

# DUKE LAW MAGAZINE

Spring 2016 | Volume 35 Number 1

Mastering a  
New Language  
**SCIENCE  
& LAW**



## From the Dean



Interdisciplinary engagement is one of the great strengths of this law school.

### Dear Friends:

WHEN WE ASK our students and alumni why they chose to attend Duke Law School, one reason they give is the opportunity to be part of a great university. They saw the chance not just to get an outstanding legal education but also to tap into the intellectual energy emanating from every corner at Duke, from the world-class medical center to the top-flight schools of business, public policy, and engineering.

Indeed, interdisciplinary engagement is one of the great strengths of this law school. The expertise of our faculty is both wide and deep, which enables our students to learn from leading scholars of political science, economics, health policy, and philosophy even without leaving the building. Many in our community also participate in cross-campus initiatives such as Duke Innovation & Entrepreneurship, the Duke Global Health Initiative, and Bass Connections, which funds interdisciplinary teams of students and faculty engaged in ambitious projects to address critical societal challenges, such as climate change.

Another example of crossing disciplinary lines, the Duke Initiative for Science & Society, is the subject of this issue's cover story (see page 48). Led by Nita Farahany '04, a Duke-educated professor of law, the initiative is bringing together scholars from across the university to address the societal impact of scientific and technological advancements. The initiative examines how such changes are affecting the law, from the increasing use of brain science in criminal courtrooms to the ethical questions surrounding the emergence of genetic testing.

As our story shows, this is a new language that many lawyers will need to master. Students here can now pursue a JD/MA in bioethics and science policy, a unique dual-degree program that can be completed in three years. This opportunity has proven quite popular among students who aspire to careers in regulatory agencies, start-up businesses, or intellectual property practices. A key feature is a summer practicum after the first year in Washington, D.C., working on the front lines of these fields.

A generation ago, such highly specialized legal training might have been unorthodox. Today, it's just one way in which our students can explore the law's intersection with other forces in our society. It also is one of the many benefits of being part of a great university.

A CRITICAL FACTOR in our ability to offer students and faculty interdisciplinary opportunities is your financial support. I'm pleased to report that at the end of March, we passed another milestone in our *Duke Forward* fundraising campaign, exceeding \$100 million in pledges and gifts. We are immensely grateful to our alumni and friends who have so generously supported this campaign, the biggest in the history of the Law School. With a little over a year to go until the campaign ends, I am looking forward to a strong finish.

FINALLY, I would be remiss if I did not note the passing of Antonin Scalia on Feb. 13. Justice Scalia was a good friend, to me and to this institution. He visited us on many occasions, judging the Dean's Cup, teaching in the Duke-Geneva Institute in Transnational Law and in the judicial master's program, and last May speaking to judges of the U.S. Tax Court when they met here.



Like many others, I have unusually vivid recollections of Justice Scalia. How could it not be? His force field was that powerful.

He taught judicial writing in our Master's of Judicial Studies program for sitting judges, and it was surely a highlight. One afternoon, he resumed class after a break saying, "Now let's talk about footnotes," in a tone that conveyed that this must be the topic that everyone had been waiting for. And was he ever right. Every judicial hand shot up, there was so much to say. This was such a lovely reminder that the craft of judging transcends politics, ideology, and judicial philosophy.

Whether experienced judges or eager 2Ls, our students were fortunate to have the chance to learn from Justice Scalia.

Thank you for your continued support of Duke Law School.

A handwritten signature in black ink that reads "David F. Levi".

David F. Levi  
Dean and Professor of Law

Dean David F. Levi conducted a "Lives in the Law" interview with Justice Antonin Scalia at the 2015 Tax Court Judicial Conference held at Duke last May.

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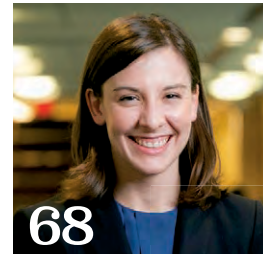
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# The Commons

*Ideas, achievements, and events  
from around Duke Law School*



Photo: Chris Seward/News & Observer

## Wrongful Convictions Clinic wins freedom for client Howard Dudley

**A** COURTROOM IN KINSTON, N.C., erupted in applause on March 2, when a judge ordered Howard Dudley's release from prison after 23 years of incarceration for a crime he didn't commit.

Dudley, a client of the Duke Law Wrongful Convictions Clinic, had been convicted in 1992 of sexually assaulting his then 9-year-old daughter. He said he will never forget hearing Superior Court Judge W. Douglas Parsons call that conviction "an injustice." Having always maintained his innocence, Dudley had rejected a plea deal and several parole options, because they required an admission of guilt. "I am not a child molester," he told reporters after his hearing. "I have never been one and I will never be one." His daughter, Amy Moore, now 33, who testified on his behalf, also has been insisting on his innocence since shortly after his conviction.

Grady Campion '16 worked on Dudley's case over two semesters in the Wrongful Convictions Clinic and attended the hearing. The judge's order "demonstrated the very real power of the law," he said. "When the judge started speaking, our client had shackles around his feet. When the judge finished, those shackles came off."

## “An injustice”

Parsons cited several reasons for invalidating the initial verdict, including the fact that Dudley’s first attorney never received documents noting social workers’ doubts about the veracity of his daughter’s allegations, including those expressed by the guardian ad litem appointed to represent her best interests. Further investigation by clinic students and lawyers uncovered some of the psychological and mental impairments suffered by Dudley’s daughter, further calling into question her testimony against him. Parsons said that her testimony was not believable. The judge also criticized Dudley’s first trial attorney, who had only been practicing law full-time for a year, had little felony trial experience, and who did not file any motions or consult any expert witnesses.

In 2005, the *Raleigh News & Observer* published a series of articles revealing problems with Dudley’s case and calling the verdict into question. The case was then investigated by the North Carolina Center on Actual Innocence, an independent nonprofit that preliminarily screens inmates’ requests for assistance. Finding it worthy of serious review, they referred it to the Wrongful Convictions Clinic.

Kim Chemerinsky ’07, then a clinic fellow, worked on the case for two years, after which teams of students enrolled in the clinic worked with Clinical Professor Theresa Newman ’88, the clinic co-director, and supervising attorney Jamie Lau ’09 to build the elements of a post-conviction relief motion that could lead to a new hearing.

Lau, who argued at the March hearing alongside Raleigh attorney Spencer Parris, said the Social Services documents and Dudley’s daughter’s medical and psychological records clearly exposed problems with his trial.

“Those two things provided us the paper trail which allowed us to demonstrate just how ineffective the attorney was as well as the Brady violations — the constitutional violations with respect to the material the state should have known it never provided at the time of the trial,” Lau said.

Among the student contributions to Dudley’s Motion for Appropriate Relief, those of Larissa Boz ’14 and Courtland Tisdale ’14 were critical, said Newman, noting that Tisdale entered law school after completing a PhD in clinical psychology. “The two of them, Court in particular, brought to this case what was necessary to the unraveling of it: an understanding of Mr. Dudley’s daughter’s complicated



In April, Howard Dudley attended the 2016 Innocence Network Conference in San Antonio with Clinical Professor Theresa Newman ’88 and other members of his legal team.

psychiatric and psychological health,” Newman said. “Larissa brought a keen understanding of what needed to get done during the investigation stage of our work and applied her prodigious energy to doing it.”

### Forty minutes, four witnesses, life in prison

Dudley had been charged and prosecuted in spite of numerous “red flags” raised during the initial police investigation, Lau said.

“A police officer who first heard the allegations reported them to the Department of Social Services, and he reported that Dudley’s daughter didn’t seem traumatized or upset at all, her mother was doing all the talking for her, and there was an ongoing dispute between the parents for child support,” Lau said. “I mean, everything he said to DSS was a red flag but it’s not in any of law enforcement’s reports or it’s not followed up on in any meaningful way. The entire investigation by the Kinston Police Department was four interviews that spanned 40 minutes.”

“Jamie said that at the hearing, and it was powerful,” Newman said. “‘Forty minutes, four witnesses.’ And life in prison.”

Campion and Evan Glasner ’16 were the lead students on the case at the time of Dudley’s rehearing, having worked on it through the fall clinic semester and in the spring as advanced clinic students.

Both will be joining litigation practices in New York after graduation and said the Dudley case offered unique preparation and a strong sense of satisfaction.

“What he had to say, it will always be branded in my mind. When he looked over at me and he’s saying that the system failed me, that’s the part right there.”

— Howard Dudley

## The Commons



Photo: Chris Seward/News & Observer

Members of the legal team joined Howard Dudley (rear center) and his family at a Kinston, N.C., Bojangles' following his release from prison.

“Working on this case was a great experience in learning how to gather facts and prepare for a court proceeding,” Campion said. “Our primary task was to line up the facts and witnesses to support our various arguments why Mr. Dudley’s conviction should be vacated. We researched and interviewed expert witnesses. We made a number of trips to eastern North Carolina to interview fact witnesses and prepare them to testify at trial. We visited and wrote to our client to keep him updated on the status of his case.”

The practical experience provided in the clinic was invaluable, both students said, but the case’s conclusion was unforgettable.

“My motivation for joining the Wrongful Convictions Clinic was to gain some practical litigation experience while doing some truly meaningful work,” said Glasner, who admitted it was hard to hold back tears of joy when the judge announced Dudley’s exoneration. “While this was the first verdict that I have been intimately involved in, I find it difficult to imagine that any future decision will feel as good.”

Glasner, Campion, Boz, and other members of Dudley’s legal team joined him and his family at a Kinston Bojangles’ for his first meal after nearly 24 years in prison.

In a telephone interview a week after his release, Dudley called Parris, Newman, Lau, and the clinic students “awesome.”

He said he had faith that his name would be cleared, but did not expect the judge’s decision to be so quick or decisively worded.

“What he had to say, it will always be branded in my mind,” Dudley said. “It was important to me that the public got a chance to hear what I heard and see what I saw, from the perspective of someone who had the authority to set me free.”

Dudley said one of the judge’s statements was particularly moving to him.

“When he looked over at me and he’s saying that the system failed me, that’s the part right there.” ♡

“While this was the first verdict that I have been intimately involved in, I find it difficult to imagine that any future decision will feel as good.”

— Evan Glasner '16

**D**URING AN INFORMAL community question-and-answer session while serving as a 2016 Rubenstein Fellow at Duke University, Gen. Martin E. Dempsey, USA (Ret.), the former chairman of the Joint Chiefs of Staff, addressed a broad range of topics pertaining to civil-military relations. Dempsey was asked by Professor Charles Dunlap Jr., the executive director of the Center on Law, Ethics and National Security, who retired from the U.S. Air Force as a major-general, whether he thought a president should bring military service to the post of commander in chief.

“I would like to know that the person who becomes the president of the United States has served somehow. That doesn’t necessarily mean having served in the military. But ... among our founding principles is service. So I’d love our future president to have served in the Peace Corps or I’d love to have a president in the future to have served in Teach for America, or some service organization to have an instinct for it, whether it’s the military or not. ... The fact is that military service by itself does not guarantee that someone is going to care about national security or about the military.” ♫



## Grammy Foundation honors O'Brien '16 for paper on “Blurred Lines” case

**S**cott O'Brien '16 was honored on Feb. 12 by the Grammy Foundation as a finalist in the Entertainment Law Initiative’s annual writing competition. O'Brien’s paper, “Of Blurred Lines and Baffled Juries: *Williams v. Bridgeport Music* and the Unrealized Potential of Survey Evidence in Music Copyright,” was one of five student papers recognized at a luncheon in Los Angeles. He received a \$1,500 scholarship and a ticket to Grammy weekend events, including the awards ceremony.

*Williams* involved a lawsuit brought by the heirs of Marvin Gaye in the U.S. District Court for the Central District of California, alleging that Robin Thicke’s 2013 hit, “Blurred Lines,” infringed the copyright on Gaye’s song, “Got To Give It Up.” A jury accepted the plaintiffs’ claim that songwriters Thicke and Pharrell Williams had infringed Gaye’s copyright by copying the feel and sound of his 1977 song, something that Thicke had admitted in interviews. Most infringement suits claim that a riff or melody has been copied.

“My primary criticism of the ruling isn’t so much that the case came out wrong, but rather that the standard for infringement in the Ninth Circuit is overly accommodating for the party trying to prove infringement,” said O'Brien, who wrote the paper for a course on music copyright taught by Jennifer Jenkins '97, director of the Center for the Study of the Public Domain. “My paper suggests that, absent a wholesale change in the infringement standard, courts should admit survey results of the intended audience of a song as non-dispositive evidence as to whether infringement occurred.”

Following graduation, O'Brien will clerk for Judge William Pauley '77 on the U.S. District Court for the Southern District of New York. ♫



## Levi elected president of American Law Institute

DEAN DAVID F. LEVI has been elected president of the American Law Institute (ALI), effective May 24, 2017. The president is a volunteer officer who chairs the Executive Committee of the ALI Council and sets the direction for the organization.

Founded in 1923, the American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law. The ALI drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. The membership includes 22 Duke Law scholars and one from the Sanford School of Public Policy.

As ALI president-designate, Levi is working closely with President Roberta Cooper Ramo through the transition. Ramo will step down in 2017 after completing her third three-year term in the role.

"I am delighted to have David as my successor," said Ramo. "He is a brilliant legal mind and a proven leader who has great passion for the mission of the

American Law Institute." Chief Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit led the ALI committee that nominated Levi as president. "I have had the pleasure of working closely with David, both in his role as an invaluable member of our council for 10 years and within the federal judiciary," she said. "His extraordinary legal background and unwavering commitment to the law will bring keen insight and direction to the American Law Institute."

Levi served as a judge of the United States District Court for the Eastern District of California from 1990 until 2007, serving as chief judge from 2003. Prior to that, he was a prosecutor in the U.S. Attorney's Office for the Eastern District of California and in 1986 was appointed by President Ronald Reagan as the U.S. Attorney for the Eastern District of California, serving in that position until his judicial appointment by President George H.W. Bush in 1990.

Richard L. Revesz, ALI's director and dean emeritus of New York University School of Law, said he was looking forward to working with Levi as the

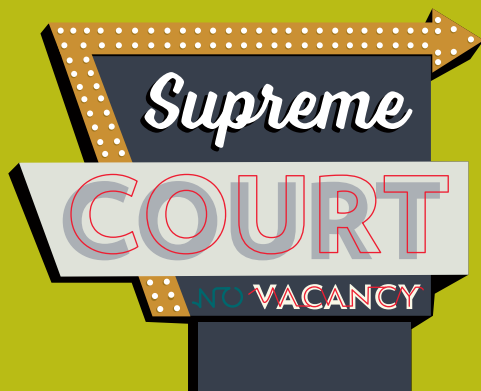
"David has dedicated his life to serving the law, and I know that he will serve the institute admirably."

— ALI Director  
Richard L. Revesz

### LEADING QUESTIONS

*Intriguing ideas from Duke Law scholars*

What is the impact on a Supreme Court opinion when a justice who supported it retires?



"... We have argued that despite the Supreme Court's insistence that lower courts should not engage in prognostication in anticipating the views of the Supreme Court on relevant precedents, judges in the lower courts face strong incentives to interpret the past decisions in ways that the current Supreme Court will accept. Doing so minimizes the risk of suffering the embarrassment of being reversed or reprimanded, and allows the lower court's decision to go into effect. The retirement of Supreme Court justices is critical in this context because the departure of justices who signed on to an opinion, and their replacement by new justices, can signal to lower court judges that support for the opinion on the current Supreme Court may have weakened. Moreover, such retirements are a particularly simple and easily observed heuristic. As a result, we expect that the influence of Supreme Court opinions is subject to a retirement effect: controlling for the degree of ideological change on the Supreme Court, lower court judges are more





institute's president after knowing him for many years. "The American Law Institute will benefit greatly from David's academic and judicial experience," Revesz said. "He brings great wisdom, sound judgment, and a record of enormously distinguished accomplishment. David has dedicated his life to serving the law, and I know that he will serve the institute admirably."

"I am truly honored that my esteemed council colleagues have elected me to this position," Levi said. "It has been my privilege to have the opportunity to serve ALI and its mission of clarifying and modernizing the law."

In addition to his role on the institute's council, Levi was an adviser to ALI's Federal Judicial Code Revision and Aggregate Litigation projects. He currently is a member of the Projects Committee and serves as adviser on the Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis.

Levi has served as chair of two Judicial Conference committees by appointment of the Chief Justice of the United States. In 2014, he was appointed chair of the American Bar Association's Standing Committee on the American Judicial System, and in 2015, he was named co-chair of the North Carolina Commission on the Administration of Law and Justice. ♡

likely to criticize Supreme Court opinions and less likely to follow them as the justices who joined the decision retire. The smaller the number of justices who remain from the original majority coalition, the stronger this effect will become. Our empirical results, which are based on tracking the annual treatment of all Supreme Court majority opinions in the courts of appeals between 1953 and 2012, provide clear and substantively significant support for this argument: as the justices who signed on to an opinion retire from the Court, the propensity of lower court judges to follow the opinion drops significantly, and the willingness of lower court judges to explicitly criticize the opinion increases." ♡

Source: "Judicial Retirements and the Staying Power of U.S. Supreme Court Decisions," by Professor Stuart Benjamin, 13 *Journal of Empirical Legal Studies* 5-26 (2015) (with Georg Vanberg)

**A**LVIN E. ROTH, the Craig and Susan McCaw Professor of Economics at Stanford University and co-recipient of the 2012 Nobel Memorial Prize in Economic Sciences, discussed matching markets, in a talk sponsored by the Duke Law Project on Law and Markets. Roth, the author of *Who Gets What — And Why: The Hidden World of Matchmaking and Market Design* (HarperCollins, 2015), described matching markets as "some of the most important markets" that we deal in.

"Where you go to school, what job you get, who you marry, whether you get a kidney, these are important things. They are not commodity markets. They are not markets where you can choose what you want — you also have to be chosen.

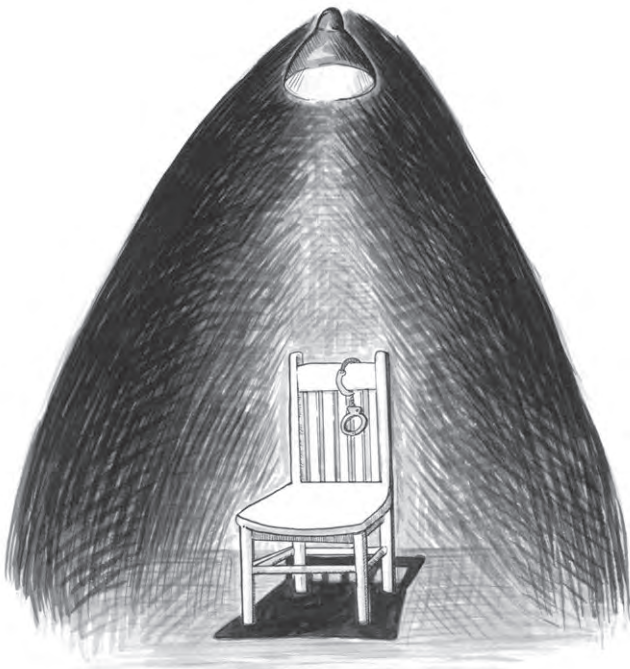
"When you look around and say what other matching markets are failing, one of the ones that comes naturally to mind is refugee and migrant resettlement. We're seeing a lot of problems of that sort in Europe.

"Refugees are just the people who you can't tell them where to go. They were someplace they didn't want to be, and they left. They are people who can move. Once you come to the United States, we can try to resettle you someplace, but you're free to go wherever you like. So, for instance, there is a Somali community in Lewiston, Maine. It's not because the Somalis all really like cross-country skiing. It's because there was a Somali community in Lewiston, Maine. If we try to settle you in Wisconsin, now, you might want to go to Lewiston. There are good economic reasons for you to want to do that. ...

"As we think about refugees in the current crises which are full-blown now, and therefore not ideal places for orderly redesign of refugee and migrant resettlement, we should learn what we can for the future. We'll have many opportunities to learn what doesn't work well, and maybe some things do work well. Because there will be refugees after the Syrian civil war and, in particular, if the sea level rises, there will be lots of refugees in the next century. So we'd better learn how to handle mass migration of people, which is a matching market." ♡



# Notable & Quotable



“The United States’ criminal justice system needs fewer guilt-assuming interrogation tactics, more disclosure of potentially exculpatory information to the defense, expanded oversight units within prosecutors’ offices to investigate potential miscarriages of justice, and fuller appellate scrutiny of convictions.”

— Professor **Lisa Kern Griffin**, a former federal prosecutor, observing that the real contributions of documentaries like “Making a Murderer” is “not to ask ‘whodunit’ but to reveal what was done to the defendants.”  
(*The New York Times*)

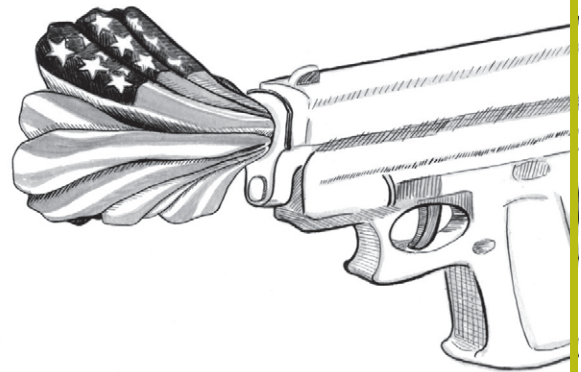


“I see affirmative action in higher education, when it’s done well, as playing a crucial nation-building role in American society, of making one society where previously there were two, and you need people of different races and ethnicities on campus in order to do that. I don’t think it’s enough to say, ‘Well, certain racial and ethnic minorities will go to other schools, and we will be OK as a society as a result of that.’”

— Professor **Neil Siegel**, participating in a National Constitution Center debate in advance of the Supreme Court argument in *Fisher v. University of Texas*, arguing that the Court’s apparent refusal to vindicate claims of racial discrimination by minority plaintiffs seems to be “quite a radical move” from the original animating purpose of the 14th Amendment, which was to try to integrate African Americans, in particular, into American society. (*We the People*)

“The bias underlying HB2 is hurtful for LGBTQ persons and their families. HB2 also makes North Carolina less inclusive, welcoming, and diverse.”

— From a statement signed by **152 members of the Duke Law faculty, staff, and administration** and delivered to Gov. Pat McCrory on April 21, asking for the repeal of House Bill 2, a law that they say “excludes members of the LGBTQ community from legal protections against discrimination based on sexual orientation and gender identity.”



“*Heller* is probably Justice Scalia’s most significant majority opinion in a constitutional case. It may well be the high water mark of originalism. No matter what happens with the composition of the Court going forward, the particular — and heretofore contested — meaning of the Second Amendment that he established seems to be secure. But, thanks in part to the language of *Heller* itself, so is the constitutionality of reasonable gun control.”

— Professor **Joseph Blocher**, observing that even as the late Justice Antonin Scalia upheld an “individual” right to keep and bear arms in his majority opinion in *District of Columbia v. Heller*, he also emphasized “that such a right — like all other constitutional rights — is subject to reasonable regulation.” (The Trace)

“... [N]o published work will enter the public domain until 2019. Books, songs, movies, even scientific articles are stuck in a legal limbo. Until the last 50 years, every generation in American history has had free and legal access to the creativity of the past. They could learn from it. They could build on it. Now all that creativity is locked away.”

— Professor **James Boyle** (depicted as an animated bird), explaining that Congress extended the copyright term by decades partly in response to Disney’s lobbying to keep Mickey Mouse from entering the public domain in 1998. (Adam Ruins Everything)



“Why should we care? Existing research shows that inaction on everyday civil issues may perpetuate inequality.”

— Associate Professor **Sara Sternberg Greene**, who asked public housing residents about their experiences with and attitudes towards civil courts and organizations, like Legal Aid, reporting that many respondents cited negative past experiences with the criminal justice system as a reason not to take a landlord or a spouse to court; many African Americans, in particular, feared that turning to the civil justice system for help with their problems would make things worse for them, not better. (The Marshall Project)

# Duke Law to co-host annual education program for judges

**D**UKE LAW SCHOOL has been selected by the Appellate Judges Education Institute (AJEI) as co-host of the institute's Annual Summit beginning in 2017.

The summit is a four-day session that gathers hundreds of federal and state appellate judges, appellate court staff attorneys, and practitioners from across the country for practical, cutting-edge, continuing legal education. Presenters include leading academics and practitioners from both the private and government sectors, and experienced appellate judges and court attorneys.

AJEI is affiliated with the Appellate Judges Conference of the Judicial Division of the American Bar Association.

Duke Law has become a research hub for the study of the judicial branch of government. In 2011, Duke established the Center for Judicial Studies to advance the study of the judiciary through interdisciplinary scholarship and cooperative thinking from multiple perspectives. By bringing together judges, researchers, teachers, practitioners, and theorists, the center fosters an interdisciplinary exploration by judges and scholars to promote better understanding of

the judicial process and to generate ideas for improving the administration of justice.

"When approached by AJEI to co-host the Summit, we immediately recognized the outstanding opportunity presented," said Dean David F. Levi, former Chief U.S. District Judge for the Eastern District of California. "As the premier educational opportunity for both federal and state appellate judges, the AJEI Summit shares our focus on strengthening the judiciary and leading to better understanding of the judicial process, judicial institutions, and judicial decision-making."

Former Texas Supreme Court Justice Craig Enoch, the president of AJEI, said he was looking forward to exploring the synergies available through the Center for Judicial Studies' support of the two-year Master of Judicial Studies degree for sitting U.S., state, and international judges; its bench-bar-academy conferences that address vital legal issues; and its publication of *Judicature*, a scholarly journal for judges.

"Working with Duke and its Center for Judicial Studies enables the AJEI Summit to reach a new level of educational excellence," he said. ♡



## On the Record at Duke Law

» March 24, 2016

**C**HIEF JUDGE ROBERT A. KATZMANN of the U.S. Court of Appeals for the Second Circuit discussed his approach to statutory interpretation with Professors Neil Seigel and Marin Levy. Katzmann, the author of *Judging Statutes* (Oxford University Press, 2014), said statutes "should be understood by the courts in a way that reflects how the members of Congress themselves expect their laws to be understood." While the legislative history is not the law, it can be very helpful information in trying to understand what the law is about, he said.

"When I think about legislative history, I'm looking at a very narrow range of materials. I look at the conference committee report. The House and Senate have passed different versions of the bill. They get together to come up with a final bill, and the conference committee report discusses what the compromise is. And sometimes it's actually the bill that's

voted on. The conference committee report is important. The committee reports coming out of each committee can be important. The statements of the floor managers, which are often scripted colloquies, are important — as the bill is about to be passed, those statements are important. Mark-ups can be important. They're not always technically available, but increasingly so. But basically the conference committee reports, the committee reports, and the statements of the floor managers. Beyond that, if some legislator who is not involved in the process gets up and says something on what the bill is about, it's not something that I would place much weight on. I don't place much weight on congressional hearings, because they are information gathering and they're often ways of identifying issues. So by looking at a narrow range of sources, you increase the chance that you'll be looking at documents that have some reliability." ♡



## DUKE LAW PARTNERS WITH ABA ON EDUCATION AND DISCUSSION ABOUT CHANGES TO CIVIL RULES

AS THE MOST SIGNIFICANT CHANGES to the Federal Rules of Civil Procedure in more than a decade began to take hold, Duke Law and the ABA Section on Litigation partnered to provide educational sessions in 15 cities across the country to help judges and lawyers understand the new discovery rules.

The sessions provided an opportunity for participants to ask questions and share best practices among judges and often opposing lawyers.

Led by Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas and Professor Steven Gensler of the University of Oklahoma College of Law, the “roadshows” grew out of a project launched at a 2010 Duke conference that assessed the state of civil litigation. Some of the ideas generated at that conference led to the rules amendments that took effect on Dec. 1, 2015.

Rosenthal and Gensler also served as reporters for *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, the result of 10 months’ work by a group of 18 plaintiff lawyers and 14 defense lawyers who attended a 2014 Duke conference on the then-pending rules amendments. The final document, generally referred to as “the Duke guidelines,” was published in the November 2015 issue of *Judicature*.

Mary Anne Sedey, a partner and employment discrimination specialist at Sedey Harper Westhoff in St. Louis, praised the session she attended.

“Whether the new rules — particularly proportionality — will work fairly for both plaintiffs and defendants remains to be seen, but I felt that the presentation armed me with what I will need to make the best possible arguments for my employment discrimination plaintiff clients,” she said.

Along with the guidelines, the roadshow offered insight on dealing with the practicalities of making discovery fairer, more efficient, and less costly for clients, said Bill Norwood, a plaintiffs’ attorney with Pope McGlamry in Atlanta who served on the American College of Trial Lawyers Task Force on Civil Justice and helped produce “Principles to Govern Future Rulemaking” in 2009. He also attended the 2010 Duke conference.

Norwood noted that Chief Justice John Roberts issued a “clarion call” for that culture change in his 2015 end-of-year report, which was dedicated to the rules changes and emphasized the need for further training and educational programs for lawyers and judges.

Several roadshow participants said the discussion and the Duke guidelines have been helpful in highlighting the broader potential in the rules changes for ensuring fairer discovery processes across the board.

Gensler told the *ABA Journal* that the regional programs gave lawyers and judges a chance to think about practices and solutions that make sense in light of local conditions and culture. “The real point of the programs — and their real value — is to start a dialogue between local judges and local lawyers on both sides of the ‘v’ about how the proposed new rules can be used to their best effect and in a way that is fair to everyone,” he told the *Journal*. “There’s no one-size-fits-all approach.”

The roadshows also provided an opportunity to gather feedback and ideas for revisions and refinements to future iterations of the *Guidelines*. Center for Judicial Studies Director John Rabiej said the document will be updated as the rules are put into practice, case law develops, and the impact of the amendments is better understood. The center plans to conduct a survey later this year to collect empirical data on the impact of the amendments.

“Ultimately,” he said, “the goal is to share information and best practices so we can achieve what these rules are designed to foster: targeted discovery processes that are fairer, less expensive, and more effective in achieving justice — for all parties.” ♡

— Melinda Myers Vaughn



Read *Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality* at [law.duke.edu/judicaturewinter2015](http://law.duke.edu/judicaturewinter2015).

