section of the Code is defective - assuming that a law is efficacious only if we have reasonable evidence that it can be correctly applied. The main thesis of this paper is that recent findings in social psychology, cognitive neuroscience, and affective neuroscience converge upon a form of skepticism that undermines the above notion of voluntariness. The thesis is that we are faced with a skepticism concerning the role of "effort" or "determination" in one's own actions and in the actions of others. The further aim of this paper is to consider the implications of the above thesis for one strand in the pragmatic view of the law. In particular, the above skepticism may serve as a test case for pragmatic versus classical views of the law, at least with respect to the claim that legal categories (such as criminal liability) evolve and should evolve to conform to what is known about relevant agential capacities.

Sari Kisilevsky (Queens College CUNY) - Against Legal Pragmatism: Greenberg and the Priority of the Moral

ABSTRACT: I argue against Pragmatists that, at the very least, there must be a distinction between law and nonlaw, and that legal considerations must have conceptual priority in legal reasoning. Legal Pragmatists are correct to insist on the open-endedness and context-sensitivity of law and legal reasoning. They are also right to emphasize the variable and often indeterminate nature of law. However, I argue, it is a mistake to conclude from this that there are no legal rules or concepts that are specified antecedently, and that these have no bearing on particular cases. To the contrary, I argue that there must, at the very least, be a distinction between those considerations that count as legal and those that do not, and the former must have conceptual priority in legal decision-making. Holding otherwise collapses the conceptual distinction between law and non-law, and does violence to our political practices. First, there must at least be some clear legal rules, and they must be capable of exerting some force in legal decision-making. Otherwise, we could not identify the legislature, legislative acts, the judiciary, a judgment, etc. This is a serious problem. Not only does it raise conceptual issues of identifying those considerations that count as the legal ones to begin with, it also makes it difficult to analyze an act's significance in the context, since the law of a community is a key aspect of moral context. Second, the state is empowered to enforce those rules that count as law under threat of sanction. All other acts count as the arbitrary exercise of force. Although this is not the only consideration that determines whether a state is justified in acting, it is an important one, making the distinction between law and non-law fundamental to our understanding of state action. We thus have political reason to uphold this distinction as well.

Heidi Li Feldman (Georgetown Law): The Distinctiveness of Appellate Adjudication

ABSTRACT: This paper concerns two topics which, I hope to show, are vitally connected. One is the distinctive importance of appellate adjudication in the legal system of United States. The other is the workings of entangled concepts in the law. That appellate adjudication is important in some sense may seem obvious to everybody (to a few it will seem obvious that appellate adjudication is unimportant). My point will be that via appellate adjudication courts engineer entangled legal concepts, and it is this aspect of appellate adjudication that is both crucial and unique to it, at least in the U.S. legal system. Entangled concepts intertwine description and evaluation; entangled legal concepts facilitate and constrain legal reasoning and legal judgments, in ways that distinguish legal adjudication from pure politics or the implementation of public policy. In the paper itself, I demonstrate more fulsomely what it is for a legal concept to be an entangled one and how entanglement supplies guidance in adjudication. I also broach how entanglement in legal concepts and engineered entanglement have significance for legal pedagogy; appellate adjudication; the respective roles of the judiciary, the legislature, and administrative agencies; the erosion of the distinction between so-called public law and so-called private law; and our understanding of the fact/value distinction. Understanding more specifically the nature of the entanglement at work in appellate adjudication requires much closer scrutiny of appellate opinions than we usually give. In this paper, I examine carefully the background to *MacPherson v. Buick* and Justice Benjamin Cardozo's particular re-engineering of 'negligence' and 'duty' - entangled concepts belonging to the same legal taxonomy. Via this scrutiny, I demonstrate the flaws in the engineering of some concepts in the buildup to *MacPherson*, and how these flaws led to those concepts' collapse and ultimately to Cardozo's re-engineering of 'negligence' and 'duty'. I also explain why careful understanding of the engineering of entangled legal concepts can make us appreciate that even the most successful of such concepts have within in them the grounds for their own obsolescence. To show conceptual engineering of entangled concepts occurs outside the context of state common law, I also examine how the Supreme Court has engineered 'commerce', itself an entangled concept. This secondary example also clarifies the nature of entanglement and engineering it. This article concerns appellate adjudication in any area of law. I maintain that whether we are dealing with private law or public law, common law or statutory law or Constitutional law, the defining feature of appellate adjudication is its continuous engineering and reengineering of entangled legal concepts. The merger of fact and value in these concepts explains both the fertility of appellate adjudication and the constraints judges work with when they work with legal concepts that entangle fact and value.

