

PRESENTS

THE 24TH ANNUAL FRANKEL LECTURE



**Exit, Voice & Innovation:
How Human Capital Law
Impacts Equality
(& How Inequality Hurts Growth)**

ORLY LOBEL

Warren Distinguished Professor of Law;
Director, Program on Employment and Labor Law
University of San Diego School of Law

MODERATOR

Dave Fagundes

Baker Botts LLP Professor of Law and Assistant Dean for Faculty Development
University of Houston Law Center

COMMENTATORS

Lisa Larrimore Ouellette

Associate Professor of Law
and Justin M. Roach, Jr. Faculty Scholar
Stanford Law School

Todd Rakoff

Byrne Professor of Administrative Law
Harvard Law School

FRIDAY, OCTOBER 25, 2019

HOTEL ALESSANDRA

1070 Dallas Street • Houston, TX 77002

11:00 a.m. – Lunch • 11:30 a.m. – Presentation
One Hour of CLE Credit, Including 0.5 Hour of Ethics

RSVP: www.law.uh.edu/frankel/

The 24th Annual Frankel Lecture will be held at Hotel Alessandra in the Belle Ballroom. Starting at 11:00 a.m., please serve yourself from the lunch buffet located just outside the Ballroom and assemble with your lunch in the Ballroom.

The formal event will begin at 11:30 a.m. in the Belle Ballroom. Professor Fagundes will start the event with introductions of Professor Orly Lobel and the two commentators, Professor Lisa Larrimore Ouellette and Professor Todd Rakoff. Professor Lobel's remarks will run approximately 30 minutes, followed by remarks from each of the commentators. Then there will be time for Q&A with the audience. Professor Fagundes will conclude the event at approximately 1:00 p.m.



Dave Fagundes is the Baker Botts LLP Professor of Law and research dean at the University of Houston Law Center. His scholarship examines tangible and intangible property from the perspective of norms, markets, and moral and hedonic psychology. Prior to joining the Law Center faculty, Dave worked as a professor at Southwestern Law School; a Bigelow Fellow and Lecturer in Law at the University of Chicago Law School; an associate at Jenner & Block LLP; and a clerk for Judge David S. Tatel of the U.S. Court of Appeals for the D.C. Circuit. He graduated with honors from Harvard College and Harvard Law School, where he served as an editor of the *Harvard Law Review*.



Lisa Larrimore Ouellette is an Associate Professor at Stanford Law School. Her scholarship addresses empirical and theoretical problems in intellectual property and innovation law. She takes advantage of her training in physics to explore policy issues such as the value of scientific disclosures in patents, the patenting of federally funded research under the Bayh-Dole Act, the polarized public discourse over patents, and the integration of patent law with other levers of innovation policy.

She also clerked for Judge Timothy B. Dyk of the U.S. Court of Appeals for the Federal Circuit and Judge John M. Walker, Jr., of the U.S. Court of Appeals for the Second Circuit. She holds a J.D. from Yale Law School, where she was an Articles Editor of the *Yale Law Journal* and a Coker Fellow in Contract Law. She earned a Ph.D. in physics from Cornell University as well as a B.A. in physics from Swarthmore College, and she has conducted scientific research at the Max Planck Institute, CERN, and NIST.



Todd Rakoff graduated from Harvard Law School in 1975, and joined the faculty in 1979 after clerking for Hon. Henry Friendly and practicing with Foley, Hoag and Eliot in Boston. He teaches contracts and administrative law, has been Dean of the J.D. Program, and is presently the Byrne Professor of Administrative Law. Since the mid-1980s, he has been one of the editors of Gellhorn and Byse's *ADMINISTRATIVE LAW*, a leading book in the field.

Professor Rakoff has been actively involved in many of HLS's educational experiments and reforms of the last quarter century, including the experimental integrated curriculum of the 1980s and the move to smaller first-year sections in the late 1990s. In the last several years, he and Professor Joseph Singer have created and led the School's Problem Solving Workshop, an experiential course that is now a required part of the first year curriculum. He has also organized programs for teachers around the country, through the Association of American Law Schools, and internationally, through the parallel international association.



Orly Lobel is the Don Weckstein Professor of Law and founding member of the Center for Intellectual Property Law and Markets at the University of San Diego. A graduate of Harvard Law School, Lobel's interdisciplinary research is published widely in the top journals in law, economics, and psychology.

Professor Lobel is the award-winning author of several books and numerous articles. Her books, *YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE* (Norton 2018) and *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS AND FREE RIDING* (Yale University Press 2013), are the winners of several prestigious awards, including Gold Medal

Axiom Best Business Books, Gold Medal Independent Publisher's Award 2014, the 2015 Gold Medal of Next Generation Indie Books, and Gold Medal in the International Book Awards for Best Business Book. In 2016, Lobel was invited to present *Talent Wants to be Free* at the White House, a meeting which resulted in a presidential call for action.

Professor Lobel is a member of the American Law Institute and has served as a fellow at Harvard University Center for Ethics and the Professions, the Kennedy School of Government, and the Weatherhead Center for International Affairs. She serves on the advisory boards of the San Diego Lawyer Chapter of the American Constitution Society, the Employee Rights Center, and the OXFORD HANDBOOK ON GOVERNANCE.

Lobel is regularly interviewed and featured in the nation's leading media outlets, journals and radio, such as the New York Times, BusinessWeek, and NPR's Marketplace. She is a sought-after public speaker and is a regular contributor to the Harvard Business Review. Recently, she was invited to speak at leading associations and companies, such as Intel, Samsung, AlphaSights, and ERE.

Exit, Voice & Innovation: How Human Capital Law Impacts Equality (& How Inequality Hurts Growth)

If an employee believes her organization is failing, she can take action using one of two strategies: exit (leaving the company) or voice (striving to bring change from within). But what happens when both exit and voice are restricted? Change itself – including both innovation and equality – suffers. This article investigates the connections between fields that are usually kept separate: intellectual property and innovation policy; antitrust law and competition policy; employment law and contract; and anti-discrimination law and equality policy. In employment, non-disclosure agreements (NDAs), non-compete agreements, innovation assignment clauses, non-disparagement agreements, mandatory arbitration, and secrecy policies all create exit constraints. They also silence employees, inventors, creators, and entrepreneurs from speaking up and from expressing themselves creatively. These trends both create impediments to mobility in the job market while also suppressing voice. These trends harm innovation. The steep rise in restrictive terms shapes human capital in ways that are harmful to all workers as well as to industries at large. Still, the burden of these restrictions is not equally distributed. Integrating economic theory and new empirical research in the field of equality and innovation, the article shows that restricting mobility and voice has negative effects on gender diversity, particularly with respect to women's opportunities to lead, create, and invent. As a result, industries using these techniques become more concentrated, with less new entry and start-up activity, and exhibit less gender parity. And because this process operates endogenously, the more an industry is concentrated, the more mobility and equality suffer. The article contends that recent findings on the gender deficit in patenting activity, intellectual property ownership, and entrepreneurship should be understood in relation to exit and voice policy. It then concludes with directions for the future and policy recommendations.

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Professor Lobel's article and the commentaries will be published in a symposium edition of the Houston Law Review: Volume 57, Issue 4, 2020.

For more information, please contact Houston Law Review at eic@houstonlawreview.org.