“Roadshow” information can be found at [law.duke.edu/proportionality](http://law.duke.edu/proportionality).



Seth Pearson '16

### Honoring Abele carries special meaning for Pearson '16

**F**OR SETH PEARSON '16, the opportunity to investigate and honor the contributions of architect Julian Abele to Duke University was an important piece of his overall experience on campus.

Abele was a Philadelphia-based African-American architect who played a key role in designing Duke's Gothic-style West Campus. Pearson served on an 11-member committee that advised President Richard H. Brodhead on how best to recognize Abele's integral work. On March 1, Brodhead announced that the central quadrangle on campus would be renamed "Abele Quad."

"On a progressive campus in the South, with its own history of racism and violence against minorities, to have the opportunity to be a part of the recognition of an African-American man who contributed so much of his talent, time, and skill to a university that he, frankly, wouldn't have been allowed to attend at the time, was an opportunity I could not have passed up," said Pearson. He added that seeing the energy, interest, and commitment students, faculty, staff, and administrators from across campus brought to the task of honoring "somebody who looked like me" affirmed his sense that choosing to study law at Duke was "one of the best decisions" he's ever made. "I appreciate being in a place where my presence, contribution, and talent are not merely tolerated, they are celebrated," Pearson said. ♡



Julian Abele

### Damiano '14 and Kim '16 secure entry to DOJ Honors Program

**C**HRISTINE KIM '16 and Devon Damiano '14 will enter the Department of Justice Legal Honors Program in the fall. For each, gaining entrance to the highly selective program represents the culmination of years of deliberately focused study and skill-building in their respective fields of interest, as well as the support and mentorship of Duke Law career counselors and alumni.

Damiano, who holds a Masters in Environmental Science and Policy from Duke's Nicholas School of the Environment along with her JD, will enter the DOJ's Environment and Natural Resources Division after completing a clerkship with Judge James A. Wynn, Jr. on the United States Court of Appeals for the Fourth Circuit. Kim will join the Civil Rights Division.

"The DOJ Honors Program is particularly selective," said Assistant Dean for Public Interest and Career Development Stella Boswell. "We are delighted for Christine and Devon, who have worked exceptionally hard to qualify for these positions."

As a student enrolled in the Duke Environmental Law and Policy Clinic, Damiano worked with Clinical Professor Ryke Longest on a challenge before the Federal Energy Regulatory Commission to the relicensing of four Alcoa dams on North Carolina's Yadkin River, and with Supervising Attorney Michelle Nowlin JD/MA '92 in preparing a complaint and negotiating with the U.S. Fish and Wildlife Service

## Eggerly '18 helps foster kids avoid identity theft

**W**HILE WORKING at the Federal Trade Commission's Identity Theft Data Clearinghouse before coming to law school, Miata Eggerly '18 talked to a lot of people whose identity had been stolen. But about a dozen of the calls she took each day, she said, were from young people who had recently left the foster care system and found that they had been victimized, in some cases by a biological or foster parent.

"They had become emancipated and were ready to start their adult lives, but found they couldn't get water or electricity in their new apartments, or even a cell phone, because someone was using their Social Security information to get those utilities," Eggerly said. The theft had often occurred many years earlier.

Eggerly learned that preventative measures, like freezing a child's credit report, are key to stopping identity theft. "By the time you call the clearinghouse or file a police report, it's really too late, and the victims are left to rebuild their credit histories," she said. "I felt really powerless to help these callers."

She found a way to help almost as soon as she got to Duke, where Director of Public Interest and Pro Bono Kim Burrucker had already resolved to put students to work on the problem. Burrucker had heard many identity theft "war stories" from clients of the Law School's Volunteer Income Tax Assistance program.

"I started asking children's advocates, family court judges, and anyone who would listen to share their thoughts on the issue," Burrucker said. "Few had heard of the problem, but all thought it would warrant investigation."

Eggerly quickly volunteered to do just that. Under the supervision of Professor Kathryn Webb Bradley, she



Devon Damiano '14



Christine Kim '16

to protect endangered butterfly species in the Florida Keys. She gained further exposure to environmental law and policy through an externship at the Southern Environmental Law Center.

Damiano clerked for Judge Francis Allegra of the U.S. Court of Federal Claims in Washington, D.C., before clerking for Judge Wynn on the Fourth Circuit, where she also held a second-year externship.

Kim's acceptance to the Civil Rights Division Honors Program is the culmination of a focus she began during her undergraduate studies in public health at Tufts University, and pursued through externships before and during law school.

Before coming to Duke, Kim worked on public health, affordable housing, and discrimination issues with nonprofits in her native Ohio. She spent her 1L summer at an internship with the Housing and Civil Enforcement section of DOJ's Civil Rights Division, followed by a second-year Duke in DC externship with the Disability Rights section of the Civil Rights Division.

She served as co-president of the American Constitution Society, editor-in-chief of the *Duke Journal of Gender Law & Policy*, and a lead student organizer for the Center on Law, Race and Politics' fall conference on civil rights.

Both Damiano and Kim expressed gratitude for the support they received for their Honors Program applications from members of the faculty, staff, and alumni community. ♡

has canvassed the way states handle identity protection for minors under their protection and has immersed herself both in the policies of the three major credit-reporting agencies and a new North Carolina identity-protection law. Aspects of both trouble her: The \$5 fee credit bureaus charge to place a freeze and the requirement that proof of a minor's identity be submitted by mail instead of online, as it is with adults, may be a financial barrier to agencies and families that impact their ability to take advantage of the law, she said. Through outreach to social service agencies, corporate advocates, and lawmakers, she is investigating how law and policy could be improved.

"This is a challenging project for a 1L to take on and Miata has just taken off with it," Bradley said. "She has shown creativity and persistence and has, frankly, taken the project further than we thought it would go this year." ♡



Pictured L–R: D.J. Rowe '16; Milan Prodanovic '16; Dexter Pearce '16; Michael Steele '16; Erik Kennelly '17; Joseph Wilson '16; Sami Ghneim '16; David Chambers LLMLL '16; Tyler Conte '18

## Holding court

**T**HE DUKE LAW INTRAMURAL basketball team took home the first place trophy at the 41st Annual Western New England University School of Law Basketball Invitational in February. The team included former collegiate athletes from Lewis & Clark, Bucknell, and South Carolina, and one from Iona who later played in a professional league in Serbia. Facing Pace Law School in the tournament final, Duke Law hit 15 three-point shots.

The team (wearing new uniforms sponsored by Latham & Watkins) also emerged as undefeated champions of the Duke Intramural League, defeating Fuqua Hoops in the April 9 championship game.

“With all the success and fun that we’ve had with this basketball team, we officially chartered Duke Law Basketball as a student organization this year in hopes that the legacy and excitement of Duke Law Basketball continues and grows far beyond our time on campus,” said Milan Prodanovic '16. ♫

**I**N A PUBLIC CONVERSATION with Professor Joseph Blocher during his 50th reunion weekend, Durham attorney Eric Michaux '66 reflected on growing up in Durham, his career, and his time at the Law School. He said he appreciated the support he received from the faculty when as young lawyers, he and his brother, a North Carolina Central University law graduate, were rejected for membership in the North Carolina Bar Association (NCBA) by its Board of Governors.

“Duke University Law School got wind of the rejection. And then, next thing I knew, the Duke University Law School had withdrawn their affiliation with the North Carolina Bar Association with the statement that ‘If you can’t accept one of ours, we don’t need to be a part of you.’”

The move was greatly appreciated and made the news, said Michaux, who was serving as a military lawyer in Denver when he was contacted by Dean F. Hodge O’Neal, who told him the governors of the NCBA had reconsidered their position. They agreed to “drop the bars of segregation,” but, in a possible slight to the Michaux brothers, would admit the civil rights lawyer Julius Chambers as the first black member before them.

“I said, ‘Fine. We’ve accomplished our most important goal, of bringing people together, and that was the intent of our application to begin with. ... So that’s the story of the integration of the North Carolina Bar Association.” ♫





University of Missouri student leaders Jonathan Butler, left, and Peyton Head, center, discussed fall protests against racial discrimination in a town hall conversation moderated by Seth Pearson '16, at right.



Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit, a civil rights icon, attended the Duke Law conference.

## CENTER ON LAW, RACE AND POLITICS

# Conference assesses state of civil rights movements

**A** NOVEMBER CONFERENCE sponsored by the Center on Law, Race and Politics (CLRP) took a broad look at race and civil rights in America.

Dozens of scholars presented research and took part in discussions on such matters as criminal justice reform, immigration, voting rights, LGBTQ rights, and discrimination in consumer markets during the two-day conference titled “The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America.” Highlights included a keynote address by Kimberlé Crenshaw of the UCLA and Columbia Schools of Law, a leading critical race theorist and executive director of the African American Policy Forum, and a town hall conversation with the student leaders of fall protests against racial discrimination at the University of Missouri.

CLRP Director Guy-Uriel Charles, the Charles S. Rhynne Professor of Law, credits third-year law students Christine Kim and Ana Apostoleris for coming to him with the idea for the conference in 2014, then recruiting a number of other students to help organize it. Charles, who served as faculty orga-

nizer along with Professor Trina Jones and Angela Onwuachi-Willig of the University of Iowa College of Law, said the event was an inspiration for those involved in research, policy, and activism “to keep pushing forward with this important work.”

Jones told conference attendees that students came up with the idea for the conference at a time when protests over the deaths of unarmed black citizens at the hands of police, harsh crackdowns against protesters in Ferguson, Missouri, and the acquittal of George Zimmerman, who killed an unarmed 17-year old boy in Florida, all combined to make a large-scale conference on civil rights seem like an important contribution to the national and scholarly discourse.

“We, like many of you, have serious concerns about the criminal justice system and law enforcement,” she said. “Yet we were also concerned about other threats to the ideal of democracy, including the effects of the Supreme Court’s ruling in *Shelby County v. Holder*, which was followed immediately by legislative action to erode voting rights acts across the nation and in this state.”

# The Commons

## A fresh look at the past

Before conference participants addressed such issues as incidents of police brutality in minority communities that have sparked recent protests, they addressed the past.

Civil Rights milestones like the March on Washington, the Civil Rights Act of 1964, and the Voting Rights Act of 1965 were vital to addressing racial equality in America, said Professor Walter Dellinger III, but may have obscured a troubling truth.

“What strikes me is how naïve we were in thinking that an end to Jim Crow was going to be the solution,” said Dellinger, the Douglas B. Maggs Emeritus Professor Law.

Karla FC Holloway, the James B. Duke Professor of English, Professor of Law, and Professor of Women’s Studies, suggested that insufficient attention was paid at the height of the civil rights movement to the cultural impact of desegregation and societal change.

“What I think was missing from that moment of extraordinary civil rights legislation in the 1960s,” she said, “were the opportunities for the cultural studies scholars — who didn’t exist back then — to give the context of what it would mean to go to school with black or white children in the next year, how our families would shift, how the conversations around our table would change. We didn’t think about how hard changing the hearts and minds of the populations who would be so extraordinarily affected would be.”



## Assessing the present

Among various discussions of present-day civil rights issues from legal, policy, and cultural perspectives, a panel titled “Race, Political Participation and the Roberts Court,” focused on voting rights.

Duke University political scientist Kerry Haynie, the co-director the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences, addressed America’s changing demographics and increased voter participation by minority groups. The wave of voter ID laws enacted by state legislatures after President Barack Obama’s 2008 election was a reaction to those developments, Haynie said. “Part of the response to these changing demographics has been action by state legislatures and action by the court to get in the way of political participation,” he said. “So one of the challenges is contending with state action and court action with regard to participation. Another is taking this national power and having it transfer to a state and local level.”



Conference co-organizers Ana Apostoleris '16, left, and Professor Trina Jones offered welcoming remarks.

Kevin Johnson of the University of California, Davis School of Law suggested that the courts may not be the best tool for addressing civil rights issues.

“I think we have to think carefully about the use of litigation and use of politics as tools in that movement,” he said “In light of the current courts that have been created over more than a generation, I think that it is hard to imagine large-scale change coming from the courts.” He cited emerging movements such as Black Lives Matter and the Occupy movement as likely proponents of civil rights action. “If you’re really interested in lasting change today, it seems to me you should think more carefully about political strategy and how to bring about social change through politics.”

## Looking to the future

Liz Wangu '16, one of the student organizers of the conference, said that she appreciated its forward-looking focus. “Rather than simply highlighting how far we have yet to come, I appreciated that every plenary panel asked ‘What now?’” she said. “There were productive conversations that left participants feeling both informed and empowered.” She added that the public conversation with University of Missouri student organizers Jonathan Butler and Peyton Head was particularly resonant for her. “The Mizzou students talked about radical and effective campus activism, which really showed how students and youth are and can be at the forefront of the present-day civil rights movement to make our institutions and country more progressive and inclusive.”

For Seth Pearson '16, another conference organizer who moderated the town hall, a highlight was Crenshaw’s keynote address, which he described as “life-changing.”

“I don’t think I ever thought about the plight of the black woman the way that I now do, through the lens that she painted for us,” he said. “I think that I also was a part of the problem, and I think that’s an amazing thing, when you start to realize that you are a part of the issue.”

Charles ended the conference with a call for future collaboration.

“I think we want to think about, collectively, what are the questions that we want to address? What are the lessons that we need to learn? In what ways can we be in conversation with each other to spur one another on, to push one another’s work, to expand the scope of our community, and to continue to do the work that matters?” ♡

# Faculty Focus



## Bradley named Andrew Carnegie Fellow

**C**URTIS A. BRADLEY, the William Van Alstyne Professor of Law and Professor of Public Policy Studies, has been named a 2016 Andrew Carnegie Fellow by the Carnegie Corporation of New York.

Bradley, whose expertise spans the areas of international law in the U.S. legal system, the constitutional law of foreign affairs, and federal jurisdiction, is the first Duke University scholar to receive the prestigious fellowship. He will use the \$200,000 award to develop a global project titled “Comparative Foreign Relations Law and Democratic Accountability” that will help define the relatively new field of comparative foreign relations law.

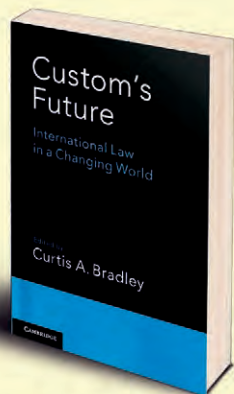
Bradley is one of 33 fellows whose proposals were selected from a pool of 200 by a jury of scholars and academic leaders based on the originality, promise, and potential impact of their proposals to address some of the most urgent challenges to U.S. democracy and international order, according to a statement issued by the Carnegie Corporation of New York. The Andrew Carnegie Fellows Program, launched in 2015, supports both established and emerging scholars, journalists, and authors whose work distills

knowledge, enriches culture, and equips leaders in the realms of science, law, technology, business, and public policy.

The nominating process for the program entailed three levels of review that began with the Carnegie Corporation’s outreach to more than 600 leaders representing a range of universities, think tanks, publishers, and nonprofit organizations nationwide. Duke University’s President Richard H. Brodhead and Provost Sally Kornbluth nominated Bradley for the fellowship.

“Curt’s superb proposal details a deeply scholarly project with potential for significant and immediate global impact,” said Brodhead. “I’m delighted that he has been honored as a 2016 Andrew Carnegie Fellow.”

Bradley’s project will significantly expand an initiative he launched at a 2015 scholarly conference on comparative foreign relations law held in conjunction with the Duke-Geneva Institute in Transnational Law. The fellowship will fund four more conferences on the subject over the next two years in Tokyo, Cape Town, Rio de Janeiro, and at Duke University, respectively, with each attended by a core group of U.S. and



**P**ROFESSOR CURTIS BRADLEY'S latest book is *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016), a collection of essays by leading international law experts that address the development of customary international law over time, the way it is applied by international and domestic tribunals, and the challenges that it faces going forward.

The book had its genesis in a yearlong school-wide project at Duke Law on custom and law that Bradley coordinated with Professor Mitu Gulati in the 2011-2012 academic year, which resulted in a symposium issue of the *Duke Law Journal* and other publications relating to customary international law. Bradley subsequently organized a conference in Geneva in 2012 as part of the Duke-Geneva Institute in Transnational Law on the role of *opinio juris* in customary international law, in which a number of the authors featured in his new collection participated.

Several members of the Duke Law faculty contributed essays to the collection. Bradley's chapter contends that the application of customary international law by an international adjudicator "is best understood in terms similar to judicial development of the common law." Gulati and co-author Stephen Choi offer an empirical examination of what international tribunals like the International Court of Justice cite in support of their rulings regarding customary international law. And Laurence Helfer, the Harry R. Chadwick, Sr. Professor of Law, with co-author Timothy Meyer, applies principal-agent theory to examine a shift by the U.N.'s International Law Commission in recent years away from codification efforts to "principles, conclusions, and draft articles that it does not recommend be turned into treaties."

Sir Michael Wood, the special rapporteur for the International Law Commission's project on customary international law, co-authored the final chapter on the continuing importance of this form of international law. ♪

international scholars as well as regional experts, jurists, and policymakers. The project will culminate in the publication of a book offering global scholarly perspectives on foreign relations law, as well as theoretical and methodological analysis of the topic and the tensions within it and concrete suggestions for improvements. Bradley, a co-director of the Duke Center for International and Comparative Law, will also develop a seminar on comparative foreign relations law to be concurrently or jointly taught at Duke Law School and at various foreign institutions.

Foreign relations law is domestic law that governs how a nation interacts with other countries and with international institutions, and how it incorporates international law into its legal system. It encompasses such topics as the making of treaties and other agreements, the role of domestic courts in applying international law, the delegation of "sovereignty" to international regulatory and enforcement institutions, and the process for deciding whether to use military force or participate in collective security. It also implicates basic issues of democratic accountability, Bradley said, as it affects both the decision-making authority that can be transferred to institutions that may lack a direct connection to the nation's citizenry, as well as the internal distribution of authority between the executive and legislative branches of the government. These are topics of frequent public debate in the United States, noted Bradley.

"During the past year, for example, there has been substantial controversy over President Obama's domestic authority to conclude an agreement with Iran concerning its nuclear program, as well as his authority to wage a military campaign against the Islamic State in Iraq and Syria," he said. To date, there has been little effort to consider foreign relations law systematically from a comparative perspective beyond the United States and Western Europe, although many democracies face similar accountability questions. Doing so, Bradley observed, will yield valuable insights into how decision-making can be effectively structured in a manner that respects basic constitutional values.

"The Andrew Carnegie Fellowship Program facilitates a uniquely broad study of these critical questions," said Bradley. "My hope is that by drawing international scholars and officials together to talk about common topics, and with the development of a seminar and course materials, the project will contribute both to deepening foreign relations law as a field of study around the world, and to establishing comparative foreign relations law as a new field."

Bradley added that his fellowship project promises to inform his work as a Reporter for the American Law Institute's multi-year Restatement project on The Foreign Relations Law of the United States. "There is a nice synergy between trying to develop this extensive work on U.S. foreign relations law for the American Law Institute and deepening my expertise in comparative law, focusing on how other countries structure foreign affairs law and foreign affairs decision-making." Several core scholars on the project also are reporters or advisors on the Restatement, he added.

Dean David F. Levi called Bradley's receipt of the Carnegie fellowship, one of the most prestigious and generous fellowships to advance research in the social sciences and humanities, a tremendous honor. "Curt Bradley is an extremely accomplished and insightful scholar in the field of foreign relations law, and his proposal promises to create a new and valuable field of scholarship and inquiry," said Levi. "This fellowship provides a well-deserved opportunity to extend his research and writing as well as his influence." ♪



L–R at the ILEP symposium in Miami: Michael Krimminger '82, James Cox, Lawrence Baxter, Ace Factor '17, and Mark Labaton '88

## James Cox:

# “The shareholder’s best advocate”

**T**HE WORK OF PROFESSOR JAMES Cox was celebrated at the 22nd annual symposium of the Institute for Law & Economic Policy (ILEP) in Miami on April 8 and 9. Titled “Vindicating the Virtuous Shareholder,” the event covered a range of issues, from private enforcement to regulatory changes affecting investor protection, many of which are reflected in Cox’s seminal body of scholarship over the past 40 years.

Many panelists and presenters at the symposium, which was co-sponsored by the *Duke Law Journal*, were colleagues, co-authors, or students of Cox, the Brainerd Currie Professor of Law, who joined the Duke faculty in 1979. A renowned scholar of corporate and securities law, he is the author of the award-winning *Cox and Hazen on Corporations*, among other books, and has testified before Congress on such matters as insider trading and market reform.

### Celebrating a scholar

In their keynote presentation titled “James Cox: The Shareholder’s Best Advocate,” Vanderbilt University Professor of Law and Business Randall Thomas and Professor Harwell Wells of Temple Law School used 11 of his articles to trace the development of modern corporate law. Thomas, a frequent Cox collaborator,

said his colleague’s prodigious scholarly output of three articles a year on average is notable for its quality and “profound” impact. Cox first championed shareholder interests against pro-market and pro-corporate legal theories in the 1980s and ’90s, and then continued to do so against external forces such as corporate globalization, corporate scandals, and the financial crisis, consistently offering fresh approaches to understanding modern corporations, said Thomas.

Wells called Cox’s 1985 article “Bias in the Boardroom” a particularly striking work. “It shows his deep respect for doctrine and statutory precedent, and at the same time his willingness to explore law in innovative ways, in this case drawing on concepts from psychology,” he said. The article, co-authored with psychologist and lawyer Harry Munsinger ’84, uses psychological research to uncover what the authors describe as the “subtle but powerful” biases that prevented even an independent, non-executive director from monitoring the behavior of corporate directors and representing the interests of that company’s shareholders.

In his overall body of work, Cox demonstrates evolving yet steadfast support for shareholders, Thomas concluded. “In this age of

'piecemeal' legal scholarship, Cox has addressed critical problems — diverse in scope, and international in nature — tackling normative issues with empirical analysis. Cox has moved the needle in corporate law scholarship — away from contractarianism and toward a more open-ended paradigm.”

Another symposium participant, Lawrence Baxter, Duke's William B. McGuire Professor of the Practice of Law, bounced ideas off Cox while developing his presentation, in which he proposed taking advantage of the extensive automated reporting currently required in banking to develop a highly sophisticated regulatory technology, or “Reg-Tech.”

“Jim likes the overall concept,” said Baxter. “But he is definitely not afraid to disagree and criticize. I love that. With Jim, it's always a true scholarly debate.” Baxter, who has taught with Cox in the Duke in D.C. program, said a visit to the headquarters of the U.S. Securities and Exchange Commission served as confirmation — if any was needed — of his colleague's stature in his field. “The regulators came out of their offices and into the hallway just wanting to meet him and shake his hand,” said Baxter.

Cox presented a forthcoming article titled “The Resurrection of the Derivative Suit” at the symposium and took part in a panel discussion on recent developments in securities class actions, including the Supreme Court's 2015 ruling in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.

### Celebrating a teacher and colleague

While the symposium focused on his scholarship, many participants commented on his influence as a teacher.

“I had him for Business Organization,” said Michael Krimminger '82, a partner with Cleary Gottlieb in Washington, D.C., and former general counsel of the Federal Deposit Insurance Corporation. “To this day I have the outline for his class on my office shelf. It's my security blanket.”

Krimminger, who took part on a panel titled “Private Suits while the Regulator Slumbers,” said Cox has “maintained a focus on the real world throughout his career — something often overlooked in academia.”

DLJ Editor-in-Chief Ace Factor '17, who recently completed Cox's Business Associations course, attended the symposium as an observer. “He is a fantastic storyteller,” Factor said. “He really animates the characters in these dense cases and makes corporate law exciting. There are 120 students in the class and we all hang on his every word.” Cox is the only Duke Law faculty member to have received the Duke Bar Association's Distinguished Teaching Award three times.

Delaware Court of Chancery Vice Chancellor Sam Glasscock '83 said he never took Cox's legendary Business Associations course, but described interacting with him outside of class as “one of the great pleasures of law school.” He said he has enjoyed seeing Cox frequently at professional conferences where “we always talk about fiduciary duty,” and appreciates the insight the venerable scholar brings to the work of the Chancery Court.

“At the Chancery Court, we put out the raw material that fuels the work Professor Cox does,” said Glasscock. “The court's work is reviewed by academicians, who respond to it in scholarly articles, and then it comes back to us — either we read the articles, or they're read by practitioners and included in briefs. There's a real exchange between academics and judges that you don't see in other areas of the law. It's exciting. We're making common law. It's great to have my work reviewed at such a high level by good academics like Professor Cox.”

Speaking at the symposium's closing banquet, Dean David F. Levi lauded Cox as an accomplished scholar with strong quantitative skills, an exceptional understanding of markets and securities law, who commands influence among academics, judges, regulators, and lawyers. “Add to this an inquiring, nimble mind and an incredible work ethic, and you have one of the foremost scholars of our time,” Levi said. He also praised Cox as a “marvelous University and Law School citizen” who takes on tough problems, “whether it is mentoring a junior colleague who needs help or designing responsible investment policies for the University.”

Calling Cox “the greatest teacher in the history of Duke Law School” (and backing up the claim with student evaluations), Levi said Cox goes above and beyond his role in the classroom. “He is a mentor, career counselor, and friend in time of trouble. They know they can count on him.

“[I]t is in the interaction with his Law School colleagues and his students where Jim particularly shines and has made the critical difference in the lives of others,” Levi said. “His natural curiosity and gregariousness, his enthusiasm for learning and helping are such that he eagerly participates in the work of others, whether students or faculty, offering insights in a spirit of mutual inquiry.” ♡ — Caitlin Wheeler '97



Since joining the Duke Law faculty in 1979, Professor James Cox has taught about 7,000 students. That is almost two-thirds of the Law School's total number of students since it was founded in 1930. His Business Associations course was described on one student evaluation as “a comedy club and a PBS news program rolled into one.”





**Jack Knight**, the Frederic Cleaveland Professor of Law and Political Science, has been elected to membership in the American Academy of Arts and Sciences. He is one of 213 national and international scholars, artists, philanthropists, and business leaders elected to the Academy who will be inducted at a ceremony in Cambridge, Mass., on Oct. 8.

A renowned political scientist and legal theorist, Knight has focused his scholarly work on modern social and political theory, law and legal theory, and political economy, and his research on the rules and norms that organize human activities in nations. In addition to studying the motivations and decisions of judges and courts, he has examined the effects of the norm of extensive prior judicial experience as a prerequisite for service on the U.S. Supreme Court. Knight holds joint appointments at the Law School and Duke's Trinity College of Arts and Sciences, where he teaches in the Politics, Philosophy and Economics Program. He is faculty co-director of the Center for Judicial Studies.

Founded in 1780, the American Academy of Arts and Sciences is one of the country's oldest learned societies and independent policy research centers, convening leaders from the academic, business, and government sectors to respond to the challenges facing — and opportunities available to — the nation and the world. Members contribute to Academy publications and studies of science, engineering, and technology policy; global security and international affairs; the humanities, arts, and education; and American institutions and the public good.

Other Duke Law faculty with membership in the Academy are Dean David F. Levi, Professor Mathew D. McCubbins, and Professors Emeritus Paul D. Carrington, Walter E. Dellinger III, Donald L. Horowitz, and William W. Van Alstyne. ♣

**Ernest Young**, the Alston & Bird Professor of Law, filed two amicus briefs in cases heard by the Supreme Court in its current term. A leading scholar of the constitutional law of federalism and the federal courts, Young wrote and filed briefs in *Bank Markazi v. Peterson* and *U.S. v. Texas*.

Young's brief on behalf of the petitioner in *Bank Markazi v. Peterson* argued that Congress exceeded its authority in passing a statute to affect the outcome of a specific civil suit in which victims of terrorism attributed to Iran were suing for nearly \$2 billion in security assets belonging to Iran's central bank. While Congress can change the law in a way that "cuts the ground out from under plaintiffs in pending litigation," he said, the legal line should be — and generally is — drawn at statutes targeting the outcome of

a single case. The Court ruled in favor of the respondents on April 15.

In *U.S. v. Texas*, a challenge by the state to the president's executive orders shielding about four million undocumented immigrants from deportation, Young's brief argued that Texas had standing to challenge the executive actions. A scholar of cooperative federalism, he argued that unilateral executive action in an area like immigration profoundly affects state policies and actions regarding such matters as law enforcement, public education, traffic safety, and social programs. "If it happens by congressional action, the states have had a voice in that," said Young, who was assisted in the brief by Will Fox '16 and Jessica Pearigen '17. "But if the executive does it on his own, those safeguards of federalism don't really operate." The Court's decision is pending. ♣



## The Commons | Faculty Focus



**George Christie**, the James B. Duke Professor Emeritus of Law, has been awarded a Fulbright grant to participate in a six-month study of “the legitimate roles of the judiciary in the global order” at the PluriCourts Centre at the University of Oslo in Norway. The study involves a subject that is growing in importance as an increasing number of basic questions of public policy and social morality, and even the allocation of social resources, are being referred to courts by national constitutions and multi-national human rights conventions.

Christie has focused much of his academic work throughout his career on legal reasoning and the limits of judicial discretion. After initially focusing on common law adjudication, beginning with his book *The Notion of an Ideal Audience in Legal Argument* (Kluwer, 2000) and more extensively in *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* (Oxford University Press, 2011), Christie has expanded his research to include developments in other advanced legal systems. He said he looks forward to participating in a study that explores these difficult challenges that confront judges from a global perspective. ♣

Professor **Lisa Kern Griffin** drafted an amicus brief in support of a petition for writ of certiorari filed with the U.S. Supreme Court in *Pena-Rodriguez v. Colorado*, a case involving the permissibility of evidence of racial bias in jury deliberations. The Court granted certiorari on April 4, and the case will be argued in the Court’s next term.

After Miguel Pena-Rodriguez was convicted of unlawful sexual contact and harassment in Colorado state court, two jurors came forward to submit affidavits alleging that another juror used ethnic slurs during deliberations concerning both the defendant’s character and the credibility of an alibi witness. The Colorado Supreme Court held that the affidavits fell within the prohibition on juror testimony in Federal Rule of Evidence 606(b) and that the racial bias did not constitute “extraneous prejudicial information.” Griffin’s brief argued that this application of 606(b) violated the defendant’s Sixth Amendment right to an impartial jury.