Barbara Baum Levenbook: Soames, Legislative Intent, and the Meaning of a Statute

ABSTRACT: A familiar jurisprudential view is that statutes have the content and apply the way the legislature intended. Scott Soames has challenged this view in one form, while giving credence to another. Although the burden of his most recently published paper is that legislative intention in the form of legislative purpose does not determine statutory content (antecedent to authoritative interpretation of them), he repeats his earlier claim that there are some legislative intentions that do. I focus on this latter claim. I maintain that Soames inflates the role of the legislative intentions and appears to ignore a source of pragmatic information that does the bulk of the work in determining the practically-enhanced linguistic content of

(*Levenbook abstract continued*) statutes. I draw on an account I developed elsewhere of what I labeled then "the applicationmeaning of statutes." This account posits the existence of social practices of salient array-identification in which speakers of a common language participate. These practices assign arrays of act-tokens, both actual and hypothetical, to a statute that directs activity; they identify a part of an array as salient for that directive in a social context. This mechanism provides the pragmatic enhancement that helps to determine what a statute conveys and to what the legislature committed itself in adopting it. The upshot is that the linguistic content of a statute is not, as Soames claims, "what is said in enacting it." The role of the legislative intentions in determining the (pragmatically-enhanced) linguistic content of statutes is more modest than he believes. Further, his emphasis on the context of the issuance of the statute as the sole or even chief point at which linguistic content is determined is misplaced. Where Soames is originalist, my view is not. I conclude with some reasons to prefer my account of what the legislature conveys by a statute.

Katherine Logan (Oregon): Joan Williams, Pragmatism, and Changing the Terms of Debate in Work-Family Conflict

ABSTRACT: Joan Williams needs to be given proper consideration for the ways in which she has advanced pragmatist legal theory in her scholarship on work-family conflict. It is her attention to work-family conflict that demonstrates the saliency and potency of a pragmatist approach to contemporary law and policy matters. Furthermore, her work in this area advances a novel articulation of pragmatist feminism, what she calls "reconstructive feminism," that is further evidence that a feminist pragmatist approach to specific contemporary law and policy matters is one that can effectively dissolve some of the familiar conflicts in feminist theorizing—the sameness versus difference debate that continues to recirculate around issues concerning motherhood, for example. It is this feminist pragmatism that Williams brings to bear on the issue of work-family conflict, first in *Unbending Gender* (2000) and most recently in *Reshaping the Work-Family Debate* (2010). In both volumes, Williams employs her pragmatist approach to the difference-sameness debate with respect to women's employment: she points out that women face a conundrum in which the workplace is organized around norms that fit a 1960s model of the family with a breadwinning husband/father and a stay-at-home wife/mother. By pragmatically refocusing the debate on labor practices, Williams manages to steer clear of seemingly intractable debates within feminist considerations of work-family conflict. This also allows Williams to consider race and class and their importance to the difficulty that is faced when attempting to reshape labor practices in the United States. I argue that Williams' work on this area ought to be taken as an exemplar for a pragmatic orientation toward law and policy conflicts. Furthermore, her "reconstructive feminism" ought to be taken as a significant contribution to the development of a distinctly pragmatist feminism, one that is ideally suited for producing effective analyses of contemporary women's problems.

Jessica Murphy (McMaster): Legal Obligation and Human Action

ABSTRACT: I argue that Hart, and, more recently, Stephen Perry and Scott Shapiro, misconstrue the nature and depth of the disagreement between sanction-based and rule-based theories of law. In a recent exchange, Perry and Shapiro have offered competing interpretations of Hart's rejection of the command theory which, despite significant points of disagreement, share the view that his move to a rule-based theory of law did not represent a significant methodological break within positivism. On this characterization of the debate, sanction-based theories of law and legal obligation are hermeneutic theories of law that fail for their lack of attention to our ordinary normative discourse; insofar as the prudential perspective is one type of practical attitude motivating participation in the legal system, sanction-based accounts that define legal obligation in terms of the power of the state to enforce sanctions are "every bit as hermeneutic as Hart's." I argue that we fail to appreciate the depth of the disagreement between these two approaches if we see the conflict as simply one between competing substantive theories on the same methodological plane. What is ultimately at stake are two competing conceptions of the human being and of human action which place different requirements on explanation, in the sense of placing limitations on the types of entities and relations to which explanatory statements can satisfactorily refer. Implicit in Hart's rejection of sanction-based theories in favour of a rule-based one is a move from an image of people as passive, predictable, and controllable to an image of people as active, meaning-giving, and free. These different conceptions support different methodologies for the explanation of human behaviour, erecting different criteria of success between the two accounts. With the possibilities for comparative evaluation limited by competing and incommensurable methodologies, the question becomes a pragmatic one of political or moral fruitfulness.

Govind Persad (Stanford): Law, Public Reason, and Pragmatist Truth

ABSTRACT: In this paper, I will argue that the theory of truth we adopt for legal justifications must be consistent with the theory of truth we adopt for political justifications more generally, because legal claims aim to legitimately bind members of society. I then argue that a pragmatist theory of truth, appropriately conceived, can be appropriate as a theory of truth both for political and legal justification. Recently, Joshua Cohen has defended a political conception of truth that he believes is compatible with the Rawlsian idea of public justification. Such a political conception of truth eschews tendentious metaphysical claims about the nature of truth. However, it does maintain several "commonplace" beliefs about truth, such as: (1) truth is the norm governing beliefs, (2) truths present things as they are, (3) truth differs from justification; and (4) truth is important. While Cohen does not explicitly discuss law, I believe any account of truth in public justification must determine our account of truth in law, because laws require publicly comprehensible justifications. If my extension of Cohen's argument succeeds, it undermines the argument that legal claims must be evaluated according to a single, often contentious, theory of truth. I go on to argue that a pragmatist theory of truth is compatible with the "commonplaces" that Cohen sees as minimal conditions for truth. It effectively satisfies the desideratum that "truth is important," and can meet the challenge of explaining why truth presents things as they are, by explaining that truth presents things as they are *to us*. While the pragmatist theory of truth is not the only theory compatible with a political conception of truth, its compatibility with a political conception of truth assures it a place as a reasonable conception of truth in politics and in law.

