



*On behalf of the faculty of  
the SUNY Buffalo Law School,  
The State University of New York,  
Dean Makau Mutua is pleased to  
announce the appointment of  
five new faculty members.*

*We introduce them to you  
with brief profiles,  
and they introduce themselves*

# IN THEIR OWN WORDS



**Anya Bernstein**  
*Associate Professor*



**Michael Boucai**  
*Associate Professor*



**Luis E. Chiesa**  
*Professor*



**Meredith Kolsky Lewis**  
*Associate Professor*



**Anjana Malhotra**  
*Associate Professor*

## Anya Bernstein

### Associate Professor

Born in Russia, Associate Professor Anya Bernstein immigrated to the United States as a child and learned English as a kindergartner. While majoring in comparative religions at Columbia College, she became interested in East Asia and spent a year at the Johns Hopkins-Nanjing University Center in China after graduation. Pursuing the interest further, she earned a Ph.D. in anthropology from the University of Chicago, with a dissertation focused on Taiwan. Her research with Taiwanese government administrators inspired her interest in how law works – or fails to work – to legitimate political action in a democracy. Following graduate school, she received her J.D. from Yale Law School and then clerked for Judge Guido Calabresi on the Second Circuit Court of Appeals. She then spent two years as a Bigelow Fellow at the University of Chicago Law School before joining the SUNY Buffalo Law faculty. Drawing on the qualitative empirical methodologies of anthropology, legal doctrinal analysis, social theory and political philosophy, Bernstein aims to present a three-dimensional account that synthesizes law on the books and law in life.

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Bernstein's scholarship examines legitimation in democratic polities and the mutual construction of governments and publics. Her work has been published in the *Indiana Law Review*, *PoLAR: Political & Legal Anthropology Review* and *Law & Social Inquiry*.

The question of how governments and publics legitimate their political action to one another animates my research, which is informed by the qualitative empirical methodologies of anthropology, in which I received my doctorate before pursuing a J.D.

My dissertation examined political legitimation in a new democracy. I asked how urban government administrators and community activists in Taipei, Taiwan, justified their actions and demands to the other. After a history of imperial, colonial and martial rule, Taiwan has developed a functioning, even vibrant, representative democracy. Yet, as my research shows, that democracy differs dramatically from that of much democratic theory, which asks for hallmarks like elections centered on abstract issues rather than personal connections, and a public sphere in which participants shed their biographic particularities at the door to engage in rational debate. While few may claim that this is how democratic action really happens in the United States, our endless public lament for the demise of rationality indicates that many of us still think that it ought to.

In contrast, I found that virtually no one in Taiwan holds this ideal of abstracted, impersonal



rationality. Far from justifying their demands through reference to democratic process or legal strictures, the people I worked with relied on social values like biographies, relationships and community belonging to persuade one another to accept the results of democratic processes and to follow laws. To many of my interlocutors, the abstracted rationality of democratic theory augured chaos, inviting people to

violate widespread social norms and deeply held values of mutual assistance and community.

As I argue in *The Social Life of Regulation in Taipei City Hall: The Role of Legality in the Administrative Bureaucracy*, 33 *Law & Social Inquiry* 925 (2008), understanding how – and whether – law relates to legitimacy is an empirical question that requires paying attention to local tropes of what constitutes authority worthy of obedience and petition worthy of response. More generally, existing value systems will determine how any given democracy works in practice – an important insight in efforts to instill democracy in new places.

In Taiwan, a lawsuit usually marks an utter breakdown in political skill. In the United States, where my more recent work has turned, impact litigation and ordinary tort suits have made courts one important site for political action. *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors*, 45 *Indiana Law Review* 719 (2012), connects the doctrine governing individuals' ability to sue federal employees for violating their constitutional rights with government-internal concerns about the separation of powers.

Figuring the state-society relationship in terms of the relationships among government branches, the article both explains a seemingly incoherent doctrinal development and situates the United States' vaunted emphasis on individual rights within a broader, and more limiting, governmental framework.