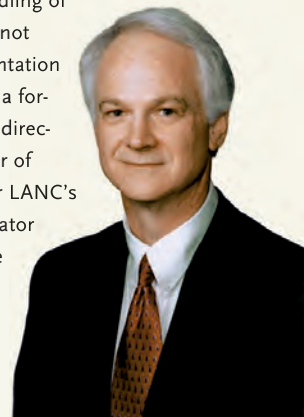
Griffin was assisted by 20 second- and third-year students in her Evidence class who worked on different aspects of the racial bias, constitutional law, and evidentiary procedure questions. Nine law professors from around the country signed on to the brief, including **James**

**E. Coleman Jr.**, the John S. Bradway Professor of the Practice of Law and Director of the Center for Criminal Justice and Professional Responsibility, and **Neil Vidmar**, the Russell M. Robinson II Professor of Law and Professor of Psychology. ♣



Civil Justice Clinic Director **Charles Holton '73** was appointed in January to the North Carolina Equal Access to Justice Commission for a three-year term by N.C. Chief Justice Mark Martin. The commission’s mission is to expand access to the civil justice system in North Carolina for people of low income and modest means by helping to coordinate the delivery of civil legal aid services. Its members include leaders of the bench and bar from a broad range of corporations and organizations. In his letter of appointment, the chief justice called access to civil justice “one of the most urgent needs facing the legal profession.”

In the Civil Justice Clinic, which is a partnership between Duke Law and Legal Aid of North Carolina (LANC), Holton teaches a seminar and mentors students in basic civil litigation skills while overseeing their handling of actual cases for clients who are not able to obtain adequate representation in the civil justice system. He is a former chair of the LANC board of directors and a longstanding member of the local advisory committee for LANC’s Durham office. He is also a litigator and senior partner with Womble Carlyle Sandridge & Rice in Research Triangle Park. ♣







A policy proposal developed by Associate Professor **Sara Sternberg Greene** is reflected in a bipartisan bill introduced on April 13 by Sen. Cory Booker, D-N.J., and Sen. Gerald Moran, R-Kan. The bill, titled “The Refund to Rainy Day Savings Act,” allows tax filers to opt in to a savings program when filing their returns. Under the program, 20 percent of their refund would be saved and accrue interest for six months, after which the deferred refund would be deposited into their direct deposit account and available for immediate use.

The legislative proposal reflects a suggestion for a deferred tax credit made by Greene in her article, “The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair,” 88 *New York University Law Review* 515-588 (2013), which she has since advanced, with colleagues, through advocacy and commentary. In interviews with 194 low-income taxpayers, Greene found that the lump-sum payment of the EITC at tax time left low-income recipients vulnerable to mid-year “financial shocks,” such as unexpected dental work or car repair, that they would often pay for with high-interest credit cards. In her article, Greene proposed an optional program under which 20 percent of an individual’s EITC could be put into an interest-bearing “savings and emergency” fund that would be released to the taxpayer for later use. ¶

Professor **Francis McGovern** received the Civil Justice Award from the Academy of Court Appointed Masters (ACAM) on April 1, during the organization’s annual meeting in Atlanta. The award is given to individuals who exhibit excellence in civil justice and promote special master service. ACAM is an independent organization of experienced masters and judicial adjuncts who serve in both federal and state courts.

A pioneer in the field of alternative dispute resolution, McGovern has established new roles for court-appointed special masters: As settlement master, he develops innovative ways to achieve settlements; as an implementation master, he oversees the implementation of decrees; and as a distribution master, he designs and implements the distribution of funds. He has developed solutions in such mass tort litigation as that stemming from the DDT toxic exposure litigation in Alabama, the Dalkon-Shield controversy, the silicone gel breast implant litigation, and the litigation arising from the 2003 fire at The Station nightclub in West Warwick, R.I., that killed 100 people and left 200 injured, which he handled pro bono. He also was appointed to sort out the complex, multi-district litigation claims stemming from the Deepwater Horizon oil spill.

In February, Judge William Pauley ’77 of the U.S. District Court for the Southern District of New York appointed McGovern to serve as a special master to oversee the New York City Housing Authority’s compliance with a consent agreement calling for the abatement of mold from housing developments. And in April, Judge Janis Graham Jack of the U.S. District Court for the Southern District of Texas called him “the best of the best” in appointing him one of two special masters to advise her on how to improve the foster care system in Texas. ¶



NYU Law School’s Brennan Center for Justice and Duke’s *Law & Contemporary Problems* journal co-sponsored a symposium on “The Second Generation of Second Amendment Law and Policy” on April 8 in New York.

Duke Law professors **Darrell Miller** (at far left) and **Joseph Blocher** spoke at the event, which featured U.S. Sen. Chris Murphy (D-Conn.) as the keynote speaker.

Miller said that the event’s title derives from attempts to address Second Amendment law after the Supreme Court’s 2008 ruling in *District of Columbia v. Heller*.

“The first generation of Second Amendment law and policy concerned whether the right to bear arms was individual or collective,” Miller said. “*Heller* held that the right was individual. The second generation of Second Amendment law and policy takes *Heller* as given, and asks, ‘What does an individual right to bear arms mean for constitutional law, self-defense law, and public policy?’”

Among the topics discussed at the conference were the history of legal theory and philosophy regarding gun ownership, the impact of *Heller* on self-defense law and constitutional law, mental health policy and gun ownership, 3-D printing technology and firearm regulations, and the impact of *Heller* on communities of color and women. ¶



Michael Frakes



Ofer Eldar



Anne Gordon

## Welcoming new scholars, teachers

DEAN DAVID F. LEVI announced three new faculty hires shortly before this issue of *Duke Law Magazine* went to press. Michael D. Frakes, a law and economics scholar and legal empiricist who focuses on health law and patent law, joins the governing faculty in July as a professor of law. Ofer Eldar, an emerging empirical scholar of corporate law and corporate governance, financial regulation, and law and economics, will also join the governing faculty as a professor of law. Anne Gordon will join the clinical faculty in the fall semester as a senior lecturing fellow and director of externships, a new position.

Frakes comes to Duke Law from Northwestern University Pritzker School of Law, where he is an associate professor and faculty fellow of the Northwestern Institute for Policy Research. He is also a faculty research fellow in the Health Care Group of the National Bureau of Economic Research.

Frakes conducts empirical research in the areas of health law and innovation policy. His research in health is largely focused on understanding how certain legal and financial incentives affect the decisions of physicians and other health care providers, and, specifically, whether medical liability influences physician behavior. His research in innovation policy centers on the relationship between the financing of the U.S. Patent and Trademark Office and key aspects of its decision making.

Frakes received his BS in economics from the Massachusetts Institute of Technology in 2001, his JD, *cum laude*, from Harvard Law School in 2005, and a PhD in economics from MIT in 2009. He was an associate at Skadden, Arps, Slate, Meagher & Flom in Wilmington, Del., from 2005 to 2007. From 2009 to 2011, he was an academic fellow at the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School. Prior to joining the Northwestern Law faculty in 2014, Frakes was an assistant professor at Cornell Law School, where he directed the Law and Economics Program.

“Michael Frakes is a highly skilled empiricist and insightful and rigorous scholar whose work is enormously respected among others in his field,” said Levi. “His work on medical liability and on the operation of the USPTO has enormous cur-

rent policy relevance and fits nicely with our current strengths in health law, patent law, and empirical scholarship. He is a wonderful addition to the faculty.”

Ofer Eldar is joining the faculty in June as a professor of law after receiving a PhD in financial economics from the Yale School of Management. With research interests that include corporate governance, corporate finance, financial regulation, and banking, his recent work applies the econometric skills he acquired through training in financial economics to assess different corporate governance regimes. A second strand of his research focuses on social enterprise and benefit corporations.

Eldar earned a BA in law from Queen’s College, Cambridge University in 2001 and an LLM in corporate law in 2004 from New York University School of Law, where he served as graduate editor of the *NYU Journal of Legislation and Public Policy*. In 2012, he earned an MA in economics from Yale University, and in 2014 he earned a JSD from Yale Law School upon completing a thesis entitled “The Law & Economics of Social Enterprises and Hybrid Organizations.” His PhD thesis is titled “Essays in Corporate Governance.”

Eldar also has practiced corporate law as an associate at Freshfields Bruckhaus Deringer in London from 2005 to 2007, and at Weil, Gotshal & Manges in New York from 2007 to 2009. At Weil Gotshal he worked on several restructuring projects related to the financial crisis, advised on securitizations, collateralized debt obligations, derivatives, and other structured products, and worked on a pro bono corporate governance project that led to the promulgation of Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies, which was published by the National Association of Corporate Directors and the Business Roundtable. He is a member of the New York Bar and the Law Society of England & Wales.

“Another strong empiricist, Ofer Eldar has already built a reputation as a perceptive scholar who examines important problems,” said Levi. “At quite an early stage of his academic career, his research holds significant implications on matters of corporate organization and governance.”

Beginning in the fall semester, Anne Gordon will work with students interested in individual externships working locally as well as integrated externships — faculty-taught courses that incorporate a shared-theme externship experience with a complementing seminar, such as the Duke in D.C. program and the Federal Public Defender’s Office externship. The Law School’s externship program enables students to receive academic credit while working under the supervision of a licensed attorney in a governmental or non-profit setting and completing bi-weekly reflection papers.

Since November, Gordon has been a distinguished visiting professor at Instituto Tecnológico de Monterrey in Puebla, Mexico, teaching professional skills and comparative law. She previously worked at the University of California, Berkeley School of Law, where she led the Appellate Advocacy Program, coordinating internal and external advocacy skills competitions and coaching the moot court team. She also served as a senior research fellow at the California Constitution Center and taught classes in advocacy. She earlier held attorney positions with the Ninth Circuit U.S. Court of Appeals, the Fifth and Sixth District Appellate Projects, and the Habeas Corpus Resource Center. She graduated from the University of Michigan Law School and clerked for Hon. Boyce F. Martin, Jr. of the U.S. Court of Appeals for the Sixth Circuit.

“Anne Gordon will help us improve the way we integrate professional skills into the Duke Law curriculum and advance our students’ engagement with public interest law while at Duke and throughout their careers,” said Levi. “This is one of the highest callings in law.” ♡



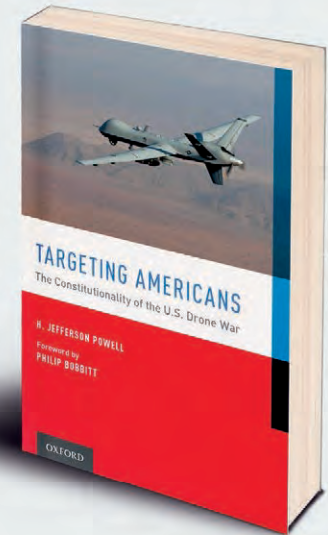
## Targeting Americans: Powell's new book analyzes the constitutionality of the U.S. drone war

ON SEPT. 30, 2011, a U.S. drone strike in Yemen killed Anwar al-Awlaki, a senior leader of al-Qaeda in the Arabian Peninsula, and a U.S. citizen. The strike was carefully planned and vetted, with executive branch lawyers finding constitutional justification for killing a U.S. citizen without a trial.

In his new book, *Targeting Americans: The Constitutionality of the U.S. Drone War*, Professor H. Jefferson Powell provides a dispassionate and balanced analysis of the issues posed by U.S. targeted killing policy. A prolific scholar whose work has addressed the history and ethical implications of American constitutionalism, the powers of the executive branch, and the role of the Constitution in legislative and judicial decision-making, Powell also has served in a variety of positions in federal and state government, most recently as deputy assistant attorney general in the U.S. Department of Justice's Office of Legal Counsel, which provides legal advice to the president, the attorney general, and other executive branch officers.

Powell cautions that constitutional questions do not address all issues relevant to the targeted killing policy: They do not resolve whether the policy in question conforms with international law or all forms of domestic law; whether it is moral or just; or whether it is in the nation's best interests. But all actions of the federal government must be constitutional, and the framework in which these issues are debated is critical, he writes. While he agreed with the Obama administration lawyers who declared al-Awlaki's killing lawful, he found their analysis flawed. In the following excerpt, Powell explains why that matters.

### EXCERPT



“IT IS ... vitally important that we try to get our constitutional thinking right, as opposed to simply arriving at the outcome we think best on some other ground and then contriving a constitutional argument to fit our conclusion. There are at least three reasons why this is so.

The first has to do with the role of law in American society and government. ... The options policymakers consider and those they reject out of hand, the extralegal factors they take into consideration, their final decisions on controversial topics, all reflect the law, or rather what people understand about the law. This can be true at very deep levels when the law in question is the law of the U.S. Constitution.

A deep concern about the law can serve the political community well in many ways, above all when legislators and executive officers have absorbed the civilizing aspects of the law into their thinking about matters of policy and discretion. But the pervasively legalistic mindset of early twenty-first-century American officials creates a standing temptation to confuse the question of constitutionality with questions of wisdom and morality. The conclusion that X is constitutional slides all too easily into the conclusion that X is a good idea and that qualms or hesitations about X are ungrounded, even though we have learned little relevant to the question whether it would be good for the U.S. government to take a particular action — target a U.S. citizen for killing for

.....  
*Targeting Americans* is published by Oxford University Press.

example — when we have determined that the action would be *constitutional*. The lawyers can play the vital role of reminding policy makers of the Republic's enduring commitments only if their advice is disciplined by their commitment to sound constitutional thinking. Often enough, as in the case of al-Awlaki, good constitutional reasoning *does* lead to the conclusion that the government can take some action, but trying to get the constitutional analysis *right*, and not just devise a convenient imprimatur for some policy, is a check on what Justice Jackson referred to when he said [in *Youngstown Sheet & Tube Co. v. Sawyer*] “[t]he tendency is strong to emphasize transient results ... and lose sight of enduring consequences.”

The second reason why those who engage in debate over the constitutionality of an act like the killing of al-Awlaki ought to care about getting their constitutional thinking right is that they have a personal duty to do so, at least if they are public officials, or lawyers advising public officials or (I would add) private individuals acting in their public roles as citizens and voters. ... No matter how exigent the threat or apparently necessary the action, anyone may question, and a conscientious president must ask, what legal authority the executive possesses to take that action in the defense of the Republic.

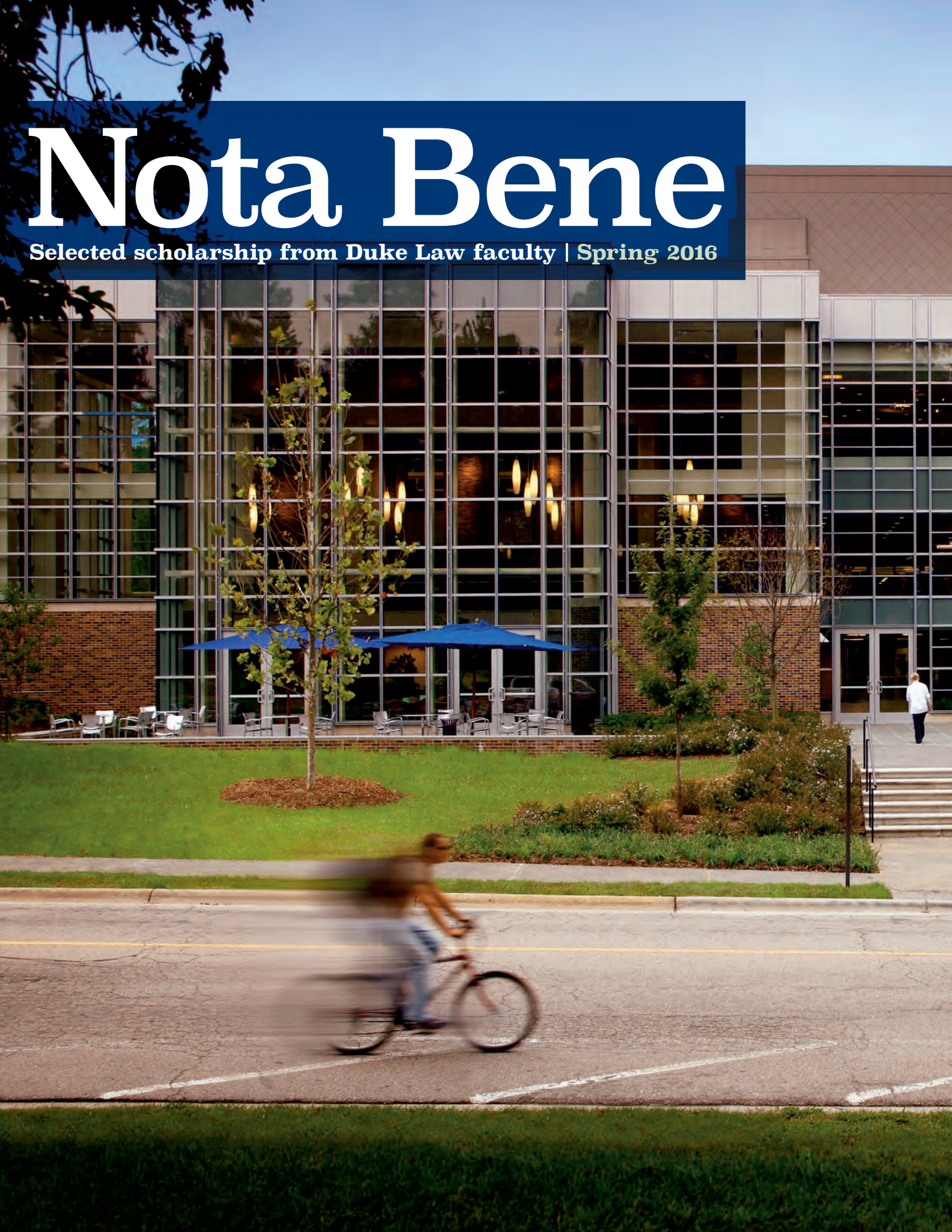
The Constitution does not rely entirely on the good faith of the president, or the members of Congress, to be sure: It establishes an elaborate set of institutional arrangements designed to channel and check the exercise of governmental power, and it ultimately assumes that an informed citizenry will exercise its powers to censure and to punish politically wayward governmental actions. But the Constitution presupposes as well that governmental officials can and should act out of a good faith intention to act in accordance with its norms. Constitutionality is a prerequisite of legitimacy in the American political system; disingenuous constitutional reasoning by those charged with making decisions undermines the legitimacy of those decisions and to that extent of the system itself. ...

The governmental system created by the Constitution constantly depends, in fact, on the intelligent and conscientious execution of their duties by those who hold public office and, in the end, those who enjoy the privileges of citizenship. The cynical belief that the Republic can dispense with a starting assumption of good faith is as unrealistic and unworkable as any Pollyannaish call for unguarded trust in the exercise of power. And the form in which those who discuss the Constitution exercise good faith toward the Republic is by making their best efforts to answer constitutional

questions with sound constitutional reasoning. Anything else — whether the individual serves the Republic as legislator, executive officer, advisor, judge, litigator, or private citizen — is a cheat.

The third, final reason why sound constitutional thinking matters has to do with the nature of the constitutional enterprise. In the introduction I quoted Justice Frankfurter's approving description of the Constitution as “the means of ordering the life of a people,” an “instrument of government [rather than] a text for interpretation.” The Constitution is surely a text, but it is a text that points beyond itself, serving through the government it creates and limits as the means by which the American political community orders its common life. The Constitution's provisions and principles exist to serve the goals of that common life — which is one reason the tradition going back to *McCulloch v. Maryland* puts such weight on reasoning about constitutional questions in light of constitutional purposes. We care about constitutional issues in order to further the commitments for which American government exists, and rightly so, for those commitments address matters that have a human significance deeper than any legal argument. Targeted killing is, I think, such a matter. I doubt anyone potentially within the sights of an armed drone would be comforted by the assurance that Congress has authorized the policy, or even (wrongly) that the president will provide him due process before ordering his death. What matters to the enemy targeted for a drone strike, as for the Americans whom that enemy threatens, has little to do with the Constitution's allocation of powers but everything to do with the Constitution's humane purposes. The law of the Constitution is vitally important, because unconstitutional killing of a human being would be murder. Constitutional legitimacy is a legal necessity, but at the same time it is not a guarantee that the killing serves the Constitution's goals. Sound constitutional reasoning will point those who must decide such matters to look beyond the Constitution to its goals. The final step when we think constitutionally is to think about the moral and political ends to which the Constitution is the means.

If it is unwise to engage in targeted killing because its net effect is to harm the security of the United States, as many think the current policy to be, then its lawfulness does not make it wise. If the president, or the American public, cannot honestly distinguish current policy from the sort of assassination that most of us would think immoral, then the U.S. government should renounce it, regardless of what the lawyers say. If it is wrong in certain circumstances to kill an al-Qaeda member who is a U.S. citizen, it is equally wrong (I think) to kill one who is not, whatever the limits of the Constitution's prohibitions. If U.S. drone strikes are imposing a reign of terror on people in some other part of the world, then we must stop because we are contradicting the deepest moral commitments of our political community. War is an ugly and brutal business, even war fought for a just cause and with the most scrupulous attention to legal norms. The limits on war that ultimately matter are those rooted in the humanity and decency of the society that goes to war to defend itself. ♡ ”



# Nota Bene

Selected scholarship from Duke Law faculty | Spring 2016



LAW

**I**N THE PAGES THAT FOLLOW we present a sampling of scholarly articles by Duke Law faculty published during 2015. The works excerpted here highlight the depth and diversity of scholarship produced by our professors as well as the traditions of innovation, excellence, and collaboration that mark the academic culture at this institution. We hope to make this an annual supplement to *Duke Law Magazine* and in so doing provide a snapshot of the outstanding research and writing our faculty scholars routinely undertake on a wide spectrum of legal issues. »

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Professors Curtis Bradley, left, and Neil Siegel





# A constructive collaboration

Curtis A. Bradley  
and Neil S. Siegel

**C**O-TEACHING A SEMINAR on constitutional theory in 2013 sparked a prolific scholarly collaboration for longtime colleagues Curtis Bradley and Neil Siegel that, three years later, is still generating new ideas.

In the seminar, Siegel, the David W. Ichel Professor of Law, and Bradley, the William Van Alstyne Professor of Law, led a dozen upper-class students in considering various approaches to constitutional interpretation and theories of constitutional legitimacy. The two public law scholars have since co-authored three articles that break new ground concerning the relationship between the constitutional text and other constitutional materials and the effect of historical practice in helping to define the respective powers of the three branches of the federal government.

Each work reflects their individual areas of expertise: Bradley's on historical practice in creating norms of international law and in constitutional interpretation, which he has applied in recent years to the separation of powers between Congress and the executive branch; and Siegel's in constitutional law and theory.

"It evolved organically," Siegel said of their partnership, which advances a long-standing focus of his wide-ranging scholarship: how the American constitutional system functions in practice and how scholars, advocates, government officials, and jurists craft their arguments so as to both advance their constitutional commitments and secure the legitimacy of the system itself. Their first article, he said, gelled while they were preparing a short piece for a scholarly roundtable they hosted as a tie-in to their seminar.

"We realized through talking about our class materials and working on the conference that we shared similar ideas," Bradley said. "At first we thought we had just one article, but we quickly saw projects that could branch out of it. We find that we see things together that we wouldn't have seen separately, given our different insights and experiences with the law."

Their seminar students were particularly engaged by the ideas that resulted in their first article, "Constructed Constraint and the Constitutional Text." (Several of

*“We find that we see things together that we wouldn’t have seen separately, given our different insights and experiences with the law.”*

— Professor Curtis Bradley



**Neil S. Siegel**

David W. Ichel Professor of Law and Professor of Political Science

Co-director, Duke Program in Public Law

Director, D.C. Summer Institute on Law and Policy

them even helped shepherd it into publication in the *Duke Law Journal*. “It was a community experience,” said Bradley.)

While most interpreters feel the need to maintain fidelity to the written text and believe that clear text is dispositive, Siegel and Bradley posit that the very act of deciding what is clear or unclear in the text is itself likely affected by other considerations, such as views about the purpose of the particular provision, the requirements of the constitutional structure, or how the governmental branches have long interpreted the Constitution.

“You have a variety of different approaches to interpretation that in our view are often interacting with the text, either filling in gaps when the text is thought to be unclear or affecting perceptions of textual clarity or ambiguity,” said Siegel.

“It turns out that reading the Constitution is itself a complicated and dynamic enterprise,” added Bradley.

The Supreme Court’s 2014 ruling in *NLRB v. Noel Canning* is one of several examples they offer to show the use of historical practice when constitutional text fails to address an issue or is perceived to be ambiguous, or even when custom seems to make apparently clear text somewhat ambiguous. In interpreting the Recess Appointments Clause in *Noel Canning*, the Court expressly relied on customary practice to discern what is meant in the clause by the term “recess” and also by the phrase “vacancies that may happen.”

“In both *Noel Canning* and subsequently last year in *Zivotofsky v. Kerry*, the Court stopped to say, ‘Longstanding historical practice is itself important to how we’re going to understand a piece of the Constitution.’ The fact that the Supreme Court called attention to it has made our entire enterprise ever more salient,” said Bradley.

In their latest collaboration, “Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers,” forthcoming in the *Georgetown Law Journal*, Bradley and Siegel shift their focus to the way customary practices of government institutions affect the powers of the federal courts, an area that has been largely ignored by scholars. Mining primary

records of political-branch debates on such high-stakes matters as President Franklin Roosevelt’s 1937 attempt to pack the Supreme Court, they find evidence that historical practice has, in fact, helped define the separation of powers between the political branches and the judiciary. They highlight one debate between former Solicitor General Ted Olson and current Chief Justice John Roberts, newly discovered in records from the Reagan Justice Department, in which Roberts argued, unsuccessfully, that Congress has broad authority to strip the Court’s appellate jurisdiction.

Each of their works has benefitted, Bradley and Siegel say, from the expertise, insights, and diverse perspectives of their colleagues at Duke. In addition to citing writings of colleagues such as Professor H. Jefferson Powell and Margaret Lemos, the Robert G. Seaks LL.B. ’34 Professor of Law, they discuss the work of Alston & Bird Professor Ernest Young on “the Constitution outside the Constitution” at length in “Constructed Constraint.” “To have a large group of really strong public law faculty here who are very responsive, who talk to you in the hallways and give you written feedback is a huge resource,” said Bradley.

In “Constructed Constraint,” which is excerpted on page 33, the titular words are both emphasized, Bradley said.

“The text matters. Unlike some critical legal scholars of the 1970s and 1980s who suggested that text really did no actual work and its application was all discretionary, we think there is constraint in our legal tradition and in our culture. Sometimes the text is more constraining than it is at other times. And our position is that some of that constraint is itself constructed or based on considerations other than just looking at the text and the plain meaning of text.”

Added Siegel: “We have the oldest written constitution in the world and yet we have witnessed dramatic changes in facts and values over the course of centuries. How does that happen? It happens in part because the text is not as constraining as is suggested by the simple assertion that ‘when the text is clear you comply with it.’ There is disciplined flexibility.” »



**Curtis A. Bradley**

William Van Alstyne Professor of Law and Professor of Public Policy Studies

Co-director, Duke Center for International and Comparative Law

Reporter for American Law Institute Restatement project on the foreign relations law of the United States

EXCERPT:

# Constructed Constraint and the Constitutional Text

64 *Duke Law Journal* 1213-1294 (2015)

## D. Benefits of the Practice

So far, this Article has attempted to describe an important feature of the role of the constitutional text in American interpretive practice; it has not sought to assess the normative implications of that feature. The Article has emphasized description over prescription in the belief that an accurate understanding of a social practice is both valuable in itself and an essential prerequisite to sound evaluation of the practice. With the Article's descriptive account of constructed constraint in hand, this Section now sketches a normative defense of the practice.

The practice of constructed constraint can be evaluated from two different points of view — from the external perspective of the analyst of the constitutional system, and from the internal perspective of the judge or practitioner. The internal perspective can be further divided into the individual and the systemic points of view. The individual perspective can be held by the faithful participant in constitutional practice — the citizen, politician, or judge who both makes claims on the Constitution and who seeks to comply in good faith with the Constitution. The systemic perspective evaluates a social practice from the standpoint of the constitutional system as a whole, not from the perspective of particular participants and their choice of conduct within the system. The systemic perspective asks, for example, whether a practice produces system goods. Such goods enhance the functioning of the constitutional system by improving its ability to accomplish its purposes, including by negotiating conflicts among different purposes.

Constructed constraint is primarily a descriptive account of part of U.S. constitutional practice from the external perspective, not a normative theory of how interpreters should decide particular constitutional questions from the internal, individual perspective. For example, constructed constraint neither validates nor condemns any of the interpretive positions taken by participants in the historical or contemporary debates used as examples in this Article — whether over the meaning of “Congress” in the First Amendment, the creation of West Virginia, or President Obama’s recess appointments. The theory itself cannot determine the proper

balance between construction and constraint regarding any particular constitutional question. Nor can it determine what materials should inform construction in any given case. To take one of the modalities discussed in Part II, the effect of a consideration of consequences on constitutional construction will depend on the interpreter’s view of what consequences are relevant, the likelihood of their occurrence, and whether they are good or bad. The theory of constructed constraint cannot resolve such questions.

Constructed constraint does, however, act as a counterpoint to certain theories of constitutional interpretation to the extent that they purport to account for actual practice. In particular, this Article contends that constructed constraint is a descriptively better account of an important part of constitutional practice than approaches that, as a general matter, conceive of the text either as highly constraining or as not constraining at all. For example, strict versions of constitutional originalism and textualism seem unable to explain the construction and reconstruction of the constitutional text in which interpreters have engaged over the course of American history. At the same time, the constraint element of constructed constraint also rules out approaches that dismiss the possibility, let alone the constraining effect, of constitutional text that is perceived to be clear. The possibility of textually perceived constraint may help to explain why eminent constitutional scholars today, such as Strauss and Balkin, agree that clear text binds and differ only in the explanation that they offer for this phenomenon. This possibility may also help to explain why certain prominent constitutional scholars, such as Balkin, Tushnet, and Levinson, do not write today about constitutional questions in the way that they did in the 1980s. In particular, they now seem more interested in text, history, and doctrine than they were in the earlier period. One might say that the Big-C crits have become little-c crits.