David Plunkett (Dartmouth) and Timothy Sundell (Kentucky): The Pragmatics of Legal Disagreements

ABSTRACT: In *Law's Empire*, Ronald Dworkin famously criticizes the thesis that the meaning of the term "law" consists in a fixed set of extension-determining criteria. Dworkin argues that such a view is unable to explain a specific type of seemingly prevalent disagreement within legal practice, namely disagreements where the fundamental criteria for something's being a law are themselves in dispute. In order to explain such disagreements, Dworkin argues that the term "law" should be understood to express what he calls an "interpretative concept" – which, roughly, he understands as a concept whose correct application depends not on any fixed criteria, but rather on the normative facts justifying the set of practices in which that concept is used. We argue that Dworkin's argument rests on a misunderstanding about the nature of disagreement. Disagreement is not, we argue, a unified phenomenon. Varieties of disagreement occur along a range of communicative dimensions, both semantic and pragmatic. We focus especially on what we call "metalinguistic disagreement" or disagreements over the usage of individual linguistic items. Metalinguistic disagreements occur precisely when speakers do *not* agree on shared criteria for the words in question. Rather than arguing for the truth or falsity of a literally expressed proposition, speakers advocate for their preferred concept in a largely tacit negotiation over the most appropriate usage of the term, given the circumstances. Metalinguistic disagreements are, we argue, common; they license ordinary linguistic denial; they "feel substantive"; and indeed they can carry great practical significance. We agree with Dworkin that some disagreements within legal practice are best analyzed, in part, as disputes about the fundamental criteria for what counts as law. However, against Dworkin, we submit that the best explanation of these disagreements does not require the introduction of a novel (and controversial) kind of concept. A more nuanced analysis of the relevant linguistic facts makes room for a better alternative, one that more adequately captures the pragmatic features of the relevant discourse, is equally sensitive to the relationship between legal practices and legal language, draws only on existing theories of concepts, and works entirely within a mainstream descriptivist framework for linguistic semantics.

Jack Samuel (UW Milwaukee): The Myth of Given Reasons: A Quasi-Sellarsian Critique of Hierarchical Voluntarism

ABSTRACT: In *Voluntarist Reasons and the Sources of Normativity*, Ruth Chang argues for a view about rational decision-making called "hierarchical voluntarism". Her view is motivated by a commitment to the idea that there is something right about voluntarism – that the source of normativity lies, "in our active attitudes of willing or reflective endorsement" – but that we do not create *all* of the normativity that is binding on us. Chang is responding to two puzzles about decision-making: one concerning how it is that we can make rationally-determined decisions in cases where our reasons have "run out", and one concerning how we can define ourselves as unique rational agents while acting as we are rationally required to. She argues that our first consideration is of the reasons given to us, but when these reasons fail to settle the matter we appeal to our autonomous ability to create normativity for ourselves. I argue that though Chang's account partially captures the way in which decision making is complicated, and influenced by seemingly different kinds of normativity, the framework of terms and distinctions she proposes – and the characterization of the process of making decisions which it entails – does not accurately represent decision making. I argue that the 'givenness' of Chang's "given

(*Samuel abstract continued*) reasons", is subject to Wilfrid Sellars' critique of "The Myth of the Given" in EPM, i.e. that they cannot ground authority in the way that they purport to, which entails that a more nuanced understanding of decision making will appreciate the role that agency plays in every stage of the process. I suggest some ways that a Sellarsian recasting of concepts and terms could be more friendly to an intuitive picture of decision making, and then describe the process as beginning and ending within the "space of reasons".

Daniele Santoro (Luiss University): Legal Responsibility: A Pragmatic Perspective