Another recent article, *The Hidden Costs of Terrorist Watch Lists*, 61 *Buffalo Law Review* 461 (2013), looks at how the state constructs the public it interacts with in the particularly fraught arena of national security. Reconceptualizing watch listing as a kind of political action that constructs – and distorts – the relationship between government and the governed, I show how the flood of information that has become available to governments threatens to obscure the continuing need for human evaluation and decision-making, and suggest ways to control the process to be both more effective and more accountable, while remaining largely secret. I plan to keep exploring issues of legitimation and public-private co-constitution through upcoming projects examining how legal doctrine figures the changing boundaries of government both here and in East Asia.

### Anya Bernstein

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### Michael Boucai

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### Luis E. Chiesa

*Chiesa focuses on substantive criminal law, criminal procedure, comparative law, and animal cruelty laws.*

### Meredith Kolsky Lewis

*Lewis explores dispute settlement, free trade agreements, international economic law, international trade law and World Trade Organization law.*

### Anjana Malhotra

*Malhotra examines issues in immigration law, constitutional law, and international human rights, with a focus on substantive theories of equality and access to justice.*



## Michael Boucai

### Associate Professor

Associate Professor Michael Boucai is a graduate of Yale College, where he majored in history and was editor in chief of the *Yale Journal of Human Rights*. He earned a J.D. from Georgetown and a master's degree in history from Cambridge. After clerking in Miami for the Hon. Rosemary Barkett on the Eleventh Circuit and practicing commercial and bankruptcy litigation in New York City, Boucai was a teaching fellow in the Williams Institute at UCLA School of Law.

At SUNY Buffalo, Boucai teaches Criminal Law, Family Law, and Law & Sexuality. His scholarship tends to explore intersections between these fields, often from a historical perspective. Boucai is currently at work on an article about the first same-sex marriage cases of the early 1970s, and he continues longstanding projects on Anita Bryant's "Save Our Children" campaign of 1977 and the complicated legacy of Oscar Wilde and his trials.

Boucai's most recent article, "Sexual Liberty and Same-Sex Marriage: An Argument From Bisexuality," was published in the Spring 2012 issue of the *San Diego Law Review*. His other writings have appeared in the *University of Miami Law Review*, the *National Black Law Journal*, the *Georgetown Journal of Gender and the Law*, and the *Journal of Social History*.

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Boucai's scholarship focuses on the regulation of sexuality and intimate relationships. He often works from a historical perspective, for example studying the first same-sex marriage cases of the early 1970s, Anita Bryant's pivotal 1977 campaign against gay rights, and the Oscar Wilde trials.

I am broadly interested in the legal regulation of sexuality and intimate relationships. How does American law favor, tolerate or disfavor particular expressions of sexuality and intimacy, and how does this treatment relate to moral beliefs, social practices and political ideas? I approach these questions informed and often inspired by work in history, literature and queer theory.

No book has more palpably influenced my scholarship than Eve Kosofsky Sedgwick's groundbreaking *Epistemology of the Closet* (1990). My MPhil thesis, for example, sought to define in historical and phenomenological terms the "closet" that Sedgwick's *Epistemology* dated to the late 19th century. Focused largely on Oscar Wilde's 1895 trials for gross indecency, my Cambridge thesis has become the basis of an ongoing book project, *Oscar Wilde, Esq.*, which casts Wilde's imprisonment in Reading Gaol as the culmination of a life lived in both contempt and contemplation of the law.

My most recent article, "Sexual Liberty and Same-Sex Marriage: An Argument From Bisexuality," is equally indebted to Sedgwick's work – in particular, to her "universalizing" appreciation of the difference between liberating ho-



mosexuals and liberating homosexuality. Departing from familiar claims for same-sex marriage based on equal protection and the supposedly fundamental right to marry, my article argues that same-sex marriage bans channel people into heterosexual relations and therefore burden substantially the sexual freedom protected in *Lawrence v. Texas*.

One of my current projects, "Gay Liberation and Same-Sex Marriage," explores from a historical rather than doctrinal perspective the relationship between sexual liberty and the foremost gay rights issue of our time. Examining three cases from the early 1970s, I ask why a militant

movement that purported to abhor the nuclear family incited and largely supported litigation for same-sex marriage. My research to date shows that, far from betraying the liberationist politics of post-Stonewall gay activism (as is often claimed of contemporary same-sex marriage activism), these first cases were conceived within that radical ideological framework. They were designed to critique the gendered roles of "husband" and "wife," promote gay visibility, and publicly affirm the moral equivalence of heterosexuality and homosexuality.