If the normative implications of constructed constraint are limited from the individual perspective, these implications are more significant from the perspective of the constitutional system as a whole. From the systemic perspective, a key question is how the system functions over time to manage

the constitutive tensions between the different values that are typically associated with constitutionalism. On the one hand, constitutionalism is widely thought to entail fundamental legal limits on politics, which help to make possible the rule of law by restraining the exercise of governmental power. On the other hand, it is also widely recognized that the rule of law itself has political foundations. It follows that constitutionalism also requires some measure of democratic responsiveness — some popular participation in the fashioning of constitutional limits. Mindful of this dimension of constitutionalism, presidents have often stressed the need for the Constitution to keep up with the times.

There is relatively little tension between these two elements of constitutionalism — restraint and responsiveness — when the constraints imposed by the Constitution facilitate democratic decisionmaking, such as by structuring and facilitating democratic politics, as discussed in the previous section. There is also relatively little tension between them when practices of popular sovereignty reinforce constitutional limits, such as by promoting a democratic political culture of respect for the Constitution. In particular cases, however, constitutionalism and democracy can be in tension. Such tensions and conflicts lie at the heart of many debates in constitutional law, from gun rights to same-sex marriage, and from abortion to health care reform. A basic question in such cases is the extent to which the Constitution should be understood as restraining or responding to popular commitments.

Robert Post and Reva Siegel have coined the phrase “democratic constitutionalism” to describe the paradoxical relationship between these two aspects of constitutionalism — “to express the paradox that constitutional authority depends on both its democratic responsiveness and its legitimacy as law.” “Americans,” they write, “want their Constitution to have the authority of law, and they understand law to be distinct from politics.” Moreover, “[t]hey understand that the rule of law is rooted in professional practices that are distinct from popular politics.” Even so, Post and Siegel stress, if the public comes to view the Supreme Court’s interpretation of the Constitution as wholly unresponsive to popular commitments, then “the American people will come in time to regard it as illegitimate and oppressive, and they will act to repudiate it as they did during the New Deal.”

How, then, can the Constitution “function as our fundamental law, as the limit and foundation of politics, and yet remain democratically responsive”? Political commitments

may become constitutional law in various ways. First, Article V amendments are rare but have not been impossible over the course of American history. Second, electoral politics results in acts of constitutional interpretation and institution building by the political branches, as well as the appointment of Justices and judges. Third, the public may engage in efforts to change social norms, whether through social movement advocacy, litigation, or both. Fourth, norm contestation may also occur through the rhetoric of presidents and other influential politicians. “To succeed in changing social norms,” Balkin observes, “may be as powerful as changing judges and politicians, for it alters the underlying sense of what is reasonable and unreasonable for governments to do. It shifts political and professional discourse about what is off-the-wall and on-the-wall in making claims on the Constitution.”

Constructed constraint illuminates both the limits and the potential of non–Article V pathways of constitutional change. The fact that interpreters feel bound by clear constitutional text enables the Constitution to partially insulate itself from these pathways. But the ability of interpreters to work with the text renders the Constitution more democratically responsive, animating the text with the values and needs of the people whom the text purports to govern. In other words, constraint empowers the Constitution to discipline politics, and the construction of constraint vivifies constitutionalism by infusing it with popular commitments.

In negotiating tensions within constitutionalism between restraint and responsiveness, constructed constraint attends to the two enduring issues in constitutional theory that were noted in Part III.A: the dead hand problem and the counter-majoritarian difficulty. The constraint element of constructed constraint helps to ameliorate the countermajoritarian difficulty by framing and channeling judicial discretion in constitutional adjudication. The construction part of constructed constraint enables interpreters to reduce the dead hand problem in practice by facilitating constitutional change, not only through judicial decisionmaking, but also outside the courts — and not only through written or unwritten constitutional amendments, but also through working with the text that they already have. ♪

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## Applying agency law to shareholders' rights

Deborah A. DeMott, David F. Cavers Professor of Law

**I**N RECENT YEARS, courts have largely approved of director-adopted corporate bylaws that affect shareholders' litigation rights, whether specifying an exclusive forum for corporate governance claims, limiting claims to resolution through arbitration, or shifting all fees to the litigant shareholders. Professor Deborah DeMott critiques this process in a recent article, using a focus on agency doctrine as a starting point.

While corporate directors are not shareholders' agents under U.S. corporate law, applying agency doctrine to the issue illuminates problematic aspects of forum-selection bylaws that are unilaterally adopted by directors after shareholders have invested in a company, DeMott writes.

DeMott, the David F. Cavers Professor of Law, served as sole Reporter for the American Law Institute's Restatement (Third) of Agency and has written extensively in the field. Her recent article, "Forum-Selection Bylaws Refracted Through an Agency Lens," 57 *Arizona Law Review* 269-297 (2015) was written for the Institute of Law and Economic Policy's 20th Annual Symposium, titled "Business Litigation and Regulatory Agency Review in the Era of the Roberts Court."

In her article, DeMott argues that agency doctrine exposes the particularly weak understanding of consent that underlies the "flexible contract" used by Delaware's Court of Chancery to justify forum-selection bylaws, and examines the ways the Delaware General Corporation Law (DGCL) could be amended to "ground consent more firmly" and limit the scope and content of litigation-related bylaws.

"Absent such an amendment, shareholders are subject to the risk that through a generic governance provision, directors may impose limitations on shareholders' rights that stem from sources external to the corporation itself, including generally applicable rules of civil procedure," she writes. "Imposing this risk on shareholders charges them with notice of a fact not in existence at the time they invest and, more generally, serves to undermine a central mechanism of fiduciary accountability."

Since DeMott's article was published, the DGCL was amended to explicitly authorize and limit forum-selection provisions. »

EXCERPT:

# Forum-Selection Bylaws Refracted Through an Agency Lens

57 *Arizona Law Review* 269-297 (2015)

## Introduction

... In 2013, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, the Delaware Court of Chancery upheld the statutory validity of forum-selection bylaws adopted unilaterally by directors. The court held that directors had power to act unilaterally, and that the designation of an exclusive forum was within the scope of a bylaw's permissible content; the DGCL defines this in general terms as "any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." The bylaws at issue in *Boilermakers* covered: derivative suits brought on behalf of the corporation; nonderivative actions asserting claims of breach of fiduciary duty owed by any director, officer, or employee; claims arising under the DGCL; and any action "asserting a claim governed by the internal affairs doctrine." Each bylaw explicitly deemed any person "purchasing or otherwise acquiring" any interest in stock to have notice of, and to consent to, the bylaw. As drafted, the bylaws at issue in *Boilermakers* reached well beyond shareholder lawsuits filed in the wake of M&A and other fundamental transactions. Finally, *Boilermakers* recognized the potential applicability of long-standing equitable doctrines that permit shareholders to challenge the adoption of bylaws on a case-by-case, situation-specific basis.

*Edgen Group Inc. v. Genoud*, a post-*Boilermakers* bench ruling from the Court of Chancery, underlines the point of the exercise conducted in this Article. There, a target corporation sought an antisuit injunction directed at a shareholder who sued in a Louisiana state court challenging a proposed merger, despite the Delaware forum-selection provision in the corporation's charter. Nonetheless, The *Edgen* court denied the injunction, reasoning that, in balancing the equities, it was unconvinced that an antisuit injunction should be "the

initial tool of judicial first resort," as opposed to awaiting the Louisiana court's response to the defendant's motion to dismiss. In particular, the Court of Chancery identified personal jurisdiction as a potential stumbling block given that "simply owning stock in a Delaware corporation is not sufficient to confer personal jurisdiction on a Delaware court." Additionally, the court emphasized that there was nothing in the certificate provision that addressed personal jurisdiction over shareholders. Further, the court characterized the status of forum-selection provisions as "an evolving issue." The court differentiated forum-selection provisions contained in "negotiated agreements" from those governing disputes involving "non-direct signatories." The latter category encompasses the connection between shareholders in a corporation and either forum-selection certificate provisions (as in *Edgen*), or the consequences of the bylaw power conferred on directors (as in *Boilermakers*).

Focusing on agency doctrine makes clear that corporate shareholders who are subject to a forum-selection bylaw unilaterally adopted by directors are even more unlike the parties to a negotiated agreement than was the shareholder in *Edgen*. This is because shareholders are linked to a forum-selection provision only by the downstream consequences of a generic governance provision conferring bylaw power on directors — as opposed to an explicit provision present in the corporation's certificate of incorporation at the time of the IPO. This link is too attenuated to satisfy the requisites for consent and knowledge articulated in agency-law doctrine. Nonetheless, similar to the principal-agent relationship, *Boilermakers* empowers corporate boards to take action with direct legal consequences for shareholders-actions bearing on rights not entirely originating with the corporation itself, including the applicability of general rules of civil procedure which specify permissible venues. The court's analysis in *Boilermakers* relies on attenuated concepts of consent and notice. These

concepts become operative once an investor acquires shares in a Delaware corporation with a certificate provision conferring bylaw power on directors, through which the investor as shareholder becomes a party to a “flexible contract” with the corporation acting through its directors.

As this Article demonstrates, the “flexible contract” and its operation are singular even when considered side-by-side with the boilerplate quality of many consumer contracts — including those containing terms imposed through a process of “rolling contract formation.” Additionally, nothing in the DGCL or any other Delaware statute explicitly alerts investors to possible downstream impediments on their right to sue in compliance with applicable rules of civil procedure, including choice of forum. In contrast, a director or officer of a Delaware corporation impliedly consents to the corporation’s registered agent as that person’s agent for purposes of service of process, an implied consent grounded in an explicit statutory provision. Additionally, unlike the statutory limits on certificate provisions limiting director liability, the DGCL does not regulate the content of forum-choice bylaws. Perhaps unsurprisingly, the prospect that bylaws might serve as vehicles to impose provisions mandating arbitration (and waiving the right to proceed as a class in shareholder suits), shift fees and costs to plaintiffs ultimately not “successful” as defined in the bylaws, or deem share ownership as consent to personal jurisdiction in Delaware, has not gone unnoticed. ...

### III. Implications

So far, this Article has argued that forum-selection bylaws rest on attenuated and implausible conceptions of shareholder consent and knowledge, a result not mitigated by the construct of the “flexible contract” announced in *Boilermakers*. Not only does the “flexible contract” justify outcomes at odds with agency doctrine, it clashes with conventional understandings of contract doctrine. Additionally,

as noted above, its legitimation may tempt even more aggressive uses of the bylaw power. As a consequence, revising the DGCL warrants consideration. In this context, an overarching justification for jettisoning the “flexible contract” in favor of statutory specification is to emphasize that limitations and restrictions on bylaw powers are constitutive of any corporation — that is, integral to the corporation as a distinct legal person — formed under that statute. This ties restrictions on directors’ bylaw power to the internal affairs doctrine, as well as distances them from state-law contract doctrines like unconscionability.

More specifically, statutory treatment of forum-selection bylaws would acknowledge the importance of implied consent in corporate law by creating a basis to determine when shareholders have been put on notice of such bylaws. That is, much in corporate law turns on implied consent, including the basic majoritarian norm of shareholder voting. But implied consent goes only so far. The current position of shareholders in Delaware corporations may be uncomfortably close to that of officers and directors in an earlier era in which Delaware treated stock ownership as a sufficient basis for the exercise of personal jurisdiction. That is, agreeing to accept a fiduciary position, when coupled with stock ownership, constituted implied consent to being haled into court in Delaware via Delaware’s sequestration procedure even when ownership of the stock itself was not the focus of the litigation. In *Shaffer v. Heitner*, the Supreme Court held that this use of in rem sequestration as a vehicle to secure personal jurisdiction violated the Due Process Clause. In a concurring opinion, Justice Stevens wrote that “[o]ne who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction.” Further, to Justice Stevens, minimizing the risks of broadly drawn implied consent was not without costs to investors

“... [S]tatutory treatment of forum-selection bylaws would acknowledge the importance of implied consent in corporate law by creating a basis to determine when shareholders have been put on notice of such bylaws. That is, much in corporate law turns on implied consent, including the basic majoritarian norm of shareholder voting.

because “unless the purchaser ascertains both the State of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation.”

In contrast, the statutory amendment that followed *Shaffer* — Del. Code Ann. tit. 10, § 3114 — both explicitly asserts Delaware’s interest in securing jurisdiction over corporate fiduciaries, and creates a firmer basis for implied consent. Thus a mirror-image of § 3114 applicable to shareholders is one possibility to consider and evaluate. To be sure, § 3114 is not a perfect analogy for a statutory exclusive-forum provision applicable to shareholders. Applicable to directors and officers, § 3114 itself is a fact that can be known before a person agrees to serve as a director or officer, and if not actually known by any particular prospective director or officer, is something that his or her lawyer should know and, like the prospective fiduciary, could know. This would also be true for a mirror-image statute applicable to shareholders. However, consistent with the insights of Justice Stevens, simply buying shares (particularly in a publicly traded corporation) may be different. An investor with an active and diversified portfolio and her advisors could confront wide-ranging research into state-law idiosyncrasies, in contrast to the more limited research to be done by prospective fiduciaries. Nonetheless, a mirror-image of § 3114 applicable to shareholders would overcome the imponderable quality of notice that dogs the “flexible contract,” which presupposes notice of a fact that is not presently discernible. But the mirror-image of § 3114 would leave open the concern that for some investors notice would remain an artificial construct due to the relative magnitude of the requisite research.

Alternatively, the DGCL might be amended both explicitly to enable the adoption of forum-selection bylaws, as well as to introduce limits and requirements applicable to them. For

example, were the DGCL amended to require shareholder approval for forum-selection bylaws, any bylaw so adopted would become a matter of public record, comparable to a provision in an original or restated certificate of incorporation. Additionally, an amendment to the DGCL could limit the effectiveness of a bylaw adopted unilaterally by directors to shareholders who thereafter acquire stock so long as the corporation creates a public record of the bylaw through a filing with the Secretary of State. Separately, the history of Del. Code Ann. tit. 8, § 102(b)(7) is relevant because it enabled the adoption of certificate provisions that exculpate directors against monetary liability for breaches of their duty of care. Amending the DGCL to add § 102(b)(7) obviated questions about the effect of exculpatory provisions not enabled by statute by framing exculpation as a question governed the DGCL itself. Section 102(b)(7) also, through exclusions, regulates the extent to which directors may be exculpated from liability. And, by permitting exculpatory provisions only in certificates of incorporation, the section foreclosed the bylaw route. An exculpatory provision requires a shareholder vote to amend the corporation’s certificate of incorporation if not present in a corporation’s initial certificate of incorporation. Either way, a public record of the provision follows because the certificate is a public document filed with the secretary of state, creating a conventional mechanism for implied consent by shareholders. This route is open to the potential objection that prospective shareholders would be subject to the burden of additional research into governance characteristics of particular companies, but at least the relevant information would be discernible from public sources. ♪

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## A new paradigm for voting rights

Guy-Uriel E. Charles, Charles S. Rhyne Professor of Law

**H**AS THE VOTING RIGHTS ACT done its job? In a series of recent works, Professor Guy-Uriel Charles, director of the Duke Center on Law, Race and Politics, argues that the Supreme Court is no longer interested in working with Congress to address the fundamental questions of voting rights policy. Reflecting on the Supreme Court's 2014 ruling in *Shelby County v. Holder*, Charles, the Charles S. Rhyne Professor of Law, argues that the Court essentially declared that the problem of racial discrimination in voting is a thing of the past.

Writing with his frequent collaborator, Professor Luis E. Fuentes-Rohwer of the Indiana University Maurer School of Law, Charles posits that the message of the conservative majority in *Shelby* was that the decades-long effort to eliminate state-sanctioned barriers to voting — the goal of the landmark 1965 law — has been achieved. With no clear consensus on how voting rights policy should proceed, Charles and Fuentes-Rohwer urge activists to be deliberate, sober, and pragmatic in searching for a model that addresses such contemporary voting challenges as voter-identification and proof-of-citizenship laws. Their co-authored works on the

subject include “Mapping a Post-*Shelby County* Contingency Strategy,” 123 *Yale Law Journal Online* 131-150 (2013); “Voting Rights Law and Policy in Transition,” 127 *Harvard Law Review Forum* 243 (2014); “State’s Rights, Last Rites, and Voting Rights,” 47 *Connecticut Law Review* 481-527 (2014); and “Race, Federalism, and Voting Rights,” 2015 *University of Chicago Legal Forum* 113-152, in addition to the work excerpted here.

In “The Voting Rights Act in Winter: The Death of a Superstatute,” 100 *Iowa Law Review* 1389-1439 (2015), Charles and Fuentes-Rohwer take a comprehensive look at how and why the venerable discrimination-based regime established by the Voting Rights Act disintegrated, and, in the following excerpt, outline three paths for the future of voting rights policy: forging a new consensus with racial discrimination at its core; building a consensus that accords voters of color political power independent of the existence of discrimination; or reconceiving the Voting Rights Act as a statute guaranteeing universal voting rights to all citizens. »

EXCERPT:

# The Voting Rights Act in Winter: The Death of a Superstatute

100 *Iowa Law Review* 1389-1439 (2015)  
(with Luis E. Fuentes-Rohwer)

## V. Forging A New Consensus: Three Models

Given the cloud of dissensus gathered over the policy aims of the VRA, the 2006 renewal process presented an opportunity *manqué*. ... Theoretically, as progress is made, Congress ought to discard older and less useful measures while fashioning new ones to address present and future concerns.

This is what one would have expected Congress to do with the occasion provided in 2006, but this is not what Congress did. The 2006 Reauthorization Act accomplished two substantive goals. First, the Act overruled *Reno v. Bossier Parish* (“*Bossier II*”). In *Bossier II*, the Supreme Court held that the Attorney General must preclear a redistricting plan that may have been motivated by discriminatory animus if it was not enacted with the intent to make voters of color worse off. Second, Congress overruled *Georgia v. Ashcroft*. In *Ashcroft*, the Supreme Court held that the legislature may trade safe majority-minority districts — districts in which voters of color are guaranteed to elect a candidate of their choice — for coalition or influence districts. Note, unfortunately, that both substantive goals of the Reauthorization Act are backward-looking and only sought to restore the *status quo ante*. ...

Consider three different ways of making sense of the policy aims of the VRA. First, one can view the VRA as a statute that is directed strictly toward eliminating racial discrimination in the political process. This is the discrimination model. Under this model, a state practice would not violate the Act unless the practice was motivated by racial animus. The discrimination model is most effective where racial discrimination is rampant and poses significant concerns in the political process.

Second, one can understand the VRA as a statute that seeks to confer political autonomy to voters of color as a group unmoored from racial discrimination. Under this model, which we label the autonomy model, the participatory right voters of color are not dependent upon the existence of racial discrimination in voting. The claim is consequential and not expressive. It is not enough that voters of color are able to register and have their votes counted. Voters of color must also be able to wield consequential political power.

Third, one can think of voting rights policy in universalist terms. Under this universal voting rights model, the VRA would be a statute that protects a constellation of rights collectively understood as voting rights. On this view, the VRA would not be about race or people of color. It would be a statute that guarantees a positive right to political participation to all voters in all jurisdictions. This VRA would be potentially applicable to any state statute that burdens the right of any individual or identifiable group of people to participate in the political process.

The need to grapple with these models could not be more important. This is because, without question, we are in “a transitional moment in American democracy.” Voting rights law and policy oscillates among these three models as we witness the decline of the racial discrimination model. The type of overt racism that gave rise to the VRA in the last century has virtually disappeared, there is evidence that racial bloc voting has decreased, and the public policy preferences of voters of color are perceptibly, though slowly, diffuse. Against this backdrop, the discrimination model is difficult to sustain. But the extent of racial progress is also difficult to ascertain. Simply, we live in a period of uncertainty.

With voting rights policy at a crossroads, this is precisely where Congressional leadership is crucial. Congress is the more competent decision maker because of its ability to engage in systematic empirical or policy analysis. The costs of decision making in this period of uncertainty increase when courts, which are ill-equipped to engage in the systematic overview of the empirical issues raised by the VRA, assume primary policy making responsibilities. In order to see this more clearly, consider once more the dispute over *Georgia v. Ashcroft* and *Beer v. United States*.

From the perspective of the autonomy model, *Ashcroft* is as right a voting rights case as we have seen from the Supreme Court in a long time. This is because this decision fatally undermined the Court’s decision in *Beer*. *Beer* imposed both a floor and a ceiling on the electoral prospects of voters of color and did so in a way that is completely contrary to the aims of the VRA. Under *Beer*, as long as a

jurisdiction did not make voters of color worse off, the jurisdiction did not violate section 5. That standard might be fine depending upon the baseline, but under *Beer* the baseline could be 1965. Thus, section 5 under *Beer* did not require progress or improvement; it simply did not permit retrogression — as if one could regress from zero.

In contrast to *Beer*, the underlying premise of *Ashcroft* is that section 5 must be sufficiently flexible to allow for progress. Where voters of color are inefficiently grouped — as, say, in a 60% black voting-age population district — the state may reduce the number of voters of color in that district and spread them to other districts as to allow them to aggregate with like-minded others or to have a greater impact on electoral outcomes. Of course, whether that strategy is worth pursuing depends upon contextual factors for which risk is a function of the denouement of real world circumstances. ...

The difficult issue presented in *Ashcroft* (and *Beer*) is this: how should the Court assess whether state actors are moving voters of color around in order to enhance or to diminish their electoral prospects? All of the justices in *Ashcroft* agreed that some moving around is warranted, in light of changed circumstances — and particularly the appreciable decrease in racial bloc voting in covered jurisdictions. Depending upon the factual circumstances, for example, a 60% black district could be vote dilution by packing. What divided the Court was determining how to assess the appropriate level of risk and who should bear the risk of an incorrect assessment.

If one believes that state actors cannot be trusted because they will take every opportunity to discriminate, then *Beer* is the preferred default option and the discrimination model is the preferred model. The civil rights community thought the Court's decision in *Ashcroft* would undermine the VRA by permitting state actors to dismantle majority-minority districts and replace them with coalition or — even worse, from the perspective of civil rights groups — influence districts, in which voters of color could not control but could only influence the outcome of an election.

Here, tremendous trade-offs are needed. As a consequence, Congress is the best institution for providing the facts necessary to accurately assess the risks. How much has racial bloc voting declined in covered jurisdictions? To what extent are state actors intent on discriminating against voters of color in the political process? Are political incumbents trustworthy guardians of the political interests of voters of color? Should states have the option to implement alternative voting structures and escape review of reapportionment plans?

How should we balance competing claims to political autonomy among the different racial groups? These are the types of questions that Congress is better positioned to answer, rather than courts under the inherent limitations of the adjudicatory process.

But Congress could not overcome the political constraints that would enable it to take on these hard questions and modernize the Act. It could only do the next best thing: set these hard questions aside for another day.

Congress's gamble was that the courts would resolve the difficult questions. This was not an altogether irresponsible gambit. Under the cooperative framework dictated by the partnership model, there was a sufficiently strong possibility that the Court would continue to step in and make the tough calls that Congress could not make for political reasons. In fact, this is the historical evolution of the Act in a nutshell. The question that the Court faced and continues to face was whether it ought to cooperate with Congress's abdication of political responsibility. Ordinarily, one might say that the courts should do what they have always done with respect to the VRA: make the policy decisions as best as they can. But these are not ordinary circumstances.

The fundamental policy judgments that courts are having to make about the future of the VRA, and the choice among different models of the VRA are more difficult than they have ever been. Courts do not have the institutional competence to make these difficult policy judgments. Increasingly, judicial decisionmaking with respect to the VRA is less about effectuating a democratic consensus with respect to the policy aims of the VRA — namely, to rid the electoral process of racial discrimination — and more about choosing between competing normative models of the VRA's purpose. The Chief Justice's complaint that the Act fails to account for current political realities is a fair indictment.

Moreover, superstatutory interpretation, which depends upon a partnership among the branches, functions best where each branch is pulling its own weight and contributing to the resolution of the public policy problem that is the aim of the statute. Congress is proving itself unable to make any more significant contributions, and the Court is no longer willing to decide the next phase of voting rights policy. The executive branch is, for now, the last actor standing. The era of cooperation is over. ♡

Reprinted with permission from: Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015) (Footnotes have been removed.)



## Co-religionist commerce in court

Barak D. Richman, Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration

**C**OMMERCIAL TRANSACTIONS structured to conform with shared religious tenets might seem archaic, but they are actually on the rise in the United States. Consider the myriad agreements between devout co-religionists, such as traditional Jewish and Islamic marriage contracts, loan agreements crafted to adhere to the Jewish prohibition against usury, and performance contracts for specific ministerial services, or the multi-billion dollar kosher food and Christian products industries.

In an article co-authored with Michael Helfand of Pepperdine Law School, Professor Barak Richman argues that contracts between co-religionists that contain “ecclesiastical” elements often don’t get the same legal support accorded other commercial relationships. In many cases, these agreements come into conflict with legal doctrines that discourage any examination of the contracting context to determine the parties’ intentions. As a result, “plaintiffs have been left to absorb commercial harms without an avenue for judicial remedy, and the viability of co-religionist commerce has become uncertain,” Richman and Helfand

write in “The Challenge of Co-Religionist Commerce,” 64 *Duke Law Journal* 769-822 (2015).

Richman, the Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration, focuses his research on the economics of contracting, new institutional economics, antitrust law, and health care policy. He has extensively studied relational exchanges in the context of the diamond industry; his book, *Stateless Commerce: Diamond Dealers, Ethnic Trading Networks, and the Persistence of Relational Exchange*, is forthcoming from Harvard University Press.

In their article, Richman and Helfand suggest a limited embrace of contextualism as a way of protecting the integrity of contracting co-religionists’ intentions. “By leveraging shared subjective intent, religious norms, and communal understandings, courts can selectively navigate the doctrinal minefields that cause courts to misunderstand or neglect commercial disputes and can provide a more stable adjudicative infrastructure for co-religionist commerce,” they write. »

EXCERPT:

# The Challenge of Co-Religionist Commerce

64 *Duke Law Journal* 769-822 (2015) (with Michael A. Helfand)

## Introduction

... Because of its ecclesiastical qualities ... co-religionist commerce presents an unusual challenge to American law. When commercial disputes arise among co-religionists, courts are asked — for example, in determining the parties’ intents or customary norms — to interpret religious terminology, standards, and practices. Courts therefore often shy away from adjudicating co-religionist commercial disputes, fearing that intervention would impermissibly contravene prevailing interpretations of the Establishment Clause. Yet courts also recognize that refusing to issue rulings both abdicates the judicial responsibility to resolve legal disputes and withdraws the legal infrastructure that is routinely available to — and necessary to support — secular commerce. Constitutional doctrine has long recognized this challenge and has instructed courts, when confronted with disputes that are imbued with ecclesiastical circumstances, to adjudicate on the basis of “neutral principles of law” — that is, to issue rulings based “on objective, well-established concepts of law familiar to lawyers and judges.” Relying on neutral principles of law allows courts to resolve disputes among co-religionists while avoiding “entanglement in questions of religious doctrine, polity, and practice.”

Unfortunately, the neutral-principles framework has proven less successful than participants in co-religionist commercial markets might have hoped. The core problem lies in a translation difficulty. Parties to co-religionist commercial agreements often lack the flexibility to replace religious terms in their agreements with secular terms, and therefore cannot contract around the Establishment Clause. For example, parties entering into purchase agreements for kosher food or into employment agreements for ministers seek a certain type of religious product or service that cannot be described without reference to religious requirements or religious standards. In other instances, co-religionist commercial agreements cannot be modified from their traditional form if they are to have their desired religious effect. For example, religious marriage contracts — such as the *mahr* in Muslim marriages or the *ketubah* in Jewish marriages — often assign financial commitments through the use of religious references. But assigning these obligations with purely secular terminology would undermine the religious significance of the marriage ceremony.

Employing contextualism as a response to the translation problem [as courts traditionally have] has been stymied by two recent doctrinal developments — one in commercial law and the other in constitutional law. In commercial law, a subjective or contextual approach to understanding co-religionist commercial disputes has been discouraged by what private-law scholars have called New Formalism. ... New Formalism urges courts to refrain from inquiring into contextual elements — such as customary norms, notions of equity, and relational principles — when interpreting and enforcing contractual arrangements. In turn, New Formalism restricts courts from inquiring into the subjective intent of parties or extrinsic evidence that might inform the contracting environment between parties. Under such a New Formalist framework, courts cannot invoke contextual evidence to interpret religious terminology in co-religionist commercial agreements.

And in constitutional law, courts have exhibited a growing wariness of adjudicating disputes that involve, even tangentially, ecclesiastical interests. This has led to what this Article refers to as “Establishment Clause Creep,” a growing tendency by courts to interpret the Establishment Clause expansively to preclude adjudication of co-religionist disputes that, at their core, are commercial in nature. In such instances, courts conflate the commercial objectives of a transaction with the religious commitments of the parties, thereby undermining the core commitments of the neutral-principles approach to co-religionist commerce. When courts refuse to adjudicate co-religionist disputes, damages flowing from commercial fraud, professional defamation, and contractual breach are left unremedied.

Together, New Formalism and Establishment Clause Creep form the Scylla and Charybdis of co-religionist commerce. On the one hand, New Formalism requires parties to use explicit language, but on the other hand, Establishment Clause Creep causes courts to withdraw whenever a dispute implicates, even tangentially, an ecclesiastical issue. Co-religionists are unable to characterize their dispute in either implied or explicit terms. ...

## IV. Toward A Better Contextualism

Co-religionist commerce stands at the nexus of both public and private law precisely because it involves transactions that

pursue both commercial and religious objectives. It therefore is vulnerable to trends in constitutional law and commercial law that have unwittingly combined to undermine the ability of co-religionists to secure commercial relations. ...

But we need not — and ought not — close the courthouse doors to co-religionist commerce. At its core, New Formalism instructs courts to avoid identifying and effectuating customary norms and subjective expectations because the costs of doing so are sufficiently high that parties *ex ante* would prefer formalist over contextualist adjudication. New Formalism thus is motivated purely by achieving parties' intents while minimizing transaction and error costs. Moreover, it encourages courts to focus on the formal text of commercial agreements only because it assumes that parties can react to judicial decisions and adapt the terms of their agreements to track clear legal rules. ...