ABSTRACT: The concept of causality plays a fundamental role in the law as it constitutes a necessary element in the attribution of responsibility. Counterfactual analysis is standardly employed in this context to single out the causal import on verdicts of criminal liability. But, upon closer analysis, when counterfactuals are taken to be relations among events, they fall short of explaining a wide range of cases (such as fail-safe, over-determination, and joint causation), and to take take into account the normative dimension of responsibility attribution. A proper role for counterfactuals should not be sought in modeling the causal element of responsibility, but in guiding legal judgments in ascertaining the responsibility of agents in response to demands of justification for their conduct. The paper explores this hypothesis from an inferential-pragmatic point of view. I will develop this point by looking at two features of legal responsibility. First, I will defend the claim that taking and attributing responsibility for an action are attitudes irreducible to the mental states underlying the mens rea. Rather, they presuppose a higher-level capacity of being "responsive to reasons" within a whole practice of "giving and asking for reasons" such that of courts of law. Within this context, imputations of responsibility, far from being judgments about what the agent did, refer to what the agent should or should not have done, and to the different sorts of commitments and entitlements imposed on the conduct. Second, a conception of responsibility as responsiveness to reasons would not be intelligible if we dispelled counterfactuals altogether, since they are still required to represent the modal reasoning that grounds legal verdicts. Cases such as "Could the offender have realized that by doing ϕ he would have committed a crime?" invoke crucial distinctions within the mens rea, as well as in the doctrine of excuses, where the issue at stake is whether the offender was able to come up with a reason to act differently from how he actually did. Cases of this sort include mental insanity, where the incapacity of forming the necessary intentions is usually sufficient for the exemption from liability, or the reckless behavior, which is more culpable than mere negligence because the offender consciously discards the reasons to avoid a dangerous conduct.

Cosim Sayid (CUNY Graduate Center)

ABSTRACT: Brandom (2011: 199) speculated that jurisprudential concepts can be fruitfully explicated and analyzed using the pragmatic meta-conceptual apparatus deployed in Wilson (2006). If one carefully follows this approach, she adduces significant evidence militating against (Gardner (2005)) the corrective justice view of private law defended by Coleman (1992) and Weinrib (1995), at least as respects the meaning of the concept TORT, though there is no reason to suppose, a priori, that a similar result would not obtain for CONTRACT and other concepts in the realm of private law.

Stefan Sciaraffa (McMaster): Anti-Positivism and the Quasi-Conceptual Nature of the Rule of Recognition

ABSTRACT: According to Hart, a rule of recognition exists in a legal system insofar as the system's officials sufficiently converge in their respective conceptions of the system's criteria of legal validity. I accept this claim, but I challenge the further claim that the laws of any legal system are determined by its officials' convergent conception of the system's criteria of legal validity. To make this argument, I draw an analogy between the rule of recognition and certain kinds of concepts. I argue that natural kind, essentially contested, thick normative and (some) hermeneutic concepts share the following structure: The concept's users converge to some degree in their respective conceptions of certain superficial features of the concept and a threshold level of such convergence is an existence condition of the concept. However, users may share the concept despite disagreement with respect to such superficial features so long as they converge in their views of the concept's extension at some higher level of abstraction. For example, users of a natural kind concept who disagree about some of the superficial properties of the concept may nonetheless share the concept so long as they convergently hold that the superficial characteristics commonly attributed to the concept are causally connected and unified by an underlying nature that is the ultimate arbiter of the concept's extension. I argue that the rule of recognition is similarly structured. Though a threshold level of convergence with respect to a system's criteria of legal validity is an existence condition of the rule of recognition, this convergence is not the ultimate arbiter of what norms are law within the system; rather, the underlying values of the convergently accepted criteria of legal validity are the ultimate determinant of what counts as a law of the relevant legal system.

Albert Spencer (Portland State) and Tyler Olson (Portland State): Occupy Pragmatism: A Reconstruction of America's Political Economy

ABSTRACT: In "Looking Backwards from the Year 2096" Richard Rorty prophesied that if the income inequality of the late 20th Century continued into the 21st Century, then Americans would inevitably take to the streets. Since the fall of 2011, thousands have begun demonstrating as part of the growing Occupy movements. While several goals motivate the Occupy movement, this paper will focus on the issue of increasing income inequality within the US's political economy as explained by economist Nathan J. Kelly. It will claim that the Occupy movement is a legitimate response to the failure of the US political economy to honor John Rawls' difference principle. It will then relate the Occupy movement to American Pragmatism by comparing the origin of the movement to Robert Westbrook's account of the emergence of American pragmatism in response to the economic inequality of the Gilded Age and suggest an alliance with Judith Green's *radical pragmatism* which provides alternative indicators of human welfare based on "cross culturally shared human needs" as opposed to "economistic aggregate indicators," like GDP. In conclusion, the Occupy movement could initiate a profound shift from representational democracy to participatory democracy within the 21st Century US political economy, but only if it shifts from the anarchist political philosophy of David Graeber to an endorsement of pragmatist deliberative democracy and transitions from *strategic nonviolence* to *principled nonviolence* through the use of more inclusive language, explicit goals, and identifiable leadership. Ultimately, the difference principle reminds us that democracies regularly experience crises of political and economic inequality. Therefore, the social power of the Occupy movement can only be strengthened by claiming continuity with the efforts of past generations and learning from their struggles. Pragmatism should be occupied.

Robert Talisse (Vanderbilt): Pragmatism, Democracy, and Justice

ABSTRACT: This paper was stimulated by a few surprising facts about John Dewey's political writings. Although there is ample discussion of freedom, community, individualism, liberalism, and democracy in the corpus, there is almost no mention of justice. Moreover, what Dewey does say about justice tends to be platitudinous and vague. Indeed, the concepts and concerns which drive familiar disputes about justice seem invisible to Dewey. My aim in the paper is to make some progress in thinking through the question of what pragmatists-- particularly those who incline towards Deweyan pragmatism-- should think about justice. My conclusion is that pragmatists should embrace John Rawls's two principles of justice, as well as the kind of justificatory device he employs in defending them.