My future scholarship will engage problems I have encountered in the course of

teaching Criminal Law, Family Law, and Law & Sexuality. One project, provisionally called "The Rampant Crime of Pornography," will study the drastic under-enforcement of numerous state and federal obscenity laws. "Sexual Minority: Consent Laws in Context" will explore how distinctly modern ideas about children – their essential moral inno-

cence, their psychological malleability, their minimal capacities for physical labor, their civic and intellectual entitlements – have affected legislation on the age of consent for marriage, abortion, intercourse and other sexual intimacies. Another article will engage a frequent response to my work on bisexuality and same-sex marriage: doesn't true sexual liberty require abolition of civil marriage altogether? I am happily agnostic on this question, as I am on many of the questions I intend to investigate in the coming years. The curiosity that draws me to them is surely, in Sedgwick's words, "the most durable form of intellectual capital."



## Luis E. Chiesa

### Professor

*Born and raised in Puerto Rico, Professor Luis E. Chiesa earned his J.D. at the University of Puerto Rico School of Law (graduating first in his class), then his master of laws and doctor of juridical science degrees at Columbia University. He clerked for Hon. Federico Hernández Denton, chief justice of the Puerto Rico Supreme Court, and taught at Pace Law School before joining SUNY Buffalo Law. Previously, Chiesa was the Rembe Distinguished Visiting Professor at the University of Washington; a visiting professor of criminal law at the Torcuato Di Tella University in Buenos Aires, Argentina; and a member of the visiting faculty at Sergio Arboleda University in Bogota, Colombia.*

*Chiesa's writings have been published in the Washington & Lee Law Review, the Utah Law Review, the Ohio State Journal of Criminal Law and the New Criminal Law Review, among other journals. Furthermore, Chiesa often publishes in some of the leading European and Latin American criminal law reviews. In addition to his teaching and scholarship, he directs the Buffalo Criminal Law Center.*

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*Chiesa's research interests focus on substantive criminal law, criminal procedure, comparative law and animal cruelty laws. He brings the perspective of comparative law to the task, looking at the ways the criminal law doctrines of other countries can inform an understanding of our own laws.*

**M**y research lies at the intersection of criminal law, philosophy and comparative law. Drawing from my experience teaching and lecturing about criminal law in the United States, Canada, Latin America, Europe and Asia, my work aims to understand and critique domestic criminal law doctrines by looking at how other countries approach basic concepts of criminal theory. An example of how comparative law informs my scholarship is my recent article “*Beyond War: Targeted Killings in Law and Morality*” (Washington & Lee Law Review (2012) co-authored with Alexander Greenawalt). The article discusses the Colombian government’s killing of drug kingpin Pablo Escobar as an example that might help assess the legality of Osama Bin Laden’s killing by American Special Forces. Opposing the dominant assumption that the targeted killing of terrorists such as Bin Laden ought to be justified by appealing to international humanitarian law (IHL), the article argues that IHL does not play a decisive role in justifying such practices. Furthermore, the article suggests that targeted killings that do not appear to be



justified under international or domestic law should nevertheless be justified if the following three requirements are satisfied: (1) it is reasonable to believe that the targeted individual is likely to carry out atrocities in the future, (2) there is no doubt about the targeted individual’s responsibility for past atrocities, and (3) detaining and trying the individual is not feasible. The article concludes that although the first two requirements are met in Bin Laden’s case, the third one was not. As a result, we argue that Bin Laden ought to have been captured and tried rather than killed.

In addition to teasing out lessons from comparative law that might illuminate domestic approaches to criminal

law, my work often explores philosophical questions that lie at the heart of basic concepts of criminal theory. In *Punishing Without Free Will* (Utah Law Review (2011)), for example, I urge criminal lawyers to start taking seriously the idea that we might not have the sort of free will that informs most of our foundational criminal law doctrines. I contend they should do this for two reasons. First, scientific evidence increasingly suggests that humans lack the capacity to control their acts. Furthermore, a system of criminal justice that presupposes that human beings lack free will may end up being more humane and efficient than one that assumes that humans are free to act as they please. As a result, I suggest

that there are good reasons to believe that the most attractive way out of the free will maze is to assume both the truth of causal determinism and its incompatibility with the type of freedom that lies at the core of contemporary criminal law and theory.