Accordingly, we advance a limited case for contextualism, which will enable courts to take the commercial context into account when resolving disputes among co-religionists. This contextualist approach offers an antidote to the dual onslaughts of New Formalism and Establishment Clause Creep, ensuring that co-religionists can enjoy both the legal support necessary to sustain their commercial endeavors and the freedom to adhere to their religious principles without suffering commercial hardship. Contextualism is necessitated in these limited situations by the inability of co-religionists to translate religious terms into secular analogs and thus leverage private law's dynamism like other commercial parties.

A limited and narrowly circumscribed embrace of contextualism would resolve the unusual legal challenges of co-religionist commerce. First, contextualism would curtail the encroachment of Establishment Clause Creep by discouraging courts from simply conflating co-religious commerce with its religious context. Contextualism instead encourages factfinders to admit contextual evidence to inform the interpretation and enforcement of commercial instruments. Factfinders thus would be able to inquire into the unique commercial and social environment from which co-religionist commerce arises. When parties suffer from purely economic torts or have intended to draft enforceable commercial agreements, contextualism encourages courts to be sensitive

in differentiating the commercial elements of an agreement from its ecclesiastical context, thereby ensuring that the Establishment Clause does not unnecessarily void co-religionist commercial agreements.

Second, in contrast to New Formalism's priority on text and outward manifestations, contextualism encourages courts to consider the parties' shared norms, expectations, and intentions when interpreting and enforcing co-religionist commercial agreements. The very nature of co-religionist commerce suggests that careful evaluation of context will frequently lead courts to different conclusions. For example, contextual inquiry may in some cases reveal that documents that facially appear to be commercial instruments were instead intended by the parties to serve as religious symbols and were drafted as part of traditional religious ceremonies. In other cases, contextual inquiry may provide a basis to interpret seemingly religious terminology, thus allowing enforcement without encroaching on Establishment Clause prohibitions. In this way, contextualism can further ensure the enforceability of co-religionist commerce by avoiding Establishment Clause pitfalls, using the norms and understandings shared by co-religionists to fill in gaps and interpret terms in co-religionist commercial agreements.

Because co-religionist commerce offers a narrow — but growing — instance in which the presumptions of New Formalism do not hold, a narrow — but meaningful — exception to formalist adjudication would mitigate the twin constraints this Article identifies. A limited contextualist correction would merely require courts to consider whether the contracting environment and the social norms of the commercial parties are such that formalist interpretation leads to an incorrect result. A healthy dose of contextualism might help courts navigate their way between New Formalism and Establishment Clause Creep, providing co-religionist commerce with the adjudicative infrastructure it needs to remain viable. ♡

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## How courts work

Marin K. Levy, Associate Professor of Law

**A**SSOCIATE PROFESSOR Marin K. Levy's scholarship focuses on the internal workings of the federal courts with the aim of contributing to a better understanding of the judiciary. Much of her work has examined how appellate courts shift administrative practices and substantive law in response to external pressures, such as an increase in workload. Her most recent articles have looked to court practices more generally, in an effort to address core empirical questions from the judicial decision-making literature.

Relying on qualitative methods such as in-person interviews with federal appellate judges, clerks of court, and other key court personnel, Levy's scholarship includes a set of articles exploring the case-management practices of the federal appellate courts. She has analyzed such matters as the significant differences among circuits in which cases receive oral argument and result in published opinions, and whether divergent practices across circuits can be justified. Levy has also examined how judges allocate their attention — a limited and increasingly scarce resource — to classes of cases in the federal appellate system, generally defending the current case management system but suggesting improvements and flagging issues in need of further study.

In "Challenging the Randomness of Panel Assignment in the Federal Appellate Courts," 101 *Cornell Law Review*

1-56 (2015), Levy and University of Chicago Law School Assistant Professor Adam S. Chilton use quantitative methods to test a widely held assumption in the academic literature: that oral argument panels in the federal appellate courts are randomly configured. Scores of scholarly articles have noted this "fact," and it has been relied on heavily by empirical researchers. Despite the importance of this assumption, it had never been tested — something Levy and Chilton set out to do. Based on Levy's qualitative research, Levy and Chilton compiled and coded what they believe to be the largest existing dataset of panel assignments from all 12 regional circuit courts. They then tested whether panel assignments are strictly random by comparing the actual assignments to random panels generated by code that they created to simulate the panel generation process. Using this methodology, Levy and Chilton ultimately found evidence of nonrandom assignment in several circuit courts.

In the following excerpt, they outline the implications of their findings for courts, court scholars, and empirical researchers. Based on her qualitative research, Levy also has a forthcoming article offering further analysis of exactly how panels are formed and guidelines for doing so that would be beneficial across all courts. »

EXCERPT:

# Challenging the Randomness of Panel Assignment in the Federal Appellate Courts

101 *Cornell Law Review* 1-56 (2015) (with Adam S. Chilton)

We believe that our results challenging the randomness of panel assignment in the courts of appeals have several implications. Fully appreciating their significance may ultimately require additional research and scrutiny of existing scholarship. For now, however, we briefly consider the implications for the three groupings identified at the outset of the Article: courts, general court scholars, and empirical researchers.

## Courts

First, our findings suggest that there is a much more nuanced story about how the courts configure their panels than that they rely on a random process. As previously noted, it may be that there are a host of considerations at work — from the schedules of the judges, to recusals, to the return of cases on remand. Accounting for these factors makes it impossible to achieve strict randomness, and scholars and practitioners should be aware of that fact.

Second, these findings could be relevant to the courts themselves. As previously stated, the qualitative evidence of one of the coauthors strongly suggests that the causal mechanism is an attempt to balance a series of otherwise arguably benign factors. The cumulative effect, though, would be important to know. For example, as noted earlier, it could be that a court with more panels of a particular ideological makeup than would occur randomly relies on an ancillary circuit rule — such as no panel may have more than one senior judge. If that circuit had quite a few senior judges who were Republican appointees, say, then this rule would affect the ideological balance of panels. It is important to know the effect of such a rule so that the court could then determine if it would be worth continuing with such a practice.

Finally, the discussion of the potential reliance on these other factors in constituting panels makes it all the more clear that it is important to know how the circuits are, in fact, creating their argument panels. Specifically, it would be use-

ful to better understand what factors the courts are taking into account and how those factors might differ from circuit to circuit. Rather than focusing on whether panels are non-random, then, future discussions would do well to focus on how and why they are nonrandom.

## Court Scholars

Turning now to scholars who generally write on the federal courts, the implications of our findings are fairly straightforward. As a general matter, such scholars would do well to no longer assume that all courts of appeals randomly create oral argument panels. For some scholarship — those articles that simply mention random panels as a passing fact — this change in assumption will likely not be significant. For other kinds of scholarship, however, the implications will be more meaningful.

As noted in Part I, there is a fair amount of scholarship that assumes panels are randomly configured and for which the assumption is relevant. Returning to a few earlier examples, one article made the argument that because oral argument panels are randomly drawn, the outcomes in agency cases are akin to lottery results. Another article claimed that random panels were important because they helped to ensure that the courts of appeals did not fall prey to typical group problems, such as polarization. Results suggesting that panels are not randomly configured, and moreover, that the ideological balance of panels is affected in some circuits, call these kinds of arguments into question.

Furthermore, Part I also notes several articles that assume panels are randomly configured and then argue against that assumed state of affairs. One prominent example is the contribution by Tiller and Cross, which calls for courts to create panels with no more than two judges of either political party. Our findings show that in at least some of the circuits, there are fewer panels with either all Democrat appointees or all



*[O]ur findings suggest that there is a much more nuanced story about how the courts configure their panels than that they rely on a random process. ... [I]t may be that there are a host of considerations at work — from the schedules of the judges, to recusals, to the return of cases on remand. Accounting for these factors makes it impossible to achieve strict randomness, and scholars and practitioners should be aware of that fact.*

Republican appointees than would be expected. Thus, those scholars who have taken the panels to be randomly configured and then argued for a change to the status quo might now want to question the premise and this, in turn, could lead to different prescriptive conclusions.

### **Empirical Researchers**

Finally, our results have important implications for researchers that use empirical methods to study judicial behavior. As we discussed in Part I, random processes are incredibly important for empirical research because they make it possible to move beyond correlations and towards causation. In part because of the importance of randomization to empirical research, researchers have relied heavily on the assumed random assignment of judges to panels on the federal courts of appeals to study judicial behavior. Our results, however, provide evidence that the fundamental assumption that panel assignments are random may not be valid.

The main import of this finding is that empirical researchers should recognize and address the fact that panels may not be fully random. Unfortunately, there is no easy solution to this problem. As we previously discussed, in one article the political scientist Matthew Hall excluded from his study circuits that he had reason to believe did not use random judicial assignment. Although it may seem on first glance that the easiest response to our findings would be to simply exclude from future studies the four circuits that we identified as displaying evidence of nonrandomness, we do not believe that this fix would be sufficient for two reasons.

First, there is no reason to believe that these results are static. Instead, chief judges change, Clerks' Offices change personnel, and the processes used by the circuits to create panels change over time. As a result, simply excluding these circuits may not be an adequate solution for scholars studying other time periods than those in our study. Second, several of the circuits we identified as having nonrandom assignments — like the Second Circuit and Ninth Circuit — are among the largest and highest-profile circuits. Simply excluding these circuits and others from empirical research would likely be an unsatisfying response to evidence of nonrandom panel assignment.

Ultimately, our findings could affect the findings of numerous articles. For some studies, our results may strengthen their core findings; for other studies, our results may in some ways weaken them. Evaluating the full scope of the consequences of nonrandomness will both require a case-by-case evaluation of the research used in other studies, as well as more research on the ways that circuit courts deviate from random assignment. But the primary takeaway is that researchers should be cautious when making the fundamental assumption that judges are randomly assigned to panels in the federal courts of appeals. ♻

Reprinted with permission from: Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Appellate Courts*, 101 CORNELL L. REV. 1, 1-56 (2015). (Footnotes have been removed.)



**The ability to understand and interpret scientific data has become an important skill for lawyers — and critical to the clients and communities they serve.**

# Mastering a New Language

*By Marla Vacek Broadfoot*

**M**ORE THAN 15 YEARS after he was sent to death row for murder — a killing the judge at his trial described as particularly cruel — science saved David Scott Detrich from execution.

On Nov. 4, 1989, after drinking heavily for several hours, Detrich sexually assaulted a woman he and a co-worker had picked up near Tucson, Ariz. He then slit her throat, stabbed her more than 30 times, and the two men abandoned her mutilated body in the desert. After one mistrial, a jury convicted Detrich of first-degree murder, and in 1995 he was sentenced to death. But in 2010, the U.S. Court of Appeals for the Ninth Circuit held that at the trial's penalty stage, his lawyer had been negligent in failing to fully investigate and present mitigating evidence that likely would have spared Detrich the death penalty: brain damage and neuropsychological dysfunction caused by childhood neglect and abuse.

**“Without investigating a neurobiological defense, lawyers run the risk of being seen as ineffective as if they had failed to mount a defense at all, or had slept through the entire trial.”** — Professor Nita Farahany '04, director of the Duke Initiative for Science & Society

The opinion is one of a number of rulings that show that neurobiological evidence is becoming firmly entrenched in criminal courtrooms, says Professor Nita Farahany '04. “Without investigating a neurobiological defense, lawyers run the risk of being seen as ineffective as if they had failed to mount a defense at all, or had slept through the entire trial,” she says.

In an empirical study reported in the January issue of the *Journal of Law and Biosciences* (a journal that is a collaboration between Duke Law School, Harvard Law School, and Stanford Law School and published by Oxford University Press), Farahany found that the number of cases in which judges cited evidence in their opinions related to the brain and the nervous system — neurobiology — increased from 112 in 2007 to more than 300 in 2012. The study, the first comprehensive review of its kind, found lawyers used such evidence to address a defendant’s competency to plead guilty or confess and mental state during the commission of the crime, and as mitigating evidence in sentencing, among other uses.

The ability to understand and interpret scientific data has become an important skill for lawyers engaged in criminal and civil cases, even for those who have consciously avoided science-heavy fields such as intellectual property, health care, environmental, and regulatory law. That development was a major impetus for the founding of the Duke Initiative for Science & Society (Science & Society), which engages faculty and students across a range of disciplines in addressing the legal, ethical, and policy implications of scientific and technological advances. Farahany, who holds a joint appointment in law and philosophy and is a member of the Presidential Commission for the Study of Bioethical Issues, directs the cross-campus initiative, and 10 Duke Law faculty participate in related research and inquiry. In addition, seven Duke Law students are pursuing a new master’s degree in bioethics and science policy offered through Science & Society concurrent with their JD, becoming well-versed in scientific principles and their societal implications, and learning how to communicate essential information to clients, policymakers, and courts.

“Many aspects of legal practice now require you to have the ability to understand science and be able to talk to experts,” says Michael “Buz” Waitzkin, deputy director of Science & Society, who advised clients in the biomedical research community on issues relating to legal and regulatory strategy and ethics during his 35-year law practice in Washington, D.C. “Regardless of whether you are in private practice, the nonprofit sector, or government, science is a very important issue. We think it is important to teach lawyers how to engage scientific experts, and teach scientists not





Professor Nita Farahany speaking to attendees at the 2016 World Economic Forum Annual Meeting held Jan. 20–23 in Davos-Klosters, Switzerland. (Photo courtesy of the World Economic Forum.)



**“Because the courts clearly play an important role in crafting policy, our goal is to ensure they rely on accurate science when making decisions.”**

— Senior Lecturing Fellow Michael “Buz” Waitzkin, deputy director of the Duke Initiative for Science & Society

Photo: Gregg Forwerck

just how to do bench science but also how to convert their findings into a language that lawyers can use.”

Farahany, who has extensively studied the legal, social, and ethical application of the biosciences, believes neurobiology, in particular, has the potential to generate profound insights into human behavior, motivation, intention, and action. But she is also wary of its limitations.

“Neurobiological evidence has profound implications for some of the most significant decisions we make in law and policy,” she explains. “It’s time we better understand how science is being used in the legal system, and start to address how it may be better used across law and policy.”

## Befriending the courts

**A**COURSE CALLED THE AMICUS LAB, introduced at Duke Law in the fall semester as a collaboration with Science & Society, launched the effort to evaluate and translate science for the courts. Under Waitzkin’s direction, the class of five law students and two bioethics and science policy graduate students produced source material to help lawyers writing amicus briefs address the use of emerging technologies.

The class was based on the assumption, which Waitzkin admits is somewhat heretical for a longtime litigator, that the adversary system does not offer the courts unbiased, accurate information. Although the practice of non-parties contributing to the decision-making process as *amici curiae* is one of longstanding, over the last century their briefs have become ever-more numerous and partisan, with many reflecting the vested interests of the filing scholars, groups, and individuals in the outcome of particular cases. For example, Waitzkin says many of the 82 amicus briefs filed with the Supreme Court in *Burwell v. Hobby Lobby*, in which private employers successfully sought an exemption on religious grounds from the Affordable Care Act’s mandate to offer contraception coverage in health insurance, were submitted by doctors and women’s organizations, theologians, and religious groups aligned with one side or the other.

“[Filing briefs] has now gotten to be a cottage industry,” says Waitzkin. “The Supreme Court is increasingly relying on amicus briefs for its facts. If we could create an entity that everyone agrees has no stake in the case and is only motivated by the desire to provide an update on where the science actually stands, that would be a very important contribution.”

During the Amicus Lab's inaugural semester, three student teams each tackled a different subject: the use of DNA from crime-scene evidence to create facial reconstructions of suspects as the basis for probable cause for an arrest; the usefulness of a technology called quantitative encephalography (qEEG) as a diagnostic test for brain injury after concussion or traumatic brain injury; and the potential of a technique called functional magnetic resonance imaging (fMRI) as a more accurate means of lie detection. The teams studied the technology, identified cases where it appeared in the judicial system, and offered an opinion as to whether or not it should be admissible in future cases.

On one team, Melany Cruz Burgos and Bob Zhao, second-year law students who are both also pursuing the MA in bioethics and science policy, along with MA candidate Darrell White, assessed the potential for fMRI brain scans to catch people in a lie. In presenting their white paper to their classmates late in the semester, Zhao, who holds an undergraduate degree in psychology and neuroscience, was charged with explaining how the fMRI works: When a neuron fires, it needs to replenish its energy, which it takes in the form of oxygen delivered through the bloodstream; because fMRI can indirectly assess neural activity by measuring changes in the concentration of oxygen in the blood, it can be used to pinpoint what brain regions are responsible for particular behaviors. Scientists have implicated hundreds of different regions in lying using fMRI. But the team pointed out that, to the extent demanded by judicial evidentiary standards, the brain regions or patterns responsible for lying have not been firmly established. "There is no evidence that current fMRI lie detection tests can consistently and accurately capture deception in real-world settings," said Zhao. For that reason, the students concluded that fMRI as a lie detection test isn't ready for the courtroom.

Their report, as well as those of the other Amicus Lab teams, became the first entries in a library of white papers that will be updated and supplemented as new research and technologies emerge. Waitzkin thinks that creating the resource could give lawyers facing a tight filing deadline a head start in drafting briefs around the merit of new technologies.

"This is all an experiment," says Waitzkin. "We are testing a hypothesis to see if this can be done, if can it be done well, and if the courts will acknowledge it. Because the courts clearly play an important role in crafting policy, our goal is to ensure they rely on accurate science when making decisions."

## Learning the language

**C**RUZ, WHO ENTERED the dual-degree program as soon as it was established in 2015, says she relishes the opportunity to help law- and policymakers understand the full implications of science and technology, which, like law itself, can be opaque.

A native of Puerto Rico who moved to New Jersey as a first-grader, Cruz was drawn to become a lawyer after a high-school friend's father was unable to navigate the immigration law system and was deported. "He was an outstanding person and was probably eligible for some kind of reprieve," she says. "I suddenly realized there was this need for translation of the law, which is really a language in and of itself."

Having grown up in the shadows of drugmakers like Bayer, Johnson & Johnson, and Merck, she also wondered about ethical issues that arise in the pharmaceutical and health care industries: How are participants treated in clinical trials? What is informed consent, really? What obligations do health insurance companies have to their enrollees? Cruz's MA concentration on health law and policy allows her to delve deeply into those questions and lay the groundwork for her long-term plan: crafting a career at the intersection of bioscience and health care.

Zhao also enrolled in the dual-degree program in his first year after finding that his interests point to a career in Silicon Valley, which he calls "the epicenter of science, business, and innovation."

"It was the perfect opportunity to learn why laws are structured this way and the policy considerations behind each statutory sentence," says Zhao, who is co-president of the Health Law Society and a staff editor on the *Duke Law & Technology Review*, as well as a member of the Intellectual Property and Cyberlaw Society. Bound for a 2L summer position at Simpson Thacher & Bartlett in Palo Alto, Calif., Zhao believes his focus on science and bioethics will be an asset in representing technology companies, whether in helping to launch a start-up, negotiating mergers, prosecuting patents or litigating infringement cases, or advising on regulatory and privacy issues.

"Even more important," he says, "is understanding how the statutes are flawed: what they failed to consider, what they cannot have anticipated, and the challenges presented by such gaps. How do legislatures, courts, and businesses keep up and adapt in a world where advances in science and technology are far outpacing our ability to fully understand their implications? This is the big question I hope to explore, and something we as a society will have to learn to navigate."

JD/MA candidates work towards their degrees over three years and one summer, taking 75 credits at Duke Law and 30 in the graduate school, where the curriculum includes five core courses and four electives selected from dozens of options. Students can choose to pursue a specialized concentration in health law and policy or another in intellectual property, or they can build one to suit their interests. Each also spends the summer after the first year working on a capstone project, which can be a research paper on a specific issue in bioethics or science policy or a practicum in the field.

During her 1L summer, Cruz worked on criminal and civil investigations in the Health Care and Government Fraud Unit of the U.S. Attorney's Office in Newark. One case involved a laboratory diagnostics company that was charging customers to have their blood work analyzed by licensed professionals when it was in fact being read by employees who did not have the appropriate certification. Zhao spent his summer practicum at j2 Global, Inc., an internet services company in Los Angeles, where he gained broad transactional experience in software licensing and the merger and acquisition of technology companies, assisted in an ongoing trademark infringement case, and helped craft policy relating to health privacy compliance procedures required by federal laws as well as anti-spam policies that integrated international regulations.

The path that Cruz and Zhao are taking did not exist when Farahany entered law school with an undergraduate degree in genetics, cell, and developmental biology from Dartmouth College. Interested not only in how research in science and technology could deepen the understanding of the natural world but also how they

## Amicus Lab notes

**I**T'S COMMONLY SAID that knowledge and perspective are among the most wonderful things humans have to offer each other, and I saw that play out again and again in the Amicus Lab.

Our first meeting read like the beginning of a bad joke: What do you get when you put lawyers and scientists in the same room? We had perhaps the two professions most guilty of producing jargon-riddled and incomprehensible writings. To make matters worse, many common words like “causation” and “reliability” have been appropriated by both professions and redefined to mean very different things. I think one of the most valuable experiences I’ve had in law school was watching the lawyers attempt to explain the

intricacies of the law in an understandable way to the scientists and the scientists try to break down complex research results for the lawyers, and then both to work together to draft a document that would be clear, accurate, and helpful to judges (or anyone at all).

With the pace of technology, we live in an era in which people need to understand what the science says in order to strike the right balance between promoting scientific progress and protecting individual privacy and safety. It seems like such an obvious concept, but the Amicus Lab showed me why clear communication and interdisciplinary collaboration may be the key to creating meaningful debate and good policy decisions. ♡ — *Bob Zhao JD/MA '17*



Melany Cruz Burgos '17 and Bob Zhao '17





can improve institutions dedicated to health, law, and public safety, she ended up designing her own course of study connecting science, policy, and ethics, earning an MA in philosophy along with her JD, and staying on to complete her PhD.

“Rather than having lots of students create an ad hoc way of getting there like I did, I thought I could use the benefit of hindsight, and my own understanding of what pieces are necessary, to gain the expertise to work at this intersection, to create a combined degree program that gives students at Duke that same opportunity,” she says.

## Shaping the debate

**T**ODAY, FARAHANY IS a sought-after public commentator on issues ranging from the ethics of mail-order genomics testing to whether colleges should allow students to take so-called “smart pills” to boost academic performance. She gives talks regularly at judicial conferences, has spoken at the World Economic Forum in Davos, and has testified on Capitol Hill on such policy matters as the implications of facial recognition technologies for privacy and civil liberty. And she’s not alone within Science & Society: Many of the initiative’s affiliated faculty are active in public discourse about science policy decisions being made through legislative, regulatory, and executive action.

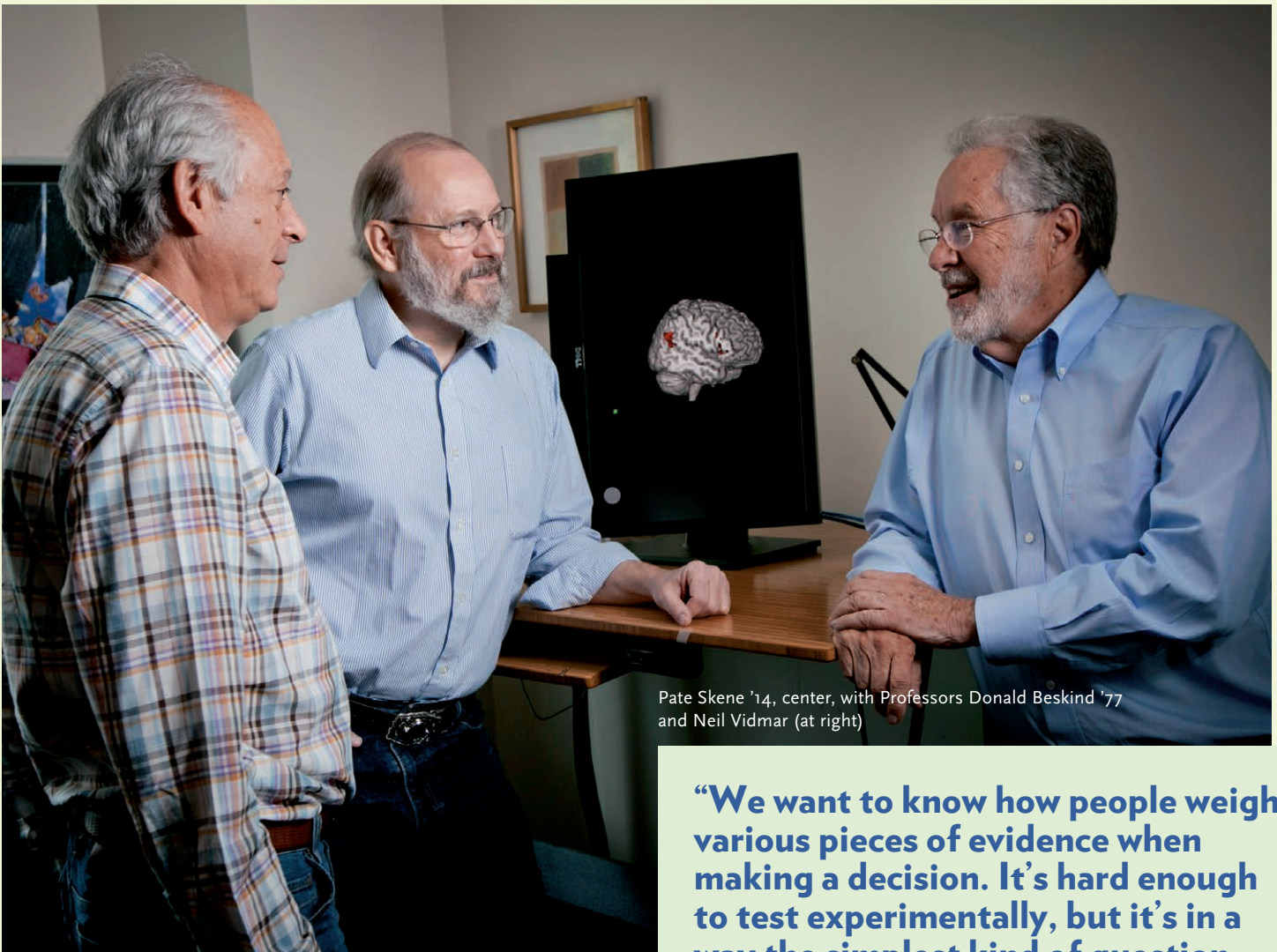
In November, Science & Society launched a website that tracks science-related bills and policy proposals, the first undertaking of its kind. Modeled after Politico Pro, a subscription-based policy news service popular among federal agency personnel, the site employs a team of Duke faculty and law and graduate students to scour proposed policies and create easily digestible summaries on what they seek to accomplish, who endorses and opposes them, and

their likelihood of adoption. The briefs analyze and explain the science underlying each policy, a feature designed to influence debate, says Farahany. As with the Amicus Lab and other programs within Science & Society, the goal of the Science Policy Tracking site ([sciencepolicy.duke.edu](http://sciencepolicy.duke.edu)), “is to position Duke as a neutral and educational translator of what’s happening in science for legal and policy decision-makers,” she says.

The site also covers news and upcoming events, such as congressional hearings and calls for public comment, and lists influential policymakers on matters of science and technology. Recent briefs have looked at the Corolla Wild Horses Protection Act, DNA Testing in Refugee Family Reunification, the Safe and Accurate Food Labeling Act of 2015, and Federal Motor Vehicle Safety Standards for Motorcycle Helmets. Currently, the program is tracking developments in two key areas: neuroscience and genetics and genomics. In the future, the team plans to expand to other topics, including health policy, engineering, environment, and energy.

Waitzkin believes the Science Policy Tracking site offers students, scientists, lawyers, policymakers, and ordinary citizens a unique source for objective, unbiased information about society’s most pressing science policy issues. As it develops, he hopes the resource will help increase citizen interest in policymaking.

“Somebody can keep current on what’s bubbling along in Washington, not after it’s passed but while it is actually in process and they can elect to participate,” says Waitzkin. “If you conduct related research, are passionate about specific topics, or perhaps work for a small company that doesn’t have the wherewithal for lobbyists or government affairs staff, you can use this resource to track what is happening at a government level.”



Pate Skene '14, center, with Professors Donald Beskind '77 and Neil Vidmar (at right)

**“We want to know how people weigh various pieces of evidence when making a decision. It’s hard enough to test experimentally, but it’s in a way the simplest kind of question you might want to ask in law.”**

— Duke neurobiologist Pate Skene '14, a Science & Society affiliate

## Exploring new frontiers

In addition to keeping track of current policy debates, collaborative working groups across Duke are looking at options for regulating emerging technologies.

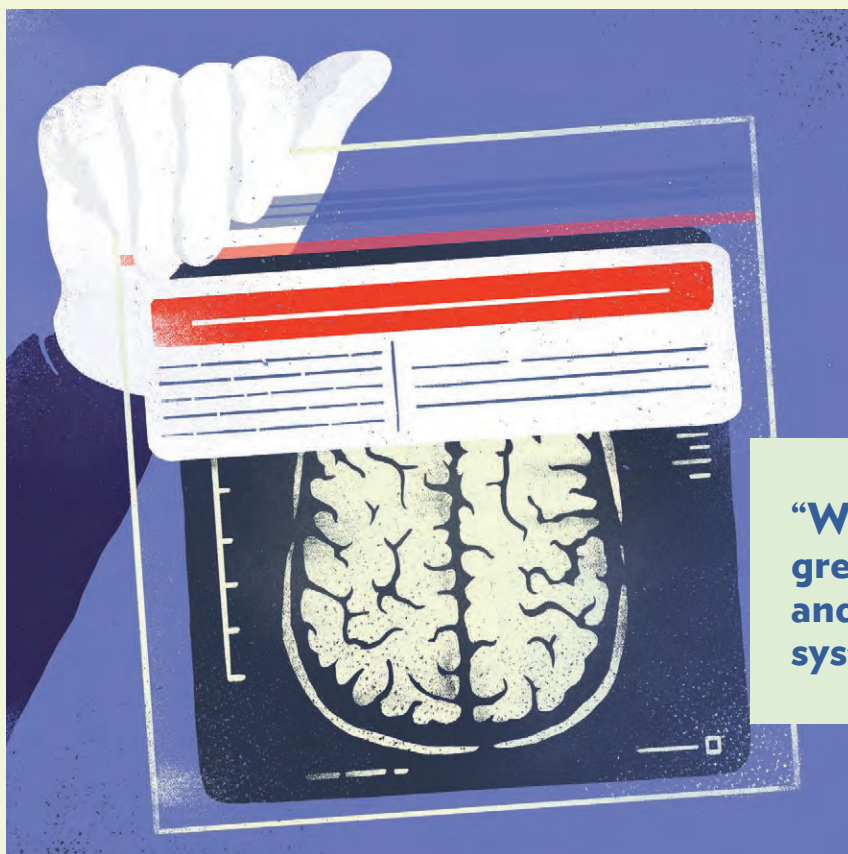
The Science, Law and Policy Lab (SLAPLAB), another core initiative of Science & Society, connects faculty, post-doctoral researchers, and students across disciplines to investigate how science interacts with law and policy. The SLAPLAB recently initiated five projects exploring how disruptive technologies like 3D printing and self-driving vehicles might be regulated. Each team is working to devise a model of governance for its particular technology, and then the entire group will gather to look for commonalities in their approaches that could be adapted or directly applied to other areas of innovation.