Lynne Tirrell (U Mass Boston): Studying Genocide: A Pragmatist Approach to Action-Engendering Discourse

ABSTRACT: Drawing on my recent work using inferential role semantics and elements of speech act theory to analyze the role of derogatory terms (a.k.a. 'hate speech', or 'slurs') in the 1994 genocide of the Tutsi in Rwanda, as well as the role of certain kinds of reparative speech acts in post-genocide Rwanda, I will highlight the pragmatist commitments that inform the methods and goals of this practical analysis of real world events. In "Genocidal Language Games", I use conceptual tools from Wittgenstein, Sellars, Lewis, and Brandom, with a nod to Searle's concept of status-functions, to develop an analysis that helps to make sense of the view that a steady, deep, and widespread derogation of a group can at least partially constitute genocide, not only be an antecedent to it. In this talk, I will sketch some of the tools and lessons of "Genocidal Language Games" with an eye to highlighting their pragmatist roots and the directions to which such real-world investigations lead. The action-engendering power of discursive practice is writ large in the economic, social, and political events from 1988-1994 in Rwanda, culminating in the murders of 800,000 to 1 million Tutsi and moderate Hutus who defended them. Widespread use of terms like '*inyenzi*' (cockroach) and '*inzoka*' (snake) helped to reshape the social landscape of Rwanda, ultimately engendering heinous actions quite closely tied to the inferential roles of these terms. Understanding the various and yet connected speech acts in which these and related terms were used – acts that grew in both extent and exposure as Hutu extremism took hold --helps to illuminate the important ways that power is enacted through discourse, how speech acts can prepare the way for physical and material acts, and how speech generates permissions for actions hitherto uncountenanced, even enabling people to violate deeply entrenched taboos. Studying the role of speech acts and linguistic practices in laying the groundwork of genocide illuminates how patterns become practices, and how discursive practices engender non-linguistic behaviors.

Jonathan Trejo-Mathys (Boston College): Discourse, Normativity and Law: Kantian Pragmatism at the Bar

ABSTRACT: This paper explores the advantages for legal theory of a 'Kantian pragmatist' approach to meaning and normativity pioneered by Jürgen Habermas and Robert Brandom. While Brandom consistently draws on an analogy between the sociohistorical nature of discursive rationality and common law jurisprudence, Habermas explicitly extends this theoretical approach to include a theory of modern positive law and constitutional democracy. I begin by reflecting on the Brandom-Habermas debate and providing an assessment of the strengths and weaknesses of their respective approaches to discourse and rationality in light of the purposes of legal theory (and the closely related domain of political theory). On this basis, I give a characterization of a 'Kantian pragmatist' version of legal theory that aims to preserve the strengths of both. I then turn in the final two sections to legal theory proper to argue for the merits of the characterized approach by showing its superiority to two key rivals with respect to the light it sheds on normative discourse in general and the normativity of legal discourse in particular. In the second section, I argue for its superiority to legal realism, whether naturalist legal realisms like that of Leiter or anti-Kantian pragmatist legal realisms like that of Posner, by exploiting Brandom's arguments against the feasibility of a naturalistic reduction of our normative assessments of claims to knowledge and justification (in this context claims to legal correctness) to assessments of whether they have a suitable connection to empirically reliable mechanisms. In the third and last section, drawing on Habermas and work by Robert Alexy and Klaus Günther, I argue that with respect to the task of explaining both the importance of social facts *in* law as well as the (role of the) normative authority *of* law it is at least as good as and probably more promising than the sophisticated reformulations of legal positivism by Raz and others.

Seth Vannatta (Morgan State): Pragmatism without the "Fighting Tag": Functional Realism in Holmes's Jurisprudence