Looking ahead, I am writing a casebook on substantive criminal law that incorporates comparative perspectives as a tool for

helping students understand the strengths and weaknesses of American criminal law. I’m also writing an academically oriented book comparing Anglo-American and European Continental approaches to criminal theory.



## Meredith Kolsky Lewis

### Associate Professor

Associate Professor Meredith Kolsky Lewis received her B.A. from Northwestern University and her J.D. and master of science in foreign service degrees from Georgetown. Lewis joined the SUNY Buffalo Law School faculty from the Victoria University of Wellington Law School, where she maintains an appointment. Before entering academia, she practiced international trade and litigation in the D.C. and Tokyo offices of Shearman & Sterling.

Lewis' research focuses on international economic law, with a particular emphasis on international trade law and the World Trade Organization. She teaches public and private international law subjects, including International Trade Law and International Business Transactions. She also directs the Law School's Canada-United States Legal Studies Centre. Lewis is co-executive vice president and a founding member of the Society of International Economic Law; a member of the International Law Association's International Trade Law Committee; and co-chair of the American Society of International Law's "Law in the Pacific Rim Region" interest group.

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Lewis writes and researches in the areas of dispute settlement, free trade agreements, international economic law, international trade law and World Trade Organization law. Her most recent book is *Trade Agreements at the Crossroads* (forthcoming from Routledge), which she co-edited with Susy Frankel.

My research focuses on international trade law, particularly issues relating to the World Trade Organization (WTO), free trade agreements (FTAs) and trade policy. My scholarship is heavily influenced by my background in international relations and economics. I also have a strong interest in the Asia-Pacific, a result of having lived and worked in New Zealand and Japan.

Much of my recent work has centered around three broad subject areas. The first involves systemic issues relating to dispute settlement. In my article "The Lack of Dissent in WTO Dispute Settlement" (*Journal of International Economic Law*), I used empirical analysis to demonstrate that few WTO panel or Appellate Body decisions featured dissents, and determined that the lack of dissent was partially the result of deliberate efforts within the Appellate Body to avoid dissenting opinions. I argued that, 10 years after the formation of the WTO, the institution was strong enough to weather a degree of disagreement, and that to the extent disagreement existed, it should be aired. More recently, a number of WTO dispute settlement panels declined to follow the reasoning in previous decisions

of the Appellate Body, essentially unanimously dissenting from the prior appellate rulings. In my article "Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement" (*Stanford Journal of International Law*), I challenged the prevailing



view that these panels had acted improperly. I argued that the panels were engaging in a dialogue with the Appellate Body to signal problems with its reasoning that needed to be remedied, and that in such a circumstance, failing to follow the Appellate Body's decisions was not improper.

A second strand of research has related to the implications of the WTO's failing to effectively enforce its own rules relating to the formation of free trade agreements (FTAs) and

the resulting proliferation of such agreements. In "The Prisoners' Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?" (*Chicago Journal of International Law*) I argue that free trade agreements are detrimental to the

WTO, but that WTO members enter into them anyway because FTAs are a form of prisoners' dilemma. I propose a solution to the dilemma, which takes into account the problems that would arise from either a retroactive or prospective change of the relevant WTO rules.

My third focus has been analyzing

and critiquing economic integration efforts in the Asia-Pacific, with an emphasis on the Trans-Pacific Partnership (TPP) negotiations. The TPP features 12 countries seeking to form a high-standards FTA spanning the Asia-Pacific. The agreement has the potential to be highly significant strategically, given its inclusion of the United States and Japan and current exclusion of China. I published the first two law review articles worldwide addressing the TPP (*Asian Jour-*

*nal of WTO & International Health Law & Policy*; *Boston College International & Comparative Law Review*) and speak and write on the subject often.

My current work includes historical research into plurilateral trade agreements as part of an analysis of the implications such agreements have for the multilateral trading system.