“We have to create regulations that work in the context of unknown risks and developments that don’t exist with current technologies,” says Farahany. “If we have a set of principles to start with that can guide us in regulating a new technology, we don’t have to reinvent the wheel every time something new like gene editing or bioterrorism tools come along.”

Several members of the Duke Law faculty are engaged in research aimed at improving decision-making in a range of dis-

ciplines related to science, law, and policy. For example, Perkins Professor of Law and Professor of Environmental Policy and Regulatory Policy Jonathan Wiener, whose expertise lies in risk analysis and decision-making, studies how these factors feed into environmental protection and regulatory oversight. (Read more, page 61.) James Coleman, the John S. Bradway Professor of the Practice of Law and director of the Center for Criminal Justice and Professional Responsibility, and Neil Vidmar, the Russell M. Robinson II Professor of Law and Professor of Psychology, study the legal, political, and scientific causes of wrongful convictions.

Discussions with Coleman and Vidmar about the accuracy of eyewitness testimony so intrigued veteran Duke neurobiologist Pate Skene about the ways brain science and law could interact that he decided to pursue a JD at Duke Law in 2010. Skene, who continued his neurobiology research throughout law school, now studies the neural mechanisms involved in making legal decisions, an area of inquiry that didn’t even exist when he began his science



**“When used wisely, science has great potential to improve accuracy and decrease errors in the legal system.”** — Professor Nita Farahany

career 40 years ago. “We can now study fundamental things like decision-making in a biological sense that we couldn’t when I got my first degree.”

Skene’s current study stems from a first-year Torts lecture in which Professor Donald Beskind ’77 discussed different factors likely to influence a person who is evaluating a claim. Skene immediately recognized that neurobiology could provide a vehicle to study those different factors and to deduce how important each one might be in shaping the person’s final decision. After examining the question further with Beskind, Vidmar, and Duke neuroscience colleague John Pearson, they opted to collaborate on a related investigation: how people evaluate guilt in the context of a criminal trial.

“We want to know how people weigh various pieces of evidence when making a decision. It’s hard enough to test experimentally, but it’s in a way the simplest kind of question you might want to ask in law,” says Skene.

In the study, participants read a short description of a crime and use various pieces of information, such as eyewitness testimony, DNA evidence, or prior convictions, to decide whether a suspect is guilty. In addition to determining guilt or innocence, the participants answer other questions about the strength of the case or the individual pieces of evidence, what they think about the crime, and how much punishment it deserves. Over 1,000 people have gone through the process, each one assessing 33 different crime scenarios with 18 different possible combinations of evidence. The research team then applies a statistical modeling method to their responses to tease out how much weight people give to each piece of information. A subset of the subjects also undergo brain scans.

Skene, now a Science & Society affiliate, says the most recent analysis has yielded a few surprises — for one, that the more serious the crime, the more likely the participants were to find the suspect guilty. That result runs counter to the traditional aspirational view of the law, which suggests that people are more careful when deciding a verdict for crimes that carry stiffer penalties, he says. He suspects psychology plays a role by priming people to punish a crime when they perceive a dangerous threat to the community. The results of the brain scans could generate further insight into those motivations.

## An ongoing dialogue

Understanding why humans behave the way they do is one of mankind’s greatest questions. On its face, the pursuit might seem scientific, but it is also now commonplace in the practice of law, whether it is in preparing a witness, crafting an argument, resolving a dispute, or establishing a policy. Advances in neuroscience, genetics, psychiatry, and psychology promise to give even greater insight into what makes people tick.

But Farahany warns that the latest tools of science are still in their infancy. Scientists must continue to perfect their methods so they can be ready for the courtroom or the legislative chamber. And lawyers must be careful not to over-hype new technologies. Farahany has called for “nuanced dialogue” between neuroscientists, advocates, judges, and the public about the role of neurobiological evidence in the legal system and its limitations, as well as its

potential to generate profound insights into human behavior, motivation, intention, and action.

In her contribution to the second volume of “Gray Matters,” a report from the Presidential Commission for the Study of Bioethical Issues that focuses on the ethical issues associated with the conduct and implications of neuroscience research, Farahany stresses that current technology is most powerful when used not to show why any one individual has made a choice but why people *in general* make choices. Neuroscience research has, for example, linked the activity of specific regions of the brain with impulsive behavior. That doesn’t mean a brain scan can indicate that a criminal defendant acted impulsively. However, it could demonstrate that juveniles have less development in the frontal lobe region of the brain that makes them more likely to be impulsive as a group, which could enable lawmakers and policymakers to think about how they structure the juvenile justice system.

One of the report’s goals was to “shift the conversation away from the traditional way neuroscience is used in criminal law, to show the myriad ways that it could or that it does influence the legal system,” says Farahany, who notes that presidential commission reports tend to be highly influential policy guides. “At the same time, having unrealistically high expectations of new science and technology can make people lose faith in the system when those expectations aren’t met. That’s why we have called for more research on the use of neuroscience in legal decision-making and policy development.

“When used wisely, science has great potential to improve accuracy and decrease errors in the legal system,” she says. “I think science and law could be much stronger partners than they are today.” ♡

# Faculty Chemistry:

## Science & Society affiliates at Duke Law

**T**he Duke Initiative for Science & Society engages faculty from differing disciplines in collaborative research and discussion across six broad areas of inquiry: Genome Ethics; Health & Medicine; Law, Policy & Science; Neuroscience & Society; Engineering & Technology; and Social and Humanistic Studies of Science. Members of the Law School faculty are affiliated with a range of research groups within those areas.



# Fa

## Nita A. Farahany

Professor of Law and Professor of Philosophy and Director, Duke Initiative for Science & Society

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Law & Genetics
- » Law & Neuroscience
- » Philosophy of Science
- » Health Policy
- » Criminal Law
- » Policy & Health
- » Neuroethics
- » Science Policy

Farahany is a leading scholar on the ethical, legal, and social implications of biosciences and emerging technologies, particularly those related to neuroscience and behavioral genetics. (Read more, page 49.) Her courses include FDA Law & Policy; Genetics & Reproductive Technologies, which examines central issues in bioethics that have arisen from the development of advanced reproductive technologies; and Science Law & Policy, which includes an examination of the interaction of law, science, and policy with an emphasis on the life sciences in the United States.



# Kr

## Kimberly Krawiec

Kathrine Robinson Everett Professor of Law

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Health Policy
- » Policy & Health

Krawiec is an expert on corporate law who teaches courses on securities, corporate, derivatives law, and “forbidden” exchanges and markets, such as those for organs, blood, or babies. Her varied research interest include the empirical analysis of contract disputes; forbidden or taboo markets; corporate compliance systems; insider trading; derivatives hedging practices; and “rogue” trading. Krawiec is a leader of the Duke Project on Law and Markets, which addresses foundational questions concerning the intersection of law and markets, including the health care market.



# Ra

## Arti K. Rai

Elvin R. Latty Professor of Law, Co-director, Duke Center for Innovation Policy

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Genetic Engineering
- » Intellectual Property
- » Policy & Health
- » Science Policy

Rai is an internationally recognized expert in intellectual property law, administrative law, and health policy. She teaches courses relating to patent and innovation law and policy, including a seminar that analyzes innovation and regulation within the heavily regulated life science industries in which biopharmaceuticals, medical devices, health services, and health care delivery are central.



# Re

## Jerome H. Reichman

Bunyan S. Womble Professor of Law

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Intellectual Property

Reichman has written and lectured widely on diverse aspects of intellectual property law, including comparative and international intellectual property law and the connections between intellectual property and international trade law. His courses include a seminar titled Access to Medicines: Intellectual Property and Global Public Health, which examines the law and policy governing the availability, price, and development of medicines worldwide and encourages students to critically examine current international law governing pharmaceutical innovation and to engage in efforts to improve incentives for the pharmaceutical sector to better meet global health needs.



# Dc

## Doriane Lambelet Coleman

Professor of Law

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Law & Genetics
- » Health Policy
- » Medical Research & Ethics
- » Policy & Health
- » Science Policy

Coleman specializes in teaching and scholarship related to children, medicine, and law. She has also practiced, taught, and written about sports law, with a focus on the Olympic movement and eligibility issues including doping and gender. She is a faculty affiliate of Duke University’s Center for Child and Family Policy, the Trent Center for Bioethics, Humanities and the History of Medicine, and the Law School’s Center for Sports Law and Policy, and is a member of the Hospital’s Ethics Committee.



# Jc

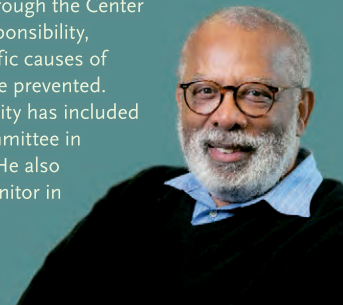
## James E. Coleman Jr.

John S. Bradway Professor of the Practice of Law and Director, Center for Criminal Justice and Professional Responsibility and Co-Director, Wrongful Convictions Clinic

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Law & Genetics
- » Law & Neuroscience
- » Criminal Law

Coleman’s academic work, conducted through the Center for Criminal Justice and Professional Responsibility, centers on the legal, political, and scientific causes of wrongful convictions and how they can be prevented. His administrative work for Duke University has included chairing the Lacrosse ad hoc Review Committee in 2006, and chairing the Athletic Council. He also periodically serves as a mediator and monitor in major employment discrimination cases.



# Vi

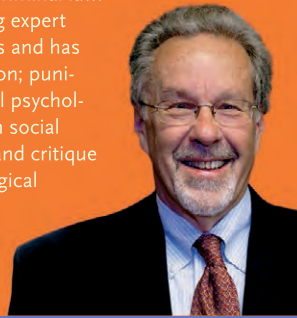
## Neil Vidmar

Russell M. Robinson II  
Professor of Law and  
Professor of Psychology

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Emotion, Memory & Decision-making
- » Law & Neuroscience
- » Criminal Law
- » Science Policy

Vidmar's scholarly research involves the empirical study of law across a broad spectrum of topics in civil and criminal law. A social psychologist by training, he is a leading expert on jury behavior in both criminal and civil cases and has extensively studied medical malpractice litigation; punitive damages; dispute resolution; and the social psychology of retribution and revenge. In his course on social science evidence in law, students learn to use and critique social science evidence by applying methodological principles that can also be applied to forensic, medical, and epidemiological evidence.



# Ri

## Barak D. Richman

Edgar P. and Elizabeth C. Bartlett  
Professor of Law and Professor of  
Business Administration

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Health Policy
- » Policy & Health

Richman's primary research interests include the economics of contracting, new institutional economics, antitrust, and health care policy. Also a member of the Health Sector Management faculty at Duke's Fuqua School of Business and a senior fellow at the Kenan Institute for Ethics, Richman teaches courses including Health Care Law and Policy and the Health Policy Practicum, in which students engage in research and advocacy designed to advance specific health policy reforms; and a seminar that analyzes innovation and regulation within the life science industries.



# Wa

## Michael B. Waitzkin

Senior Lecturing Fellow, Deputy  
Director, Duke Initiative for  
Science & Society

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Health Policy
- » Policy & Health

Waitzkin teaches and lectures on issues of science law, policy, ethics, and politics, with a focus on developing biomedical technologies. He is the co-founder and chief strategy officer of Genomeon LLC, a start-up company developing and commercializing a genomic diagnostic technology based on what others have discarded as "junk DNA." Over 35 years of law practice in Washington, D.C., he handled complex commercial and criminal cases in federal and state trial and appellate courts throughout the country. He has extensive experience in advising the biomedical research community on issues relating to legal and regulatory strategy and ethics. He served as special counsel to the president in the White House Counsel's Office. Waitzkin teaches Science Law & Policy and the Amicus Lab. (Read more, page 49.)





## Jonathan Wiener

Perkins Professor of Law and Professor of Environmental Policy and Professor of Public Policy

### SCIENCE & SOCIETY RESEARCH GROUPS

- » Health Policy
- » Environmental Policy
- » Policy & Health

PROFESSOR JONATHAN WIENER has spent most of his career at the intersection of science and society. An expert in risk analysis and regulatory governance, he is at the forefront of efforts to anticipate and resolve tensions — and solutions — posed by scientific and technological innovation.

In his 1995 book, *Risk vs. Risk*, Wiener and his co-author John Graham provided the first analytical framework of its kind for dealing with “risk-risk tradeoffs” — in which an intervention to reduce one risk may unintentionally increase other risks.

“We live in a world of multiple risks, but our policymaking typically addresses one risk at a time. We have to change our thinking and policy decision frameworks to assess multiple important risks and how they interact,” says Wiener. He explains, by way of example, that reducing carbon dioxide emissions to address global warming, such as by shifting from coal to natural gas, could increase the production of other greenhouse gases such as methane.

Wiener co-directs Duke’s Rethinking Regulation program (based at the Kenan Institute for Ethics), has been president of the Society for Risk Analysis, and is a member of the Scientific and Technical Council of the International Risk Governance Council (IRGC), as well as the Faculty Governance Committee of Duke’s Science & Society Initiative. He is working with Professor Nita Farahany and other Science & Society scholars to research approaches to “adaptive regulation” of evolving innovations such as biotechnology and self-driving cars. He is also co-editor, with his Rethinking Regulation colleagues Ed Balleisen, Lori Bennear and Kimberly Krawiec, of *Policy Shock*, a forthcoming book on how crisis events reshape regulation — and how regulation can learn from crises — including oil spills, nuclear accidents, and financial crashes. The group presented this research at a 2014 conference at the Organisation for Economic Co-operation and Development in Paris.

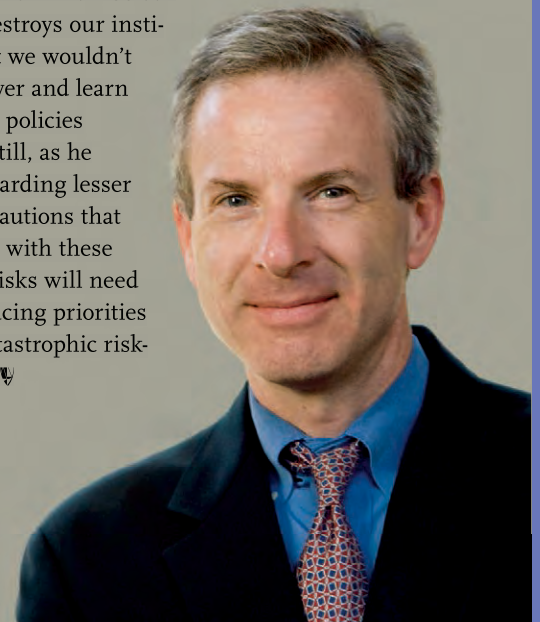
“So many issues in bioethics and science policy are nested in an environment of uncertainty and risk,” says Science & Society Deputy Director Michael Waitzkin. “How do you make decisions and formulate policies when the facts are not fully known and the risks cannot be accurately foreseen? Jonathan Wiener’s work on risk analysis has brought an exceedingly valuable and useful

perspective to our MA students as they grapple with these issues.”

Climate change, arguably one of the greatest risks facing humanity, is a problem on which Wiener has worked for three decades; while serving in government, he helped negotiate the first climate treaty in 1992, and in 2014 he was a co-author of the Intergovernmental Panel on Climate Change chapter on “International Cooperation” which emphasized that climate change represents a classic “tragedy of the commons” in which multiple actors overuse shared resources with damaging consequences for all.

In a new article, “The Tragedy of the Uncommons: On the Politics of Apocalypse,” forthcoming in the journal *Global Policy*, Wiener argues that as societies learn to overcome “tragedies of the commons,” they should pay greater attention to rare extreme global catastrophic risks, such as a large asteroid hitting the earth or an alien microbe wiping out terrestrial life.

“These rare global catastrophic risks present the strongest case in favor of precaution, and the main reason is not only uncertainty, or large losses, but the inability to learn from the event,” says Wiener. “In the past, regulatory systems have improved over time as we learn from experience and crises. But for extremely rare catastrophic risks, we lack the experience to motivate responses, and the impact may be so massive that it numbs our psyches and destroys our institutions, so that we wouldn’t be able to recover and learn to improve our policies afterwards.” Still, as he has argued regarding lesser evils, Wiener cautions that policies to deal with these remote mega-risks will need to avoid misplacing priorities or inducing catastrophic risk-risk tradeoffs. ♣



# Profiles



Michael Lieberman '81 was honored, on Oct. 21, 2015, with the Attorney General's Award for Meritorious Public Service for "Outstanding Contributions to Combat Hate Crimes." L-R: U.S. Attorney General Loretta E. Lynch; Lieberman; Acting Assistant Attorney General for Civil Rights Vanita Gupta; and Steven M. Dettelbach, then the U.S. Attorney, Northern District of Ohio

## Michael Lieberman '81

**M**ICHAEL LIEBERMAN is philosophical about investing 13 years in the effort to expand federal hate crimes laws. "Policy work is slow, but it has the potential to make a real impact," says Lieberman, the Washington counsel and director of the Civil Rights Policy Planning Center for the Anti-Defamation League (ADL).

Congress finally passed the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA) in 2009, giving federal authorities the right to prosecute hate crimes motivated by a victim's gender, gender identity, sexual orientation, or disability, and expanding resources for investigations and prosecutions. Lieberman contributed significantly to the law's

development and passage, both through his ADL post and as organizer and leader of a coalition of organizations representing diverse communities across the country. And he has remained active in its implementation and enforcement in multiple ways, including working to build trust between vulnerable communities and law enforcement agencies and filing amicus briefs in federal and state hate crimes appeals.

Last fall, Lieberman received the Attorney General's Award for Meritorious Public Service, the top public-service honor granted by the U.S. Department of Justice, designed to recognize a citizen's significant contributions to the department's accomplishment of its goals. In announcing the



award, Attorney General Loretta Lynch cited his “collegial and constructive” efforts relating to the passage and enforcement of the legislation.

The HCPA is “a major statement about the right to equality and to freedom from violence,” says U.S. Criminal Deputy Solicitor General Michael Dreeben ’81, who has argued a number of seminal hate crime cases in front of the U.S. Supreme Court — and who also happens to have been Lieberman’s roommate during law school. “Michael has dedicated his talent and his career to enrich lives of citizens generally. There are not many lawyers who have done this very special thing.”

Lieberman, who joined the ADL in 1982, sees the HCPA as a vital tool in his continuing civil rights advocacy — but not a panacea. “Every day when I walk through the two steel-reinforced doors to my office, I am reminded of the persistence of hate crime,” Lieberman says, adding his view that the present uncivil election campaign and fierce partisan divide has contributed to a particularly dispiriting climate of mistrust and fear, he says. “It is the worst since 9/11.”

Still, Lieberman finds his daily work uplifting. It is “absolutely fantastic,” he says, to tackle tough issues with like-minded, mission-oriented people.

It’s what he always wanted to do. He grew up in Ohio, in a close-knit Jewish community where volunteerism and the Judaic concept of “*tikkun olam*” (literally, “repairing the world”) were foundational values. He majored in Judaic Studies at the University of Michigan, and went straight to law school, choosing Duke largely as a place to escape frigid Midwestern winters. And in spite of finding little institutional support for public interest careers at Duke Law in the late 1970s, he kept his goal in mind, taking a job with the ADL in Columbus, Ohio, after a brief stint on Capitol Hill.

“I was looking for a job where I could combine civil rights, Jewish community, and constitutional law with a range of advocacy elements, and this was a perfect fit,” says Lieberman. The ADL, which was founded in 1913 to fight anti-Semitism and all forms of bigotry, has a current mission “to secure justice and fair treatment for all.” Lieberman soon moved to Chicago as the organization’s Midwest civil rights director, and in 1989 became the group’s Washington counsel.

Over the years Lieberman has taken note of shifts in social sentiment and striking changes in how hate is spread. “It used to be that if you wanted to threaten someone, you had to mimeograph papers, drive over, and physically place them on their driveway.

“Every day when I walk through the two steel-reinforced doors to my office, I am reminded of the persistence of hate crime.”

— Michael Lieberman ’81

Now, there’s the Internet. It’s so easy to use Twitter.” But he acknowledges that social media also makes it easier to confront hate. “The United States is unique in our protection of free speech, including hate speech,” says Lieberman, an active tweeter. “That just makes it important to speak up with better speech, and encourage others to do so too. It can be empowering.”

Writing is, in fact, key to Lieberman’s work, and it’s a skill he gained at Duke. “I’m so thankful for the legal writing program,” he says, recalling his relief when it “clicked” with him in the middle of a tough first year. “I could not be doing what I’m doing now without a law degree, and a big part of that is being able to write like a lawyer.” Winning a “write-on” position on the *Duke Law Journal* was a highlight of his time in law school, as was founding another, the *Duke International and Comparative Law Institute*. Though the *Institute* published only one issue as part of *Law and Contemporary Problems* in 1981, Lieberman feels the editors demonstrated the need for more student-run journals at Duke.

Another Duke highlight: his classmates. “There was some magic in the make-up of that class,” Lieberman says. “It was such a geographically diverse, multi-dimensional, supportive group of people.” He is delighted to still be working with Dreeben, who argued such cases as *Virginia v. Black*, a challenge to criminal cross burning statutes, and *Wisconsin v. Mitchell* in which the Supreme Court upheld the constitutionality of enhanced penalties for crimes motivated by bias (Dreeben argued for the federal government in urging the Court to uphold the Wisconsin hate crime statute).

The two regularly meet for lunch with two other D.C.-based classmates, David Wittenstein and Russell Fox, but not to discuss social issues. Their agenda: family and sports.

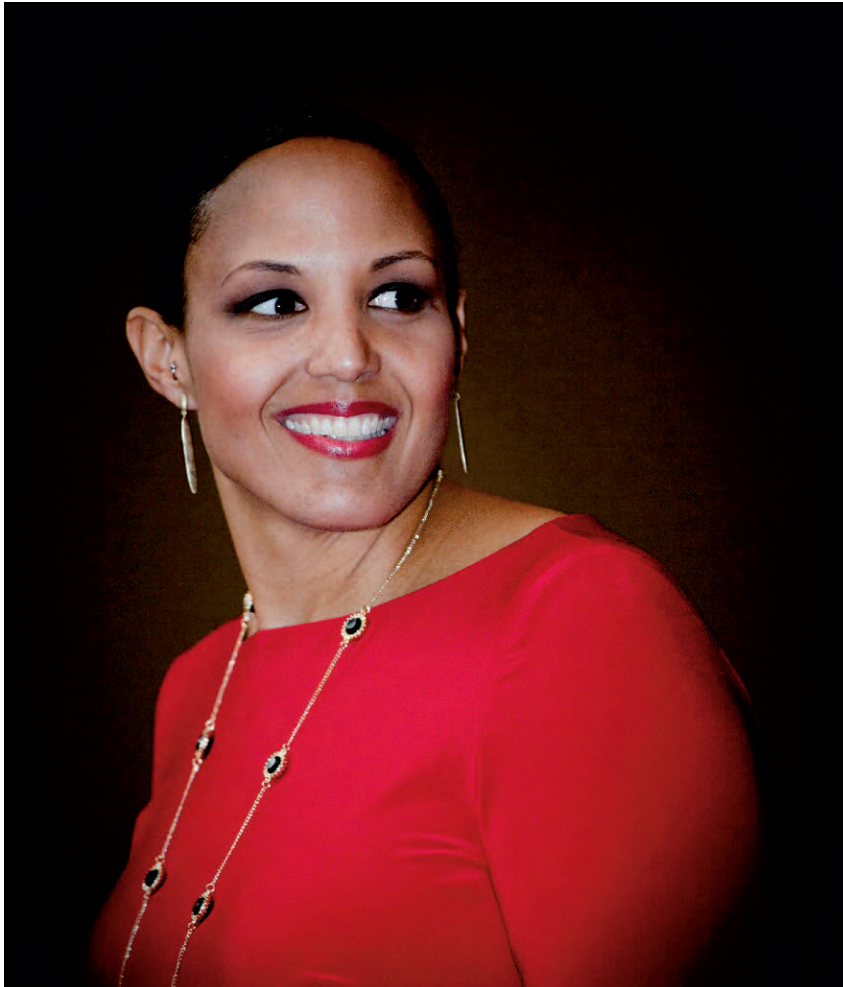
“Anti-discrimination proponents should feel lucky he wasn’t born 6’5”,” Dreeben jokes of Lieberman’s passion for basketball. “He was the driving force behind our law school basketball team — a great point guard.” Lieberman also served as announcer for the Duke women’s basketball team in Cameron Indoor Stadium. “He’s got this incredibly loud voice,” says Dreeben. “He had a microphone, but definitely didn’t need one.”

Given Duke Law’s current strong support of students interested in public interest law, Lieberman hopes that his career, and Dreeben’s, can inspire young lawyers to pursue civil rights work.

“There is really good work to be done and really good people to work with,” says Lieberman. He encourages law students to look for internships in the field. “Identify the area that you see as a galvanizing force, whether that’s the environment, or women’s issues, or civil rights, or Jewish issues. Then go do it,” he says, making a pitch for involvement in the ADL’s Summer Associate Research program, in which law clerks summering at firms across the country tackle the toughest legal research questions the organization encounters through the year.

“It’s a really interesting, hands-on experience, and you know the work you’re doing is being used to secure justice.” ♡ — Caitlin Wheeler ’97

## Profiles



### Gretchen Bellamy JD/LLM '05

**W**AL-MART STORES, INC., OPERATES more than 11,500 stores in 28 countries. An estimated 37 million people shop at them daily — more than the total population of Canada — and the company says that over 50 percent of Americans shop at them each week. With customers coming from every sector of society and every part of the world, the ability to serve a diverse market is critical to the bottom line.

For Gretchen Bellamy, a senior culture, diversity, and inclusion strategist in the company's Office of Global Culture, Diversity and Inclusion, it starts with ensuring that Wal-Mart's 2.2 million employees, including its 1.4 million U.S. associates, reflect those markets, a point she makes with a story about sweet potato pie.

It goes like this: A young African-American buyer, new to Wal-Mart's bakery section, didn't think the sweet potato pie the company was selling tasted sufficiently homemade. In a cookbook by Patti LaBelle, she found one similar to her family's recipe, so she approached the singer about partnering with Wal-Mart. Patti LaBelle's Sweet Potato Pies were born, and when a customer's YouTube review of them went viral, they sold out.

"If that woman hadn't by chance been working as a buyer for the bakery, we would probably be selling the same pie as before," says Bellamy, who moved into her position in October after spending two-and-a-half years addressing diversity

and inclusion in the company's legal ranks. "How do you take chance out of it and make sure that we have the right person at the right place in the right time? In the U.S., how do we make sure we have someone who understands the African-American consumer and the Hispanic consumer? And how does that translate to consumers in China or South Africa?"

Wal-Mart's goal, she says, is to establish it as "a given" that the different perspectives brought by people of different backgrounds, genders, orientations, and life circumstances fuel sound business decisions — and that inclusion is the key to unlocking the power of all associates. The new vision statement from her office states it succinctly: "Everyone Included." Wal-Mart's sheer size and reach — its nearly \$500 billion in annual revenue made it the world's largest company in 2015 — will influence how the rest of the corporate world does business.

Bellamy characterizes her role at Wal-Mart as "managing change" in a way that requires input and support from all levels of corporate leadership. It's a continuation of the work she has done in a variety of cultures and countries for much of her adult life. She helped women transition out of homelessness as a resident shelter manager and advisor and served in the Peace Corps in Cameroon prior to entering law school. During an externship in Zimbabwe while pursuing her JD and LLM in International and Comparative Law, she investigated the country's child protection laws and recommended changes to make them more effective. And as director of international public interest and pro bono programs at the University of Miami School of Law, Bellamy engaged students in writing wills for women and marginalized groups in Tanzania for whom even a modest inheritance could be life-changing.

#### Diversifying the legal pipeline

"There are not many people who have as deep an understanding of and a desire to change societal wrongs as Gretchen has," says colleague Alan Bryan, who manages Wal-Mart's outside counsel in the U.S. as senior associate general counsel. The two worked closely on efforts to diversify the company's legal operations over her two years as assistant general counsel.

"She took a fresh look at how we engaged our strategic partners and developed a new grant-application system," Bryan says. "She helped the legal department make sure that we were spending our diversity dollars in a thoughtful and productive way."

"I feel strongly about changing the legal profession," Bellamy says of finding ways to bring in under-represented groups, such as through supporting scholarships for Native American law students, and building partnerships with such groups as the National Association of Women Lawyers and the National Asian-Pacific Bar Association, among others. "If we can get more diverse students into the pipeline, then down the line we could talk to them about where they might go in their careers." She hopes, for example, to see more Native American lawyers working in-house at Wal-Mart, or at some of the hundreds of law firms it retains as outside counsel. Ensuring the solidity of the pipeline rests on law firms and corporations to make their respective work environments inclusive.

While outside counsel in the U.S. are selected with an expectation of adherence to corporate guidelines regarding diversity, inclusion, and flex-time goals, those issues don't always translate easily to international markets, Bellamy says; varying cultural norms and demographics mean there is no "one-size-fits-all" approach to access and advancement within the legal profession.