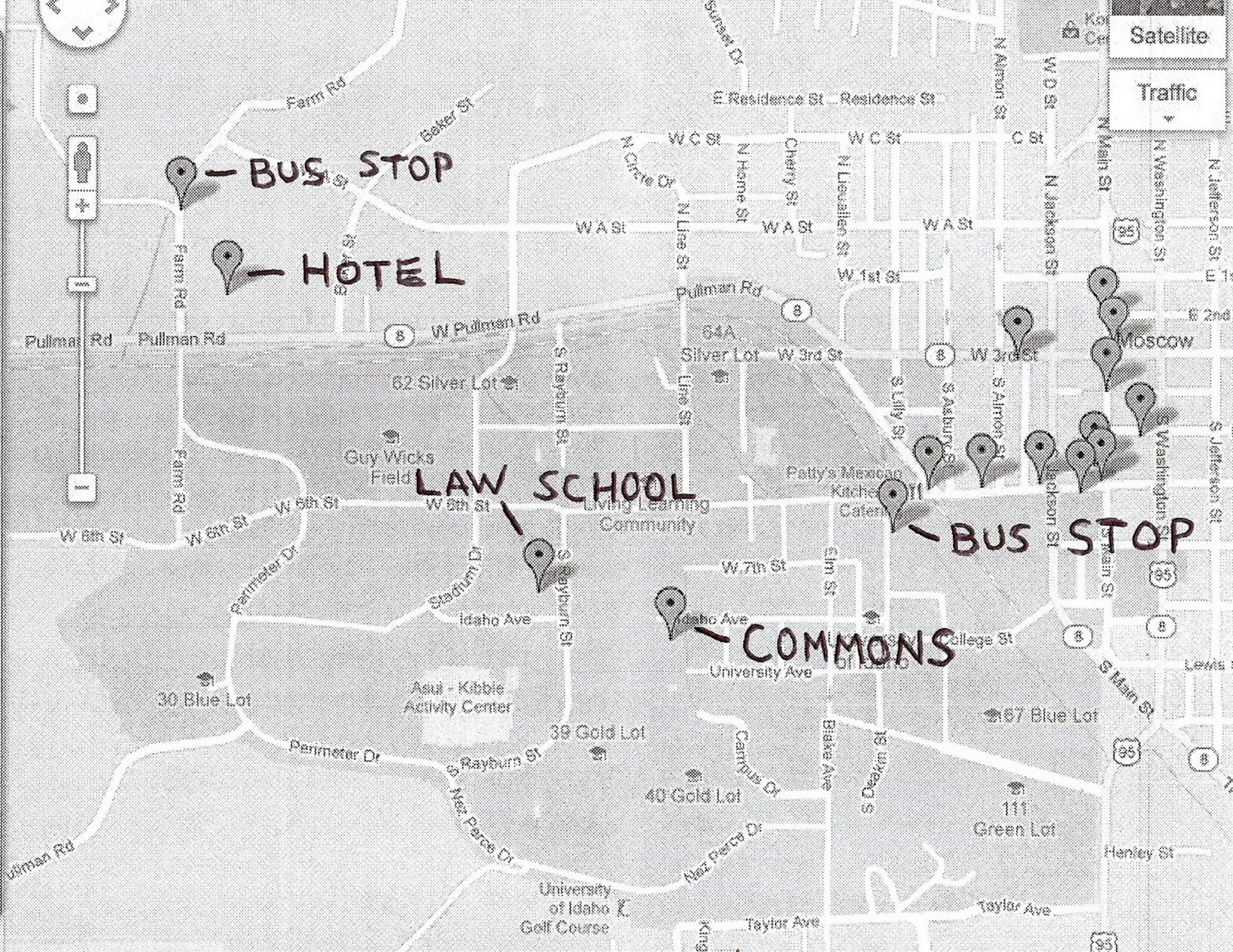
ABSTRACT: In this paper I discuss the virtues and vices of the label of "pragmatism" as a description of a legal philosophy. In an effort to distance my version (and others' versions) of legal pragmatism from Judge Richard Posner's, I hypothesize that there is value in dropping the label and replacing it, in certain circumstances with "functional realism." Both Posner and I see our versions of legal pragmatism initiating with Justice Holmes's jurisprudence, and here the difficulty with the label begins. In a response to Harold Laski's noting of Holmes's "implicit pragmatism," Holmes wrote, "I should drop pragmatic […] because it diminishes the effect or checks the assent you seek from a reader, if you necessarily put a fighting tag on your thoughts" (Sep. 15, 1916). I suspect this "fighting tag" has its virtues in certain contexts; however, I will argue that Holmes's position on values, ideals, norms, and legal principles can be characterized as "functional realism." Holmes held that the reality and meaning of values and ideals are found in their functional effects and that the norms, principles, standards, and rules, which guide the process of judicial inquiry, are generated by the facts of the case, as opposed to being *a priori* principles (versus natural law theory) and as opposed to lacking any reality at all, (versus nominalism). This element of Holmes's "implicit pragmatism," without the "fighting tag," will serve as a premise in a larger effort to rethink and reconstruct Posner's version of legal pragmatism. Seeing the realism of C.S. Peirce at work in Holmes's philosophy undermines Posner's central premise, that legal pragmatism is independent of philosophical pragmatism. I argue that Holmes resides at the intersection of the legal and the philosophical pragmatisms, where Posner thinks these run parallel and never intersect.

Ron Wilburn (UNLV): Rorty, Davidson and Pragmatic Value

ABSTRACT: Richard Rorty is famous for his critiques of the notions of truth and "objective" reality. Talk of ''truth,'' he tells us, is part of an "obsolete vocabulary" we should "sluff off" in an effort to make ourselves "more sensitive to the life about us." Rather than asking whether our claims "correspond to" some nonhuman, eternal entity, we should ask about their pragmatic utility. In this paper I question the tenability of this account. To so judge beliefs pragmatically successful requires non truth-dependent criteria of pragmatic success. For Rorty, these criteria include predictive efficacy. But predictive efficacy itself, I argue, does not wear its usefulness on its face. What is needed is an account of the role that predictive efficacy serves in the promotion of practices which we invest with intrinsic worth. For Rorty, these practices are best explicated by Davidson, for whom predictive accuracy lends stability to the perceived world, where this stability is itself of value for its capacity to allow linguistic agents to interact in such a way as to acquire thought and language. Such an account falls directly out of Davidson's efforts to turn the traditional Cartesian picture of inference from inner to outer domains on its head. On Davidson's anti private-language telling, the "objects or events" picked out by a speaker's sentences originally become determinate only through acts of ''triangulation.'' These are the essentially public and cooperative performances that are required for the references of one's utterances to become clear, even to oneself. Thus, on the story I tell, realistic commitment to the objects of our common sense world view must be in place from the outset if the pragmatic value of predictive efficacy is to even be apparent. Rorty's pragmatism fails to be a self-supporting doctrine.