# Anjana Malhotra

*Associate Professor*

*Before joining SUNY Buffalo Law School, Associate Professor Anjana Malhotra taught at the Seattle University School of Law as the inaugural Fred T. Korematsu Clinical Fellow, where she developed and co-taught the Civil Rights Amicus and Impact Litigation Clinic. A magna cum laude graduate of Duke University, she majored in anthropology and served as a university representative to the 1995 NGO Forum on Women, in Beijing. Malhotra went on to earn her J.D. cum laude from New York University School of Law, where she was a Root-Tilden-Kern Public Interest Scholar.*

*Following law school, Malhotra clerked for the Hon. Harry Pregerson, justice of the U.S. Court of Appeals for the Ninth Circuit, in Los Angeles. Her pre-academia experience includes complex and labor litigation practice at two New York law firms; serving as the first Aryeh Neir Fellow at the ACLU Immigrants' Rights Project and Human Rights Watch, and directing the International Human Rights/Rule of Law Project at Seton Hall Law School. Prior to law school, Malhotra worked as a research strategist and organizer for the United Food and Commercial Workers International Union, in Washington, D.C.*

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*Malhotra's scholarship centers on issues in immigration law, constitutional law and international human rights, with a particular focus on substantive theories of equality and access to justice.*

**M**y research explores immigration law and policy, constitutional law, and international human rights, with a particular focus on substantive theories of equality and access to justice. I link these areas by exploring the manner in which legal doctrine, procedures and institutional arrangements can optimally interact to promote equality and fundamental rights. In asking these questions, I am particularly interested in how legal institutions, legislation and doctrine both regulate and are affected by larger issues of race, ethnicity, citizenship, social and economic class and other markers of identity and membership. My past work and upcoming research analyzes inequality and access to justice from a number of theoretical, doctrinal and policy angles.

For example, in "The Immigrant and Miranda," forthcoming in *The Southern Methodist Law Review*, I uncover a broad trend among federal courts of refusing to apply Miranda rights equally to immigrants in criminal and civil custodial interrogations, departing from a century of Supreme Court jurisprudence that has, and formally continues to, define the criminal justice system without regard to



citizenship. In synthesizing every published federal appellate court decision addressing this issue, I reveal a new troubling doctrinal inequality for immigrants that has diminished clarity to police, suspects, and for courts and led to widely divergent local and state practices, while disproportionately impacting the constitutional rights of immigrants and minorities. Relying on documents obtained through FOIA, I examine the serious implications of this emerging jurisprudence in light of the increasing role of local law enforcement agencies in such civil-criminal custodial interrogations, as part of federal

compensation programs. I explore the normative questions raised by my analysis, and conclude by proposing federal regulatory interventions that would restore doctrinal equality in the criminal justice system for immigrants.

In a second forthcoming piece, *Right to Receive and Arizona's Ethnic Studies Ban*, I explore H.B. 2281, a

2010 Arizona law prohibiting ethnic studies in K-12 schools which was used to exclusively eliminate the Mexican American Studies Program in the Tucson Unified School District, while leaving intact other similar ethnic studies programs in Tucson and Arizona. The state's elimination of the MAS program was particularly controversial because it has resulted in significant gains in academic equity for Latino students in Tucson. To better understand the dynamics behind this legislation, I explore the historical antecedents to the struggle over education to manage identity, and uncover striking resemblances of H.B.

2281 to the last formal state campaigns imposing substantive restrictions on students' education from the early to mid-20th century, which were soundly rejected by the Supreme Court. I argue that the essential rhetorical themes of these discredited education cases remain that of Arizona's, and that this continuity helps us both see the profound mistakes of the contemporary approach to matters of race. I further develop a normative framework to address the difficult questions raised by new forms of racially targeted ideological control in the classroom.

Together, my past and upcoming work advance a broader goal in my scholarship: exploring the systemic, structural and social obstacles to effective enforcement of equality in the law, and developing legal and practical proposals to promote fundamental rights. I have also explored these themes in three previous pieces analyzing the international human rights and U.S. Constitutional issues arising out of the government's use of civil arrest and detention authority to hold Muslim criminal suspects indefinitely in the War on Terror. I am excited about further exploring these questions while at SUNY Buffalo.