In 2013, she partnered with Bryan and the general counsel for Wal-Mart's Latin American operations in an effort to increase diversity in the professional pipeline feeding the company's legal team in the region. After extensive conversations with lawyers, business leaders, and other stakeholders confirmed that barriers to career development in law differed from country to country, they settled on Chile as the site for a pilot program designed to provide equal opportunity for lawyers and law students underrepresented at the top law firms. In Chile, Bellamy says, these happened to be members of ethnic minority groups and individuals from low socio-economic backgrounds, whose prospects for long-term career success would be significantly improved by English-language proficiency and improved networking skills and opportunities. Enlisting the support of legal educators and practitioners, the team crafted a program through which Wal-Mart is supporting English lessons and law firm clerkships for 12 qualifying students from two top Chilean law schools for three years, garnering commitments from the firms to extend job offers to those students who successfully pass the bar.

"Eventually these lawyers might be partners working on Wal-Mart matters," Bellamy says, calling it a long-term investment in change. "We are trying to fill the talent pipeline, effectively saying, 'We want this changed,' but trying to do it in a culturally sensitive way."

Launched in October 2014 at a conference attended by almost 300 lawyers, government representatives, and corporate leaders in Chile, the project won Bellamy and her two colleagues the Wal-Mart Stores, Inc. Dr. Martin Luther King, Jr. Visionary Award on behalf of the legal department. Bellamy also was named Outstanding International Corporate Counsel in 2015 by the American Bar Association's Section on International Law.

### **Building on international experience**

Bellamy credits much of her own professional development to her long involvement with that ABA section. She joined during law school, after she contacted the chair of the section's Africa Committee for advice on finding a job on the African continent, where she had years of experience. "She said she'd be happy to discuss that with me as long as I joined the committee," recalls Bellamy.

Bellamy eventually co-chaired the committee for two years and spent another two as the section's diversity officer and as vice-chair for research for the section's International Models Project on Women's Rights Task Force. One of several international meetings she helped organize sparked the idea for a book on corporate social responsibility, *Corporate Responsibility for Human Rights Impacts* (ABA Book Publishing, 2014), which Bellamy edited along with two colleagues.

One of her section colleagues who had recently left a job as director of international public interest and pro bono programs at the University of Miami School of Law urged Bellamy to apply for the post. Bellamy got it, and in addition to

helping students find internships and externships abroad, she leveraged her experience working with the Africa Committee on women's issues in Tanzania and Rwanda to establish a student seminar focused on African probate law and policy. After intensive class work in Miami and at the University of Dar es Salaam in Tanzania in which they studied the nuances of probate under common law, customary law, and Sharia law, Bellamy supervised the students in field clinics in which they drafted wills for marginalized women. They quickly realized, she says, that most of the women in Tanzania lacked basic understanding of property rights, let alone probate.

Bellamy created a training module "on the spot" to help students explain the concept of a will in basic terms. "I would say, 'I have my son and even if I just owned some pots and pans, I would want my son to get them rather than have the government get them.'" But as they held more clinics, she realized that they needed to include men in their project; if a man died intestate, all property would revert to his family of origin.

"When we connected with men," she says, "it was amazing to see the wheels turning as we explained the importance of having a will — that their wives would need to inherit property to take care of the children and to be able to direct it after *her* death. It was really empowering."

### **Agent for community change**

Bellamy, who has an 11-year-old son, has also taken an interest in local issues near Wal-Mart's Arkansas headquarters. After a debate over expanding the local school board's employment policies to include protections for sexual orientation and gender identity, veteran status, family status, pregnant women, and genetic information, she co-founded an online group called Bentonville Public School Citizens for Equality to combat discriminatory policies in the public schools. The group has since won the Arkansas Advocacy Award from the Northwest Arkansas Center for Equality. "Desmond Tutu says that if you are silent, you are one of the oppressors if you see something happening that's wrong," says Bellamy.

On the job, Bellamy is working to finalize a new three-year strategic plan to make Wal-Mart as diverse as its millions of consumers. "Our ultimate goal is to have diversity and inclusion embedded into the culture of Wal-Mart so that we can change the name of our office to be the office of 'culture,'" she says. "Right now, it's the Global Office of Culture, Diversity & Inclusion. We want to be able to drop the 'global, the diversity, and the inclusion' because it's just who we are." ♣ — Frances Presma



### Stuart Feiner '74

**E**VEN THOUGH HE STAYED with a single employer for 30 years, Stuart Feiner has enjoyed a career of remarkable diversity. As a senior mining executive and general counsel and, through his retirement, as a consultant, Feiner has worked in venture capital investments, corporate governance, environmental health and safety, public and governmental affairs, regulatory compliance, negotiations with aboriginal peoples, and cross-border transactions all over the world.

Feiner, who arrived at Duke with an undergraduate degree from the Wharton School and an MBA from Columbia (formally awarded after law school), landed at the Wall Street firm of Brown, Wood, Fuller, Caldwell and Ivey (now part of Sidley Austin) after completing law school. Although he enjoyed its blue-chip investment-banking client practice, he says he never planned to be in the law firm environment for long. “I wanted to get directly involved in businesses,” he says.

In 1976 Feiner joined Inco Limited., the Toronto-based mining and metals giant that was — and remains, after several mergers and name changes, as Vale Canada Limited — one of the biggest producers of nickel, copper, and platinum-group metals in the world.

One of Feiner’s first assignments as an in-house counsel was helping to complete the financing for a nickel mining and processing facility in Indonesia, at the time one of that country’s largest projects outside of the oil-and-gas industry. But he quickly moved into ventures much farther afield from the company’s core business when he became involved in its venture-capital operation.

Inco had created a venture-capital unit as a means of diversification, a relatively common corporate strategy of the era, he says. “But unlike most of the other corporate players in venture capital, Inco looked at some of the early-stage biotechnology investment opportunities.” Inco took a stake in Genentech (now a subsidiary of Roche), and in 1978 helped found Biogen, now one of the biggest biopharmaceutical firms in the world. Inco then parlayed its early success in venture capital to become a manager of limited partnerships funded by a range of institutional and other investors for early stage venture-capital opportunities.

“I was involved in that process, helping to look at locations for Biogen,” he says. “With Genentech enlisting a number of leading scientists on the West Coast, we saw an opportunity, with Biogen, to enlist world-renowned scientists from Europe and on the East Coast. Biogen started with its base in Europe but then moved to the Boston area.”

Feiner was made president of Inco Venture Capital Management in 1984. Prior to that role, he had spent several years sorting out some of the company’s early misfires, such as divesting its investment in battery-maker ESB Inc., which Inco had acquired, in 1974, in a hostile takeover — in fact the first hostile cash tender offer for stock — in a bid for corporate diversification. According to Feiner, the venture-capital unit was “run solely on a return basis,” generating over a hundred million dollars in realized gains back in the mid-1980s.

But in 1992, Inco's board decided to exit venture capital investment entirely and Feiner went back into the company to become vice president (soon executive vice president), general counsel, and corporate secretary. He moved, for 11 years, from Manhattan to Toronto, and his new posts took him around the world.

"At that point in time, Inco was a different company," he says. "It had significant investments in Indonesia, it was much more global in scope in terms of what it was looking for." He spent considerable time in Japan, Australia, and Brazil, in particular.

Feiner also oversaw several corporate functions beyond legal matters, including environmental health and safety, public and governmental affairs, and some of the largest acquisitions in the global mining business. The environmental and regulatory issues he faced through Inco's massive mining operations in Canada, notably in Sudbury, Ontario, and Thompson, Manitoba, were particularly complex, he says.

"The ores were sulfide ores, subject to emission control orders that kept being amended in order to further reduce emission levels," he says. "The company rebuilt its smelter in Sudbury to accommodate those standards, but we had to look at a whole range of other technologies during my tenure to do more." Corporate governance in Canada and the U.S. and evolving corporate disclosures and compliance also presented an array of challenges, he adds.

Feiner developed unique insight into the resource rights and concerns of Canada's aboriginal peoples and First Nations through Inco's acquisition in two stages, beginning in 1995, of the large Voisey's Bay deposit in Labrador. He was very much involved in negotiating so-called impacts and benefits agreements with the Inuit and the Innu Nations, who live, hunt, and fish in the deposit's location. "They were probably the most comprehensive impacts and benefits agreements ever negotiated in Canada at that

time," says Feiner, who also negotiated with First Nations in Ontario over Inco's impact on their traditional lands and rights.

After his retirement from Inco in 2006, Feiner used that experience to help various First Nations in their negotiations with mining companies. He describes his extensive work with the chief and leadership of one First Nation in the Yukon as a particularly satisfying experience.

In addition to staying engaged with mining and resource matters through consulting and board memberships, Feiner joined the private-equity world as a consultant in 2011, working with a Texas-based private-equity fund group focused on international natural resource investment. And he remains an avid traveler, often exploring the world on two wheels; Feiner and his wife, Randi, spent part of January cycling in India.

Asked about the most satisfying aspect of his work at Inco, Feiner quickly replies: his colleagues. "The people I worked with were remarkable in being committed to Inco and being committed to doing the right thing," he says. He has demonstrated a similar commitment to Duke Law School, even though he also holds degrees from two other top institutions.

"I found Duke consistently supportive of what I have wanted to do philanthropically," says Feiner, who has made gifts in support of student scholarships, facilities, faculty-excellence funds to support research, and the Annual Fund.

"Regardless of the amount of the gift, Duke's attitude has always been, 'If you're interested in doing something, we'll help you see how you can do that,'" he says. "That is what has driven my support for Duke from the first scholarship program I created, which was probably 25 years ago."

Adds Jeff Coates, who recently stepped down as associate dean for Alumni & Development at Duke Law: "Stuart understands the importance of evolving institutional priorities over time, which is why his support to Duke Law has included this wide range of important initiatives. I admire how Stuart has always remembered and given back to the Law School even as his impressive professional career had him working all around the world. I have been honored to help facilitate his philanthropy to the Law School."

Feiner's endowed scholarship no longer bears his name, but that of his friend, Bob Booth, a longtime international development officer at Duke University, who died in 2013.

"I developed a relationship with Bob over the years through his work on Duke's behalf," says Feiner. "When he passed away, I wanted to do something in his honor." ♡ — *F.P.*



## Anna Johns '16

**W**ith her JD in hand and nearing the finish line on her PhD in history, Anna Johns finds it hard to believe that she once planned to study medicine.

She entered Wellesley College on a pre-med track, intending to follow her mother into medicine. But after taking her first history course, Johns decided to switch gears. “It was *Bread and Salt: An Introduction to Russian History*, and I was just *in love*,” Johns says. “I pretended to be pre-med for one more semester. I took chemistry, but I decided my heart just wasn’t in it.”

The native of Birmingham, Ala., graduated with a bachelor’s degree in history and French cultural studies in 2009, but found it impossible to land a job. “It was a terrible time to graduate from college because the U.S. economy was a mess. I felt really sheepish about moving home without a job.”

At that point, she had no interest whatsoever in the practice of law, but her father persuaded her to interview with one of his former law partners for a position at Maynard, Cooper & Gale. She was hired as a paralegal, and that position furthered her passion for research and laid the foundation for her career.

Under the mentorship of a former justice of the Alabama Supreme Court, Johns worked with a team defending the state of Alabama in a class-action lawsuit brought on behalf of public school children. The plaintiffs alleged that the state property-tax system had been put in place with a racially discriminatory intent in order to deprive black school children of an equal education. In addition to participating in drafting the state’s motion for summary judgment, Johns researched property tax laws at the state archives, looking for evidence supporting the plaintiffs’ claim of racially discriminatory intent in the drafting of the state’s property-tax laws.

“I never found it — which made me feel better about my home state — and the state won,” Johns says. But spending time mired in information about poor educational outcomes of Alabama kids, especially in the poorest counties across the state, sparked her interest in Teach For America, in spite of her longer-term plan to go to law school.

“The kids didn’t win,” she says. “I felt like the substance of what I was doing at the law firm had a lot to do with education, and that forced me to confront the extremely unequal access to a good education in America.”

Johns taught fourth and fifth grades, respectively, in San Antonio, Texas, for two years. She says she would have stayed teaching longer, had she not been admitted both to Duke Law (her first choice) and to the university’s PhD program in history (also her first choice). “It took that to tear me away from my kiddos after my second year.”

The James B. Duke Scholar spent her first year at Duke laying the groundwork for her PhD, happily “deep in the history mud.” She then took a leave of absence to focus solely on law. “It was awesome to just be a 1L,” she says. “I got to build friendships and put down roots, which I don’t think I would’ve been able to do if I had tried to do both at the same time.” That’s exactly what she has done for the past year-and-a-half. “Each semester was the craziest semester I’d ever had, only to be topped by the semester that was coming just down the line,” she says of juggling course loads and extracurriculars for both programs. At Duke Law Johns has served as president of the Moot Court Board, articles editor for *Duke Law Journal*, and co-president of the Volunteer Income Tax Assistance program, which prepares tax returns for low-income Durham residents.

Duke University’s Bass Connections initiative allowed Johns to advance her interdisciplinary interests by serving as graduate student co-chair for the initiative’s Student Advisory Council and working on a project examining retrospective regulatory review headed by Associate Professor of History and Public Policy Edward Balleisen. She

also served as as Balleisen’s teaching assistant for his class, *The Modern Regulatory State*. Balleisen, Duke’s vice provost for Interdisciplinary Studies, says he admires Johns’ poise, maturity, and ability to apply her teaching background in structuring group activities for undergraduates. “She’s unbelievably articulate, has very wide interests, and has the ability to make connections across very different domains,” he says. “She’s taken on two grueling, challenging fields of study. I’ve seen her assimilate those two different bodies of knowledge.”

Johns says she began to appreciate and was able to better understand just how those different bodies of knowledge connect during her second year of law school when she took both an international law course with Laurence Helfer, the Harry R. Chadwick, Sr. Professor of Law, and a graduate-level course on regulation and political economy. At one point, discussion in both classes turned to the collapse of a commercial building in Bangladesh. “In Professor Helfer’s class, we were talking about international trade flows and, in the wake of the Rana Plaza disaster, corporate actions that try to address worker safety issues in Bangladeshi factories,” she recalls. “And then in my history class we were talking broadly about corporate involvement in creating public policy. I started seeing all of these connections between the two different programs. The approaches are different, but the problems are similar.”

She is highlighting those connections in her PhD dissertation, which expands on an independent study with Professor Thomas Metzloff on the history of consumer class actions and how they have been used as tools for consumer protection. After spending the summer of 2016 as a summer associate for Williams & Connolly in Washington, D.C., Johns will return to Duke “writing with ferocity” to finish her PhD. Johns will then clerk first for Judge Allyson Duncan ’75 on the U.S. Court of Appeals for the Fourth Circuit in Raleigh and then for Judge John D. Bates of the U.S. District Court for the District of Columbia. ♡

— Rachel Flores Osborne

# Alumni Notes



Judge Gerald Bard Tjoflat '57  
and Marcia Parker Tjoflat

## Judge Gerald Bard Tjoflat '57: A legend keeps on

**J**UDGE GERALD BARD TJOFLAT of the U.S. Court of Appeals for the 11th Circuit celebrated an incredible 45 years on the federal bench in November. He was appointed to the U.S. District Court for the Middle District of Florida in 1970 by President Richard Nixon '37, and now at age 86 is one of the longest-serving active federal judges in the country.

Tjoflat served in the U.S. Army from 1953 to 1955 as a counterintelligence agent before entering law school at Duke. Following law school, he worked in general private practice for about a decade in Jacksonville, Fla., and later served as a judge on the Fourth Judicial Circuit of Florida in Jacksonville from 1968 to 1970.

Tjoflat, a life member of the Law School's Board of Visitors, told the *National Law Journal* that his entry into the judiciary was rather "freakish." As a Republican in a region dominated by Democrats — "You could count 'em on your fingers and toes, really" — a court appoint-

ment seemed a nonstarter. When he got the call from Florida's first Republican governor since Reconstruction, he assumed he wouldn't survive past an election. "I had told my partners, 'I'll see you in January,'" he said. But no one registered to run against him. Not long after, he was nominated by Nixon to a new seat in the Middle District of Florida and confirmed by the Senate a week later.

In November 1975, President Gerald Ford nominated Tjoflat to the former U.S. Court of Appeals for the Fifth Circuit. He was later re-assigned to the then-newly created 11th Circuit in October 1981. He served as chief judge from 1989 to 1996. Twenty years later, he's still carrying a full caseload. When asked by the *National Law Journal* when he thought he might step back, he said simply: "We'll wait and see." ♡ — *Alexis Reynolds '16, is online editor for Duke Law Journal. Adapted with permission from Judicature.*

» For *Super Lawyers* and other professional kudos, see page 76.

## 1961



**Llewelyn Pritchard** received the Outstanding Service Award at the American Bar Foundation's

60th Annual Fellows Awards presentation, held Feb. 6 in San Diego. The award is given to an attorney who, in a professional career spanning more than 30 years, has adhered to the highest principles and traditions of the legal profession and to the service of the public.

## 1966

**Ed Robin** founded NAS Insurance in Encino, Calif., in 1975. The firm, a full-service specialty insurance underwriting manager, celebrated its 40th anniversary in September.

## 1970

**James Frenzel** retired on Dec. 31, after more than 45 years of law practice. He was a partner in the bankruptcy and insolvency practice groups at large firms in North Carolina and Georgia, and for the past two decades ran his own firm in Atlanta, garnering acclaim as one of the top business bankruptcy attorneys in Atlanta and the Southeast.

**Larry Lawton** is serving as a volunteer guide at the Rochester, N.Y., mission of The Church of Jesus Christ of Latter-day Saints. He is retired from law practice.





**Colin Brown '74**, CEO of JM Family Enterprises, was named 2015 “Floridian of the Year” by *Florida Trend Magazine*. In a cover profile in the January 2016 issue, the magazine lauded Brown for his decision, “with no fanfare or press release,” to implement a \$16-an-hour minimum wage for all employees of the family-owned company that operates one of two franchised Toyota distributorships in the U.S.

“As a result, about 400 employees got a raise overnight,” wrote *Florida Trend’s* Amy Martinez. “Another 600 employees who already made \$16 or more per hour also got a raise, maintaining the wage tiers that reflect different experience levels. In all, about a quarter of JM’s 4,100-person work force directly benefited from the move.”

Brown, a life member of the Duke Law Board of Visitors, told *Florida Trend* that the raises were “financially feasible and consistent with the company’s corporate culture. “There are certain people who run businesses and treat people like they are a disposable asset. I think those people totally misunderstand what makes good business. If you drive everything only to the bottom line, you might gain in the short run, but you will not gain in the long run.” ♣

## 1971

**Randolph May** has co-authored *The Constitutional Foundations of Intellectual Property – A Natural Rights Perspective* (Carolina Academic Press, 2015). Randy is president of the Free State Foundation in Potomac, Md. **BOV**

**Mike Warren** received a 2015 Lifetime Achievement Award from the Auburn University Alumni Association. The awards recognize recipients for outstanding achievements in their professional lives, personal integrity and stature, and service to the university. Mike is chairman and CEO of Children’s of Alabama, the state’s only free-standing pediatric medical facility.

## 1973

**Charles Holton**, senior lecturing fellow and director of the Duke Law Civil Justice Clinic, has been appointed by North Carolina Supreme Court Chief Justice Mark Martin for a three-year term to the N.C. Equal Access to Justice Commission. Charles is also a litigator and senior partner in the Research Triangle Park office of Womble, Carlyle, Sandridge & Rice.

**Kenneth Starling**, adjunct professor at Georgetown Law School, is also serving as senior counsel of the D.C. Affordable Law Firm, an innovative new “low-bono” firm established by Georgetown Law to serve clients of limited means who are not eligible for free legal aid.

## 1974

**Steven Pierce** retired on Sept. 30 as chief justice of the Massachusetts Housing Court. During his career he served in all three branches of the Massachusetts state government — first in the legislature, then in two gubernatorial administrations, and finally in the court system. He was appointed to the Housing Court in 2002, and named chief justice in 2006.

## 1976

**Barbara Arnwine** founded the Transformative Justice Coalition (TJC) last July, and serves as its president. According to its website, TJC is a “national organization committed to using a multisectoral and interdisciplinary approach to bring about systemic change that achieves racial, gender, economic, and social justice, and human rights.” Barbara served as the executive director of the Lawyers’

Committee for Civil Rights Under Law from 1989 until 2015. **BOV**

**Robert Weber** has been nominated to serve as general counsel of the United States Golf Association’s 2016 Executive Committee. Bob is a senior advisor to IBM, following a nine-year career as its senior vice president of legal and regulatory affairs and general counsel.

## 1977

**Amber Reichgott Junge** was the keynote speaker at the annual meeting of the N.C. Public Charter Schools Association held in Durham last July. Junge, who in 1991 as a Minnesota state senator wrote the nation’s first charter school law, is the author of *Zero Chance of Passage: The Pioneering Charter School Story* (Beaver’s Pond Press, 2012).

## 1978



**Michael Dockterman**, a partner in the Chicago office of Steptoe & Johnson, has been named a *Law 360* “Trial Ace.” Michael also teaches a section of Trial Practice at Duke Law School each spring. **BOV**

**Chris Sawyer** has been named chair emeritus of the Board of Visitors of the Institute for the Environment at the University of North Carolina. Chris, a retired partner of Atlanta-based Alston & Bird, began his service to the Board in 2003 and served as its chair from 2011 until 2015.

## 1979

**Carl Schuman**, a Connecticut superior court judge since 1998, has edited *Connecticut Criminal Procedure* (Connecticut Law Tribune, 2015).

## 1980



**John (Jack) Hickey** presented his paper “Typical Liability and Causation Defenses in a Typical Auto Case” at the American Association for Justice 2015 annual convention in Montreal last July. He also spoke on a panel at Florida International University’s School of Law in September.

**Russ Jones**, chairman of the litigation department at Polsinelli, was installed as president of the Kansas City Metropolitan Bar Association in December.

This section reflects notifications received between July 1, 2015 and Jan. 31, 2016. **BOV** denotes membership on the Law School’s Board of Visitors.



L-R: Nancy Nasher '79, David Haemisegger, Nasher Museum Director Sarah Schroth, and exhibit curator Marshall N. Price, in front of Elliott Hundley's *eyes that run like leaping fire* (wood, soundboard, ink-jet print on Kitakata, string, pins, paper, photographs, plastic, wire, and found embroidery, 98½ × 240½ × 113½ inches, five panels. Nancy A. Nasher and David J. Haemisegger Collection. © Elliott Hundley)

## 1981

**Patrick Fazzone** has opened the law firm of Montgomery Fazzone in Washington, D.C., with several colleagues. He was previously a partner at Butzel Long Tighe Patton. Pat continues to focus on international trade and commercial matters in the Asia Pacific region and divides his time between the U.S. and Sydney, Australia.

**Michael Lieberman** has received The Attorney General's Award for Meritorious Public Service, the top public service award granted by the Department of Justice, which recognizes significant contributions of citizens and organizations that have assisted the DOJ in accomplishing its mission and objectives. Michael

is Washington counsel and director of the civil rights policy planning center of the Anti-Defamation League. The award noted his "outstanding contributions to combat hate crimes." (Read profile, page 62.)

## 1984

**Helen Nelson Grant** has been hired as the first chief diversity officer for the Richland Two School District in Columbia, S.C. Helen recently worked at Nexsen Pruet, where she developed a retention strategy to diversify the company's workforce.

**Wilson Schooley** has been elected secretary of the ABA Section of Civil Rights & Social Justice, serves on the section's Executive Board and will serve as chair in 2018. He

is also chair of the editorial board of *Human Rights Magazine*, as well as special advisor on the publications board of the ABA's Solo, Small Firm, and General Practice Division. He is the San Diego County Bar Association's delegate to the ABA House of Delegates.

## 1985

**Janet Ward Black**, owner of Ward Black Law in Greensboro, N.C., has been awarded the Order of the Long Leaf Pine, the state's highest civilian award. Janet received the award on Jan. 29, during a surprise birthday party for her mother, Fran Black Holland, who received the Order of the Long Leaf Pine award in 2007.

**William Horton**, a partner at Jones Walker in Birmingham, Ala., is chair of the ABA Health Law Section for 2015-2016. He is the first lawyer from Alabama and the first Duke Law alumnus to hold that position.

**Lisha Wheeler** retired in July after a 30-year career practicing in the areas of real estate finance, affordable housing, and community development law. At the time of her retirement, she was an associate general counsel in the legal department of Fannie Mae. Lisha is now a certified professional executive coach with Wheeler Coaching & Consulting in New Orleans, where she also pursues her interest in acting by working as an extra/background actor in movies and television shows.

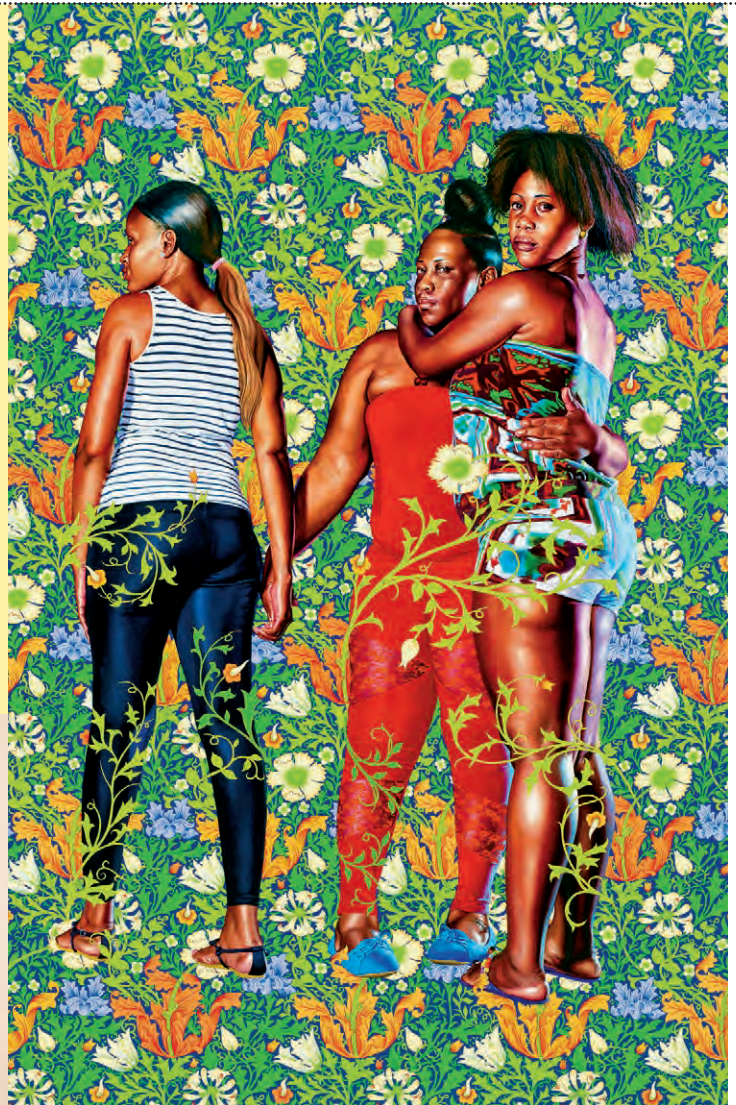
## Nancy Nasher '79

**H**IGHLIGHTS FROM A VAST COLLECTION of contemporary art amassed by Nancy Nasher '79 and her husband, David Haemisegger, are on display at Duke University's Nasher Museum of Art until June 26.

The 35-piece exhibit, titled "A Material Legacy," includes large-scale sculptures by Huma Bhabha, Anthony Caro, Tony Cragg, Edmund de Waal, Anish Kapoor, Sol LeWitt and Rachel Whiteread, and paintings and drawings by Damien Hirst, Mark di Suvero, Julian Schnabel, Richard Serra, Kara Walker and Kehinde Wiley, among many others. The exhibit at the Nasher Museum, named for founding benefactors Raymond and Patsy Nasher, Nancy's parents, marks the first public display of the works that feature a wide range of materials and textures.

"There's never been a show quite like this in our area, with such exquisite examples of a variety of artistic processes by so many 'blue chip' artists. The galleries are smashing," Sarah Schroth, Mary D.B.T. and James H. Semans Director of the Nasher Museum, told *Duke Today*.

Nancy Nasher chairs the board of directors of the Nasher Museum. ♡



Kehinde Wiley, *Naomi and her Daughters*, 2013. Oil on canvas, 180 x 90½ inches (457.2 x 229.87 cm). Nancy A. Nasher and David J. Haemisegger Collection. © Kehinde Wiley Studio.



## 1986

**Brent Clinksale**, head of litigation for the Greenville, S.C., office of Womble, Carlyle, Sandridge & Rice, has been elected to membership in the American Law Institute. Brent also serves as chair of Womble Carlyle's Diversity Committee. **BOV**

**Michael Friedman**, partner with Fox Rothschild in Denver, has authored a trio of short novels, *Martian Dawn and Other Novels* (Little A, 2015).

**David McKean** took his post as U.S. ambassador to Luxembourg on April 8, 2016, after being confirmed by the U.S. Senate. He was nominated to the post by President

Barack Obama in October. He previously served as director of the Office of Policy Planning at the U.S. Department of State.

**Gary Myers** has published the fifth edition of his casebook, *Entertainment, Media and the Law: Cases & Materials* with Paul Weiler (Harvard) and Will Berry (Mississippi) (West Publishing, 2015). Gary continues to serve as dean at the University of Missouri School of Law.

**James Smith**, who stepped down as chief administrative patent judge at the U.S. Patent and Trademark Office last July, is now working as chief IP counsel of Ecolab in St. Paul, Minn. **BOV**

## 1987

**David Berger**, a litigation partner at Wilson Sonsini Goodrich & Rosati in Palo Alto, Calif., served as general counsel to the Super Bowl 50 Host Committee.

## 1988

**Jody Debs** has been named general counsel of HDR Inc., a world-wide engineering, architecture, environmental, and construction services firm. Jody is also a fellow of the American College of Construction Lawyers and a board member of Engineers Without Borders.