Benjamin Zipursky (Fordham Law): The Paradox of Pragmatism in Jurisprudence

ABSTRACT: As a school of philosophical thought, pragmatism emphasizes that practicality and engagement with the bread-and-butter activities and practices of life cut very deeply into the core of important issues in metaphysics and epistemology. Pragmatists understand the practical aspects of speech and thought as prior to their putative representational capacities, rather than vice versa. Because law is a practical enterprise, it is unsurprising that pragmatism has caught fire in jurisprudence. Under the banner of "legal pragmatism" one finds sophisticated versions of the thesis that judges, lawyers, and academics unpacking legal meaning should recognize that legal words and concepts are instruments for the realization of a variety of social goods, and one finds the argument that philosophical pragmatism warrants a practical turn in legal theory. This paper, tentatively titled, "The Paradox of Pragmatism in Jurisprudence," suggests a contrary conclusion: that philosophical pragmatism, properly understood, counsels a rejection of instrumentalist thinking in legal interpretation. It justifies, instead, a return to more conceptualistic approaches to interpretation. The principal reason is that instrumentalism in law has been driven to a great extent by highly reductionistic conceptions of legal and moral meaning, which philosophical pragmatism decisively rejects. With the defeat of reductionism comes an openness to a far more nuanced conception of the nature of interpretation and normative reasoning more generally – one that takes the content and structure of legal concepts seriously. The paper concludes by softening the paradox of pragmatism in jurisprudence; it does so by explaining why some forms of pragmatic thinking remain critically important in law, and entirely compatible with certain aspects of conceptualism.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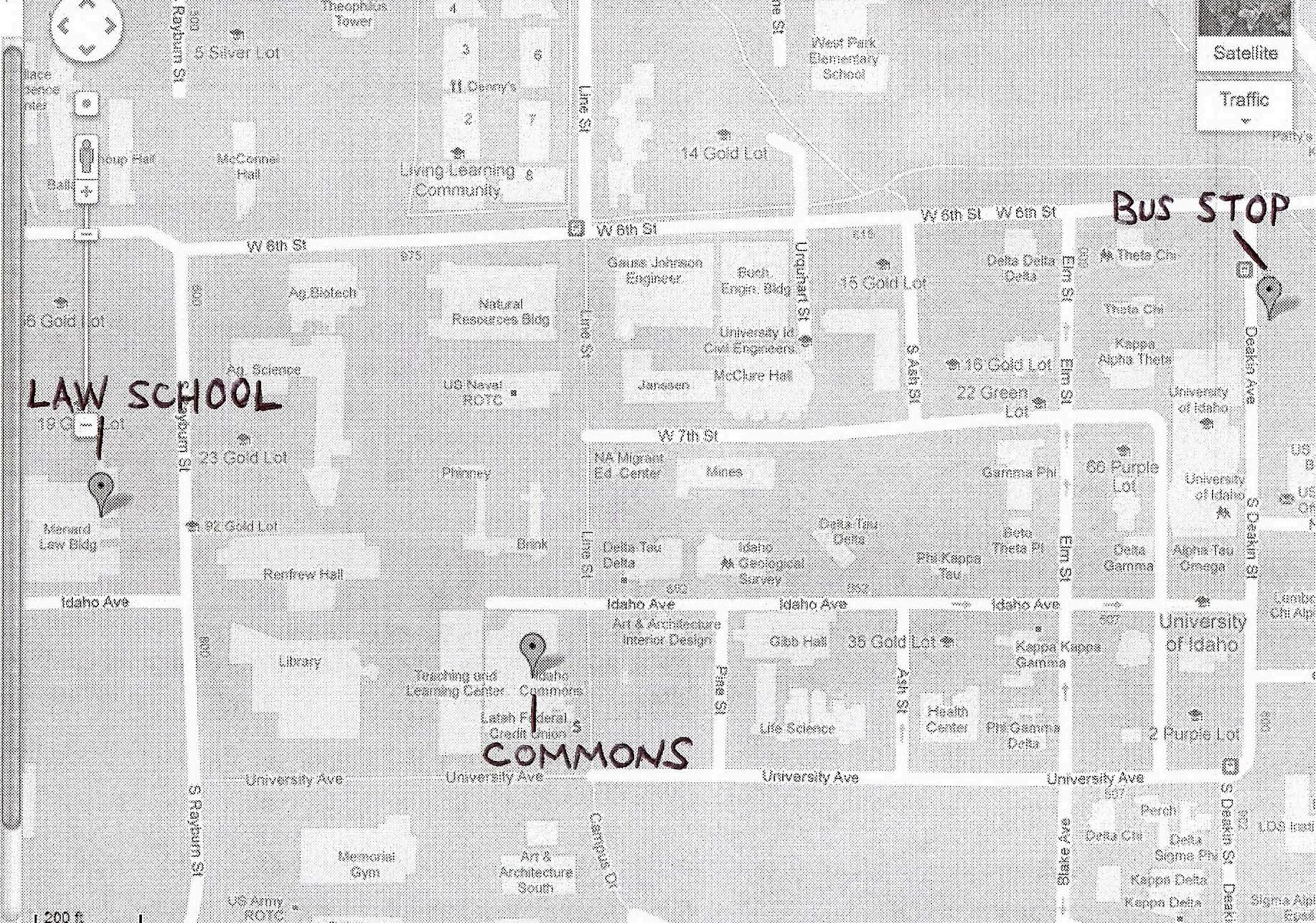
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Bernard Law Bldg
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Idaho Commons
Latah Federal Credit Union
Art & Architecture Interior Design
Gibb Hall
Life Science
Health Center
Art & Architecture South
Memorial Gym
US Army ROTC
Idaho Geological Survey
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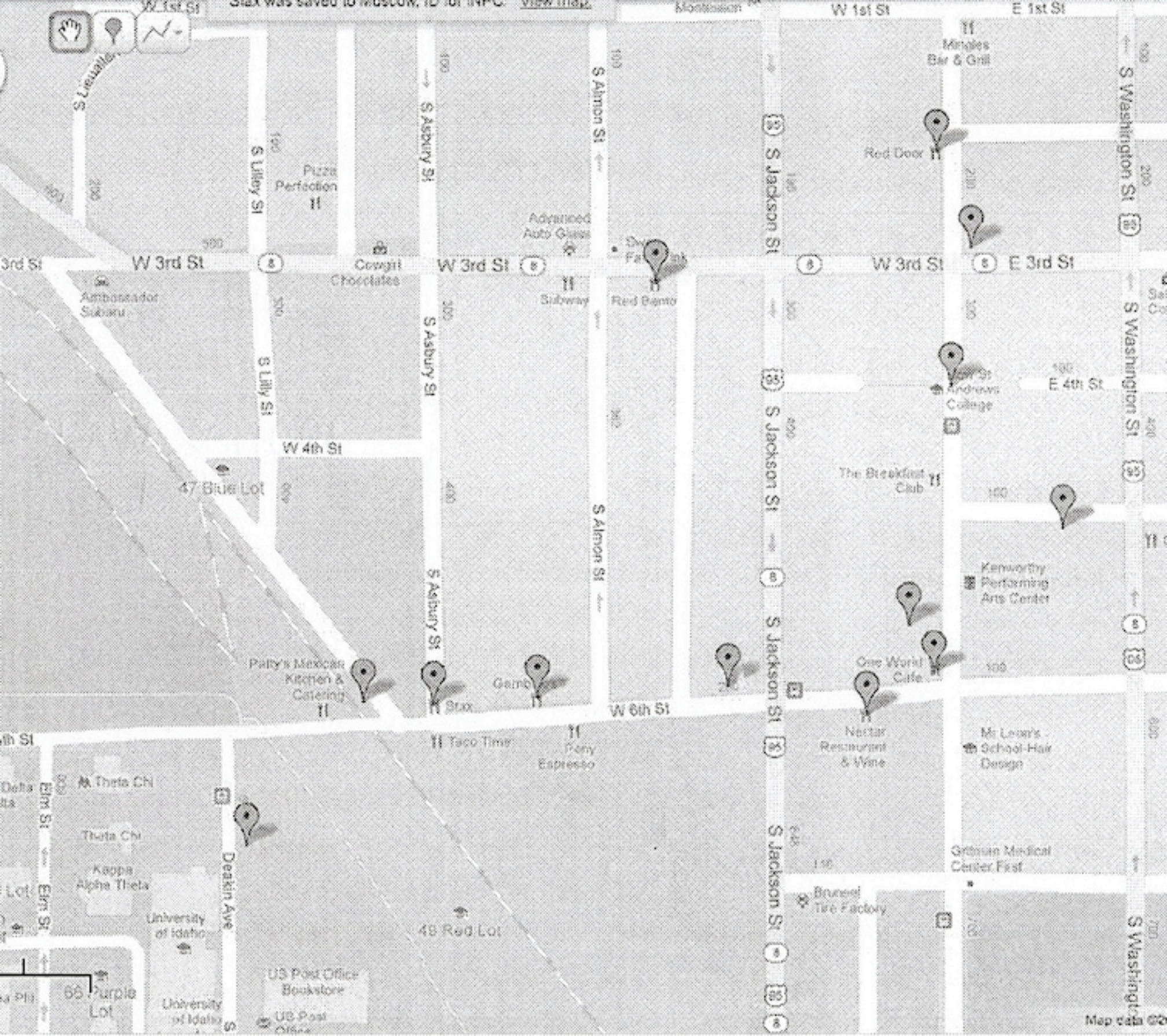
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