**Richard Gulino** has been named senior vice president, general counsel and secretary at Vanda Pharmaceuticals, Inc. Rick has over 20 years of experience representing life sciences and healthcare companies, most recently as vice president and general counsel of Ameritox, Ltd., a clinical drug-testing laboratory.



**Shawn Lochinger** has joined the education law firm of Sweet, Stevens, Katz & Williams in its new office in Hershey, Pa. Shawn previously practiced with Rhoads & Simon in Harrisburg, and is a former gifted education hearing offi-



**John Simpkins '99** became general counsel for the U.S. Agency for International Development (USAID) in July. He previously served as deputy general counsel in the White House Office of Management and Budget.

Simpkins, who holds both a JD and an LLM in International and Comparative Law, returned to Duke Law on Feb. 4 for a wide-ranging conversation about his role at USAID and his career path. He also offered advice to students interested in careers involving international trade and development. The event was sponsored by the JD/LLM Program in International and Comparative Law. ♣

cer in Pennsylvania with a background in special education law and labor and employment law as it relates to schools.

## 1989

**Kenneth Murphy**, a managing partner in the Philadelphia office of Drinker, Biddle & Reath, has been elected to membership in the American College of Trial Lawyers.

**David Starr** has been promoted to senior vice president and general counsel of The LaSalle Group, Inc. David became the company's vice president and general counsel in 2014.

## 1990

**Mandisa Muriel Maya** has been appointed by South African President Jacob Zuma as the first female deputy president of the

Supreme Court of Appeal, one of the highest positions in the leadership of the judiciary. She was appointed to the Supreme Court of Appeal in 2006.

## 1991



**Pancho Aleman** has relocated from Singapore to London with Citibank, becoming head

of private bank compliance for Europe, the Middle East, and Africa. Pancho, who has been with Citi for over 16 years, had been in Asia since May 2012, first as acting head of compliance for Citi Global Markets Japan and, since January 2013, as Asia Pacific head of corporate compliance.

**Takaaki Fujimoto** joined UBS in July as Japan head of compliance and operational risk control, located in Tokyo.

**Laura Gellman** has been appointed managing director/global chief auditor for conduct and ethics at Citigroup. Laura previously was a managing director at Bank of America.

**Douglas Gooding**, co-chair of the finance and restructuring group at Choate, Hall & Stewart in Boston, has been selected as a fellow of the American College of Bankruptcy.

**Maurice 'Mo' Green** has been appointed executive director of the Z. Smith Reynolds Foundation in Winston-Salem, N.C. The foundation is a nonprofit organization that invests in statewide, regional, and

community-based organizations. Mo previously served for seven years as superintendent of Guilford County (N.C.) Schools.

## 1992

**Dan Berman** was appointed, in January, to serve as interim president and CEO of the Carolina Theatre of Durham. Dan has served on numerous boards, including that of the Full Frame Documentary Film Festival, which he chaired, and the Duke University Center for Documentary Studies.

**Kevin Flynn** has a solo patent practice, Flynn IP Law, in Chapel Hill. He guides young companies to obtain initial patent coverage, with a focus on medical devices and clean energy.

**Caryn Coppedge McNeil** has been elected chair of the Board of Trustees of Ravenscroft School in Raleigh, N.C. She has served on the board since 2010, and is the first female board chair in the 156-year history of the school. Caryn is a partner at Smith Anderson, where she leads the firm's employee benefits and executive compensation practice group.

## 1993

**Eduardo Hauser**, president of the board of Vme TV and associate director of Hauser & Co. in Miami, is the host of 'm TED, a weekly series of Spanish-language TED Talks by influential Hispanic leaders. The show debuted last fall. BOV

## 1994

**Jason Hanson** has joined medical device company NuVasive as executive vice president of strategy, corporate development, and general counsel. He previously served as a corporate vice president and a member of the senior executive team at GE Healthcare.

**Michael Sorrell**, president of Paul Quinn College in Dallas, was named, last fall, as one of *Washington Monthly's* "Ten Most Innovative College Presidents." In October, he was the featured speaker at the Fourth Annual "Changing the Odds" Conference in Dallas. And in January, Michael was honored by the Dallas Bar Association with its 2016 Martin Luther King, Jr. Award. The annual award recognizes attorneys who embody the principles and values of Dr. King's life and legacy, justice, compassion, and service.

**Stacie Strong** has joined the law faculty at the University of Missouri as the Manley O. Hudson Professor of Law. Stacie previously taught at Cambridge and Oxford Universities and worked as a lawyer in New York, London, and Chicago. She specializes in international and comparative law, particularly in the area of international arbitration.

**Laurie Sanders** has joined the San Francisco law firm of Osborn McDerby as partner. Previously, Laurie founded Emeryville Law, a boutique business law firm providing services to small- and mid-size private businesses.

## 1995

**Michelle Neumann** has moved her employment law practice to Sonoma County, Calif. She serves employees in all aspects of employment law including wrongful termination, discrimination and harassment, and retaliation.

**Alejandro Posadas**, director of graduate studies in law at Escuela de Gobierno y Transformación Pública at Tecnológico de Monterrey in Mexico, has been elected a member of the executive committee of the biannual conference Global Alliance for Justice Education (GAJE). He is one of two Latin American representatives on the executive committee.

## 1996

**Randy Lehner** has joined Kelley Drye & Warren as a partner in Chicago, where his practice focuses on regulatory investigations, government enforcement actions, and commercial litigation. He was previously partner-in-charge of the Chicago office of Ulmer & Berne.

**Linda Martin** has joined Freshfields as a partner in the firm's dispute resolution practice, based in New York. Linda was previously a partner in the litigation group of Simpson Thacher & Bartlett.

## 1997

**Stacey Friedman** has been promoted to general counsel of JPMorgan Chase & Co., after serving as general counsel of the bank's corporate and investment banking unit. Prior to joining JPMorgan in 2012, she was a litigation partner at Sullivan & Cromwell.



**Kirkland Hicks** has been named executive vice president and general counsel of Lincoln Financial Group.

Kirkland joined Lincoln Financial from Towers Watson & Co., where he served as general counsel and secretary since 2012. **BOV**

**Matt Kirsch** is chief of the Criminal Division in the Office of the U.S. Attorney's for the District of Colorado. He has been an assistant U.S. attorney since 1999 and has prosecuted a variety of crimes, with a focus on white collar crimes.

**Patricia Northrop** has been appointed as general counsel for Public Media NJ, Inc. (NJTV), New Jersey's statewide public television network. She previously was senior counsel for WNET, New York Public Media.

**Clay Wheeler**, a partner at Kilpatrick Townsend & Stockton and a member of its government enforcement and investigations team, has been honored with a unanimous resolution from the Board of Legal Aid of North Carolina (LANC) for his "crucial and timely contributions to the social justice mission of LANC." Clays works out of the firm's Raleigh and Winston-Salem offices.

## 1998

**Katy Drechsel** has relocated to St. Charles, Mo., and is working for American Railcar Leasing LLC as director of contracts and assistant corporate secretary. She was previously senior attorney for Southwest Airlines in Dallas.

**Stephen Cirami**, executive vice president of the Garden City Group, has also been named its chief operating officer. Garden City Group is headquartered in Lake Success, N.Y., and provides legal administrative services for class action, mass tort, and bankruptcy cases.

**Amanda McMillian** has been promoted to senior vice president, general counsel, corporate secretary, and chief compliance officer at Anadarko Petroleum Corp., based in Houston. Amanda joined Anadarko in 2004.

**Alan Parry** has been appointed by North Carolina Supreme Court Chief Justice Mark Martin to serve a three-year term on the N.C. Equal Access to Justice Commission. Alan is a founding partner of Parry Tyndall White in Chapel Hill.

**Arden Phillips** is corporate secretary and associate general counsel of U.S. Steel located in Pittsburgh, Pa. Arden previously was corporate secretary and governance officer of WGL Holdings, Inc.

**Bobby Sharma** is managing partner of Blue Devil Holdings LLC, an international sports, media, and entertainment investment company based in New York City. From 2011 to 2014, he was senior vice president and head of global basketball for IMG Worldwide, Inc., and earlier served as vice president and general counsel of the NBA Development League, the NBA's first minor league that he helped establish.

**Richard Welch** is an associate professor at the Beijing Foreign Studies University Law School. He previously practiced at Starr Gern Davison & Rubin in Roseland, N.J.

## 1999

**Layth Elhassani**, a former special assistant to President Barack Obama in the White House Legislative Affairs Office, has joined Covington & Burling's global public policy and government affairs practice in Washington, D.C.

**Tara Allen Esteves** has joined Armbrust & Brown in Austin, Texas, as a partner with a corporate and securities practice. She previously was a partner at Reed Scardino, also in Austin.

**Bernhard Welten** has merged his firm with Lemann Walz & Partner in Bern, Switzerland.

## 2000

**Jose Ignacio Diaz** has joined Celulosa Arauco & Constitucion, a Chilean wood pulp, engineered wood and forestry company, as legal director. He previously practiced at Yrarrázaval Ruiz-Tagle law firm in Santiago.

**Arturo Benegas Masia** has joined the New York office of Akerman LLP as an international partner in the firm's corporate practice group. Arturo was previously senior counsel at Verizon Communications, Inc.

## Kudos

The following alumni have been recognized by their peers for excellence in their respective specialty areas as listed in such publications as *Best Lawyers in America*, *Super Lawyers*, *Chambers USA*, *Law 360*, *BTI Client Service All Stars*, and *Thompson Reuters*. See details at [law.duke.edu/alumni/news/classnotes](http://law.duke.edu/alumni/news/classnotes). This list reflects notifications received by Jan. 31, 2016, and includes such designations as "Rising Stars."

James R. Fox '71  
 S. Ward Greene '73  
 Fred Fulton '74  
 John K. Keller '75  
 Reginald Clark '78  
 Mark Prak '80  
 Rich Van Nostrand '80  
 Irene Keyse-Walker '81  
 Sharon M. Fountain '82  
 Bruce Ruzinsky '83  
 James Dale Smith '83  
 Wilson A. Schooley '84  
 Lisa S. Boehm '88  
 R. Joseph Morris '88  
 William Mureiko '89  
 Donald M. Nielsen '90  
 Caryn Coppedge McNeill '91  
 Amy Meyers Batten '92  
 Subhash Viswanathan '95  
 Cynthia Johnson Walden '95  
 Randall D. Lehner '96  
 Geoffrey R. Krouse '97  
 Geoffrey W. Adams '98  
 Kimberly A. Schaefer '98  
 Dustin Rawlin '00  
 Nicole Crawford '03  
 Nicole Williams '03  
 John H. Jo '06  
 Brent Lorentz '06  
 Kelli A. Ovies '06  
 Adam Doverspike '09  
 Issac A. Linnartz '09  
 Toby R. Coleman '10

**Keron Smith** has joined TicketNetwork, Inc. in South Windsor, Conn., as associate counsel. She previously worked at Webster Bank.



**Chris Van Tuyl** has joined Sacks Tierney in Scottsdale, Ariz., as a shareholder. He previously

served as an officer-level legal counsel at publicly traded companies in Arizona and Florida.

## 2001

**Kristi Bowman**, professor of law at Michigan State University, has been appointed associate dean for academic affairs. She also has been elected to membership in the American Law Institute. Kristi's 2015 edited volume, *The Pursuit of Racial and Ethnic Equality in American Public Schools*, was named a 2015 outstanding academic title by *Choice: Current Reviews for Academic Libraries*.

**J.D. Hickey** became CEO of BlueCross BlueShield of Tennessee in September. He had served as chief operating officer since 2012 and CEO-elect since June. Before joining BCBS in 2011, J.D. was a principal at McKinsey & Co., where he led strategic health care consulting and management teams.

**Erin Lovall** has joined the American Society of International Law as the managing editor of its journal, *Proceedings*. She is also the co-producer and co-director at Seeking Truth Productions, a company that produces human rights documentary films. Its first film, "Seeking Truth in the Balkans,"

which explores the legacy of the International Criminal Tribunal for the Former Yugoslavia, was screened at the Law School last fall.

**Josh Malkin**, executive director of The Malkin Group at Morgan Stanley Private Wealth Management, was named one of the top 40 financial advisors under age 40 by *On Wall Street Magazine* for 2016. Josh was also named to the list in 2015.

## 2002

**Alison Benge** has joined Pacifica Law Group in Seattle as a partner in its public finance and municipal law group. Alison's practice focuses on federal income taxation issues in public finance transactions. She previously practiced at Jones Hall in San Francisco.

**Andrew Chang** was named a partner in the San Francisco office of Shook Hardy & Bacon, effective Jan. 1. Andrew is a member of the firm's global product liability group where his practice focuses on individual, mass tort, and class actions involving automotive, pharmaceutical, medical device, and other consumer products.

**Conway Chen** has been named senior director of consumer product partnerships and strategic partnerships at LinkedIn. He previously was a director of business development at Twitter, Inc. Conway is based in the San Francisco Bay area.

**Catherine Duval** has joined Zuckerman Spaeder in Washington, D.C., as a partner. She advises on professional liability issues and counsels clients in congressional and government investigations. She previously served as an attorney and advisor in the Obama administration on oversight issues and high-profile investigations, most recently at the Department of State and, before that, as counselor to the commissioner of the Internal Revenue Service.

**Terry Eaton** has opened The Eaton Law Firm in Washington, D.C., where he is the principal managing attorney. The firm focuses on white collar, criminal defense, civil litigation, employment counseling, and mediation. Terry continues to serve as an adjunct professor at Georgetown University as well as an instructor for the NITA Intensive Trial Skills Workshop in D.C.

**Andy Grimmig** has been appointed senior vice president, general counsel, and corporate secretary of Corporate Risk Holdings, LLC, after serving in other senior leadership roles within the company. Andy previously was a corporate attorney in the Washington, D.C., office of Latham & Watkins.

## 2003

**Molley Clarkson** has been appointed general counsel of The Seibels Bruce Group, Inc., an insurance services provider based in Columbia, S.C. Prior to joining Seibels, Molley practiced at Sutherland Asbill & Brennan in Atlanta.



**Jaclyn Moyer** has been elevated to partner at the Washington, D.C., office of WilmerHale,

where she is a member of the securities and securities litigation and enforcement practices.

**David Silverstein** has joined the New York office of Axinn Veltrop & Harkrider as a partner in the firm's intellectual property group. He previously practiced in-house at Par Pharmaceuticals.

**Nicole Williams**, a partner in the trial practice group of Thompson & Knight, has been appointed as a member of the Dallas Judicial Nomination Commission. Her two-year term will expire on Sept. 30, 2017.

Have news to share?

» Drop us a line at [law.duke.edu/alumni](http://law.duke.edu/alumni)

## 2004

**Phil Bezanson** has been named managing partner of Bracewell's Seattle office. His practice focuses on white collar criminal defense, internal investigations, securities enforcement and regulatory matters.

**Jeremy Entwisle** has joined Hoya Corporation as regional general counsel for Europe, the Middle East, and Africa. He has relocated to Amsterdam from Tokyo where he worked at JPMorgan Chase.

**Jonathan Krause** has joined Klehr Harrison Harvey & Branzburg as a partner resident in the firm's Philadelphia and Cherry Hill, N.J. offices. His practice focuses on employment law and litigation. He previously practiced at Morgan Lewis.

**Jason Sass** is vice president, legal and compliance at China Development Industrial Bank in Taipei, Taiwan. He previously practiced in Beijing with Paul Hastings and in Tokyo at White & Case.

## 2005

**Alexa Chew**, clinical associate professor of law at the University of North Carolina at Chapel Hill, received the Robert G. Byrd Award for Excellence and Creativity in Teaching in April 2015. She joined the UNC faculty in 2012, and teaches Research, Reasoning, Writing, and Advocacy; Foundations in U.S. Common Law; and U.S. Legal Research and Writing.

**Kelsey Weir Johnson** and her husband, Ty Johnson, welcomed a son, Michael Henry, on Jan. 4, 2016. He joins big sister Evy.

**Joy Lim Nakrin** has joined NECN, the nation's largest regional news network. She made her network on-air debut in early May as an afternoon anchor and evening

reporter. Joy has more than 10 years of television experience, the last two as an anchor and reporter at WFXT in Boston.

**Angela Rafoth** has been elevated to shareholder in the San Francisco office of Littler. Angela advises employers on a number of employment law matters including discrimination and harassment, wage and hour issues, and disability issues and leave compliance.

**Valerie Tessler** has joined Societe Generale in Paris. She previously was with Gide Loyrette Nouel, an international law firm based in Paris.

## 2006

**Wilson Chung** has joined Macquarie Capital in Hong Kong as vice president. He previously was an executive director at Litegrid Holdings Ltd., also in Hong Kong.

**James Nowlin** authored "To GC or Not to GC? Keys to Hiring Exceptional General Counsel," which appeared in the Jan./Feb. issue of *Texas CEO Magazine*. James is CEO of Excel Global Partners and fund managing principal of the EGP Family of Companies, located in Austin.

**Amy Yeung** has joined Dataminr, a New York software company that "datamines" social media for real-time datapoints for journalists, fire and rescue, investment banks, and the government. Amy is leading the firm's legal efforts.

## 2007

**Nichole Hines** has joined Humana as in-house legal counsel, based in the Miami office. She is in charge of Florida Medicaid plans and all plans offered in Puerto Rico. Nichole previously practiced at Squire Patton Boggs and at Eli Lilly.

**Ryan McLeod** has been appointed a lecturer at Columbia Law School, where he teaches a seminar on deals litigation. Ryan is a litigation associate at Wachtell, Lipton, Rosen & Katz where he represents corporations and directors in complex corporate, commercial, and deal-related litigation, and advises on transactional, fiduciary, and governance matters.

**Steven Schindler** has been promoted to partner at Perkins Coie, where he is a member of the firm's personal planning practice in Seattle.

**Adam Shestak** has joined the employment and labor practice group at Houston Harbaugh in Pittsburgh. Adam previously was an assistant attorney general for the North Carolina Department of Justice.

**Landon Zimmer** has been appointed to the North Carolina Wildlife Resources Commission. He practices at Zimmer & Zimmer in Wilmington.

## 2008

**Abby Dennis** was elected to partnership at global law firm Boies, Schiller & Flexner. Abby is a litigator based in Washington, D.C.

**Penelope Donkar** has joined the Public Defender Service for the District of Columbia as a staff attorney in the Mental Health Division. She was previously an assistant public defender in Augusta, Ga.

**Michael Frandina** has joined The Askman Law Firm in Denver, where he continues his general commercial litigation work and assists in the firm's environmental, tribal, and natural resource practice areas. He was previously at Kutak Rock.



**Brandon Neal** and his wife, Kerbie, welcomed a son, Joshua Caleb, on Dec. 23, 2015. He joins big sister Kennedy. Brandon is senior counsel for Wells Fargo in Charlotte.

**Scott Skinner-Thompson** has authored *AIDS and the Law* (5th ed., Aspen Publishing, 2015). Scott is acting assistant professor at NYU School of Law.

**Monica Chaplin Starosta** married Moises Starosta on Jan. 31, 2015, in Miami Beach.

**Brian Strand** has been promoted to principal in the Houston office of Fish & Richardson. He is a member of the intellectual property litigation group, where his practice focuses on complex patent litigation and appeals.

**Sarah Hawkins Warren** has joined the Office of the Georgia Attorney General as a deputy solicitor general and special counsel for water litigation. Sarah previously was a partner at Kirkland & Ellis in Washington, D.C.

**Andie Wyatt** has joined the Congressional Research Service in the Library of Congress as a legislative attorney, advising congressional staff on environmental law topics. She previously practiced at Beveridge & Diamond.

## 2009

**Sarah Campbell** has joined the Office of the Tennessee Attorney General as special assistant to the solicitor general and the attorney general. Sarah previously practiced at Williams & Connolly in Washington, D.C.

**Ingrid Kaldre Foster** has founded Legal Data Analytics, a data, analytics, and information design company, located in Los Gatos, Calif.

**James McDonald** married Jessie DuPont on July 11, 2015, in West Tisbury, Mass. Duke President Richard H. Brodhead led the ceremony, after receiving permission from the Commonwealth to officiate. Jim is a prosecutor with the criminal division of the U.S. Justice Department in Washington, D.C.

**Francisco Prat** has joined the Santiago, Chile, law firm Del Rio Izquierdo Abogados as a senior associate in the corporate practice group. He previously was a legal director at LATAM Airlines Group.

**Elizabeth Thomsen** has joined the corporate and commercial practice of Smith Anderson as an associate in the Raleigh office. She previously was in the media and information technology group at Dow Lohnes in Washington, D.C.

**Lei Zhang** has been named reference librarian at the Jamail Center for Legal Research, Tarlton Law Library at the University of Texas at Austin. He most recently was reference librarian at Western State College of Law.

## 2010

**Morgan Clemons**, a regulatory compliance associate at Aldridge Pite in Atlanta, has been chosen as one of *The MReport's* 2015 Women in Housing "Leading Ladies."

Honorees were recognized at the Women in Homeownership Leadership Forum at the Five Star Conference in September in Dallas.

**Jie (Jeanne) Huang** is associate professor of law at Shanghai University of International Business and Economics. Her book, *Interregional Recognition and Enforcement of Civil and Commercial Judgments – Lessons for China from US and EU Law* (Hart Publishing, 2014), based on her Duke SJD dissertation, won the First Prize of Excellent Scholarship 2015, awarded by the China Association of Private International Law. She also welcomed a son on Nov. 2, 2015.

**Daniel Mandell** is clerking for Senior District Judge Jack B. Weinstein, U.S. District Court for the Eastern District of New York. He began his clerkship after five years of practice in the complex commercial litigation group at Mishcon de Reya in New York.

**Sheena Paul** is chief operating officer of World Class Capital Group, a national commercial real estate investment group, which she co-founded with her brother in Austin, Texas, in 2007. Prior to rejoining World Class to run its New York operations, Sheena was an associate in the New York office of Skadden, Arps, Slate, Meagher & Flom, where she practiced in the banking and restructuring groups.

**Katherine Record** has co-authored "Humans, Not Hangers: Why It's Time to Regulate the U.S. Fashion Industry," published in the Dec. 21, 2015, issue of *U.S. News & World Report*.

**Patricia Richman** has become an assistant federal public defender for the District of Maryland in Baltimore. She previously practiced at Williams & Connolly in Washington, D.C.

## 2011

**Johnson Atkinson** has joined Manhattan Legal Services as a staff attorney. He previously was an associate at Willkie Farr & Gallagher in New York City.

**Aonghus Cheevers** is a PhD student at the Sutherland School of Law at University College, Dublin.

**Nicholas Collevocchio** has joined Baltimore-based Gallagher Evelius & Jones as an associate in the real estate and business transactions, corporate and corporate finance, and commercial and real estate lending groups.

**Ofer Ganot** has joined Venable as an associate in the corporate group in Los Angeles. He previously was an associate at Pomerantz in New York City.

**Rebecca Holljes** has joined the Raleigh firm of Ragsdale Liggett as an associate.

**Christina (Jones) LeBlanc** and **Scott LeBlanc** welcomed a daughter, Claire Elizabeth, on May 21, 2015.

**Andy Roth** is head of customer service for RocketBolt, an online tracking startup launched at The Startup Factory in Durham.

**Adam Schupack** has joined Hanglely Aronchick Segal Pudlin & Schiller in Philadelphia as a litigation associate. Prior to joining the firm, Adam completed two federal judicial clerkships and was an associate at Kirkland & Ellis.

**Aubrey Smith** has joined the New York office of Winston & Strawn as an associate in the firm's labor and employment practice group. He previously practiced at Sanford Heisler Kimpel.

## 2012

**Jorge de Santa Ritta** has been named a lecturer in political science and public administration at the University of North Carolina at Charlotte, where he continues his studies as a PhD candidate in public policy.

**Glen Rectenwald** is a frequent contributing co-author of articles for the *National Law Review*, including a November 2015 piece about companies that lack formal policies to manage open-source risks. Glen is an associate in Morgan Lewis's business and finance practice in New York City.

**Sarah Vacchiano** has joined FilmNation Entertainment, an independent film company based in New York. She previously practiced at Gibson Dunn.

**Nels Vulin** has joined the construction defect group at Ball Janik in Portland, Ore. He previously practiced with another Portland firm.

## 2013

**Seth Bloomfield** has joined Nelson Mullins Riley & Scarborough in Atlanta as an associate. He focuses his practice in the areas of real estate capital markets and commercial finance. He previously was at Chadbourne & Parke in New York.

**Barrett Johnson** has joined the Raleigh office of Cranfill Sumner & Hartzog as an associate in the medical malpractice practice group, where he represents health providers. Before joining Cranfill, Barrett practiced at Fried, Frank in Washington, D.C.

**William LeDoux** and his wife, Amanda, welcomed a son, Oliver Lawrence, on June 6, 2015. He joins big brother, Liam. William is an associate at K&L Gates in Dallas.



**Jennie Morawetz** has joined the environmental transactions practice group in the Washington, D.C. office of Kirkland & Ellis.

## 2014

**Whitney Blazek** has joined Baker Botts as an associate in the corporate practice in Dallas, after completing a clerkship on the Texas Supreme Court with **Judge Eva M. Guzman LLM '14**.

**Alex Dimock** has joined the Dallas office of Thompson & Knight as a litigation associate after completing his clerkship with **Judge Gerald B. Tjoflat '57** of the U.S. Court of Appeals for the 11th Circuit.

**Nina Gupta** joined the Washington, D.C., office of Paul Hastings as a litigation associate after completing a clerkship with Judge Robert L. Hinkle of the U.S. District Court for the Northern District of Florida.

**Eugenio Guzman** worked in the international associate program at Simpson Thacher & Bartlett in New York City after graduation. He has now returned to Santiago, Chile, and joined Portaluppi Guzman & Bezanilla as a senior associate.

**Ruben Henriquez** has joined the bank finance team at White & Case in New York City. He previously was in the bankruptcy group at Bracewell.

**Gabriela Jara** and **Edward Bersuder** were married on July 2, 2015, in Hartford, Conn. Gabby completed a clerkship with Judge Christopher Droney of the Second Circuit, and is now clerking for Judge John Koeltl of the U.S. District Court for the Southern District of New York. Ed is a corporate, banking, and credit associate at Simpson Thacher & Bartlett.

## In Memoriam

Received September 1, 2015 — March 21, 2016

### Class of '48

**John M. "Jack" Turner**  
January 2, 2016

### Class of '49

**Louis Carr Allen, Jr.**  
December 1, 2015

**William James Lemmon**  
December 6, 2015

### Class of '51

**Ned P. Everett**  
October 26, 2015

### Class of '53

**Vallie Carlton Brooks**  
February 25, 2016

### Class of '55

**William D. Branham**  
November 10, 2015

### Class of '56

**Robert L. Felts**  
December 27, 2015

### Class of '58

**J. Robert Sterling**  
January 20, 2016

### Class of '59

**Charles England Plunkett**  
January 14, 2016

### Class of '65

**Gordon Pickett Peyton, Jr.**  
January 13, 2016

### Class of '69

**John Patrick Cooney**  
November 2, 2015

**Jefferson K. Streepey**  
August 29, 2015

### Class of '74

**Richard Caspar Glass**  
January 3, 2016

**Richard Eric Teller**  
June 24, 2015

### Class of '80

**Howard Dale Dillman**  
December 24, 2015

### Class of '86

**John David Briggs II**  
June 12, 2015

# Sua Sponte



## Hunt changed hearts and minds at Duke Law

**T**HE DUKE LAW COMMUNITY was saddened to learn of the March 16 death, at age 51, of Darryl Hunt, a passionate advocate for the wrongfully convicted, who received an honorary degree from Duke University in 2012.

Hunt spent 19 years in prison in North Carolina for a rape and murder he did not commit before being exonerated by DNA evidence and released in 2003, a story told in the award-winning HBO documentary, “The Trials of Darryl Hunt.” Every year since then, he visited Duke Law with his lawyer, Mark Rabil, and spoke with first-year students about his fight for justice and his desire to do everything he could to improve the criminal justice system and keep others from suffering in the same manner he had. Hunt said he felt no anger about his wrongful conviction. “I wanted to live,” he told students in 2004. “Bitterness and hatred can eat you up on the inside. I was at peace in my heart.”

Hunt’s perseverance and grace, grounded in a deep religious faith and the knowledge that he was innocent, were an inspiration to

the entire Law School community, said Clinical Professor Theresa Newman ’88, who co-directs the Wrongful Convictions Clinic. “Many of our first-year students arrive with the belief that the U.S. criminal justice system is infallible,” she said. “Darryl changed hearts and minds on that issue, convincing students they needed to remain vigilant to ensure the system operates fairly and accurately.” He also advised students “to treat their clients with respect — as they would want to be treated,” no matter what legal field they entered, Newman said.

Writing on the Law School’s Facebook page, Kelcey Patrick Ferree ’07 recalled hearing Hunt speak during LEAD Week 2004: “He made such an impact.” ♡



BUILDING NEW SKILLS *in the NEW YEAR*

Jan. 6–10, 2016

DUKE LAW'S 6th ANNUAL

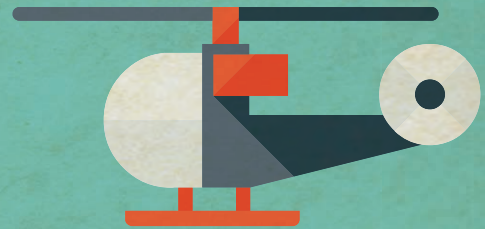
# Wintersession

BY THE NUMBERS:

**460**  
students

TOOK  
**26**  
courses

focused on practical skills, such as how to use Excel, deposition practice, and the basics of crowdfunding for early-stage businesses.



**108**

FIRST-YEAR STUDENTS  
TOOK AT LEAST ONE COURSE

AND

**286**

UPPER-LEVEL STUDENTS  
AND DUAL-DEGREE 1LS  
SIGNED UP FOR TWO.

**41**  
instructors

INCLUDED

**23** Duke Law alumni  
**4** Trinity College grads  
(a few "double Dukies")  
**4** full-time faculty, and  
**2** judges.

Save the date for Wintersession:  
**Jan. 4–8, 2017**



**Nota Bene:**  
A selection of  
faculty scholarship  
page 28