

THE INFLUENCES THAT CHARLES DREW ON TO CREATE HIS MUSIC WEREN'T JUST GENERAL TRADITIONS. THEY WERE VERY, VERY SPECIFIC.

I LIKE THAT SONG.

# DUKE LAW MAGAZINE

Summer 2017 | Volume 36 Number 1

## REMIX OR ROBBERY?

TWO COPYRIGHT SCHOLARS PRESENT THE *HISTORY OF MUSIC* AS AN *EPIC BATTLE* BETWEEN *CREATIVITY* AND *CONTROL*



ALSO  
IN THIS  
ISSUE

Nota Bene:

Selected scholarship from Duke Law faculty

# From the Dean



We are preparing students not just for a career that starts the day they graduate, but also for a practice that will span decades into the future.

## Dear Friends:

OUR FACULTY AND STUDENTS know that excellence in the legal profession depends both on depth of experience and the continued acquisition of new knowledge and skills. In addition to mastery of the basic analytic skills, legal writing, and professionalism, the faculty attempts to imbue our students with a willingness and ability to learn new areas of law and to adapt to and benefit from changes to law practice. For some, change is surely coming. It would be startling if law practice 25 years from now were the same as law practice today. One can either resist or attempt to shape and take advantage of the dynamism in the legal economy. Change and the need to learn new practice areas and skills are what can make the law such a satisfying and exciting career, even if the prospect takes us a bit out of our comfort zone and routine.

The arrival of potentially disruptive new technologies in the practice of law is described in one of our feature articles in this issue (see page 58). Already we are seeing major law firms use artificial intelligence to do jobs that previously went to associates and paralegals, such as document review and contract drafting. Whether this development ultimately benefits the legal profession as a whole is not clear. Our hope is that our graduates, who are among the most creative and thoughtful in the legal profession, will welcome the assistance of machines to handle the routine tasks at less cost to their clients. But the power of this market force seems undeniable whatever the outcome in costs and benefits.

Access to justice by those who cannot afford civil legal services may be significantly advanced by new technologies that are interactive, intuitive, and available on a smartphone. Access to justice is one of the great challenges for our profession, and it is exciting to see the possibilities that technology may offer, in addition to pro bono efforts and legal aid offices.

Duke Law is becoming one of the leaders in the “law tech” space. We believe that we have an obligation to our students to understand the ongoing impact of technology on the legal profession and ensure they are ready to meet both the challenges and opportunities it is creating. We are preparing students not just for a career that starts the day they graduate, but also for a practice that will span decades into the future. We began looking at law tech a few years ago. There is interest and enthusiasm in our faculty and also in other Duke faculties, such as computer science and engineering, where

some of the same possibilities are explored in somewhat different contexts. Last year I asked Associate Clinical Professor Jeff Ward '09, who has served as director of our Start-Up Ventures Clinic since 2013, to take an in-depth look at how we are doing in the law tech field and what more we need to do. The result is a range of initiatives described in these pages, including the establishment of a new Center on Law & Technology.

This is not new territory for Duke Law School. We have long had one of the strongest intellectual property faculties in the country, as well as a library that led the transition to the digital era of legal research and scholarship under the leadership of Dick Danner (see page 27). Our LLM in Law and Entrepreneurship has readied scores of lawyers to go to work in the innovation economy, and with the Start-Up Ventures Clinic, has enmeshed itself in the technology community in Durham and the Research Triangle. We have taken the lead in educating the bench and the bar about e-discovery through the acquisition last year of EDRM, and we have on the drawing board plans to broaden our offerings and expertise in cybersecurity, an area of much-increased importance.

Innovation, technology, and new ways of practicing law are all very promising, particularly here in the Research Triangle, one of the great concentrations of innovation, especially in the medical field. But these changes, exciting and awesome as they may be, are only as good as the minds that direct them to certain ends. The timeless debates over values and purposes in the study and practice of law remain central.

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Shortly before this issue of *Duke Law Magazine* went to press, I announced that I will step down as dean of Duke Law School on June 30, 2018 (see page 2). By then, I will have been your dean for 11 years, which is a long time for any dean!

It has been a great privilege to lead the Law School, but an even greater privilege has been the opportunity to meet and work with you, Duke Law's amazing alumni. We have something very special here at Duke Law in our dedicated faculty and staff, and you recognize and appreciate this. As I embark on a busy final year as dean, I am grateful for your continued friendship and support, and I look forward to expressing my thanks to you in person.

Best wishes for a wonderful summer.

David F. Levi  
Dean and Professor of Law

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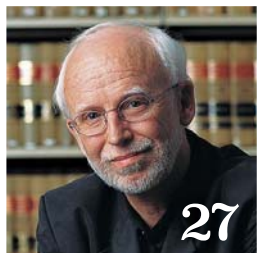
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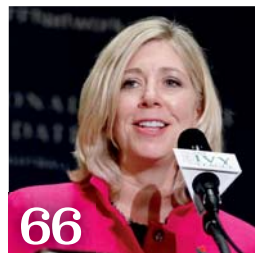
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## Innovation incubator:

Duke Law stakes out a leadership role in law and technology



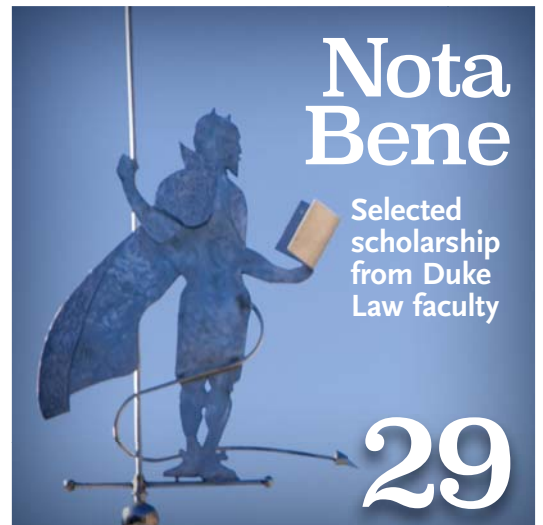
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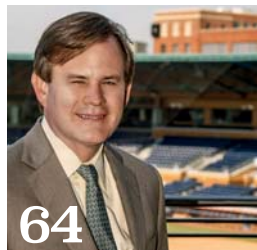
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# The Commons

Ideas, achievements, and events  
from around Duke Law School



## Levi to step down as dean of Duke Law School in 2018

**D**AVID F. LEVI, THE 14TH DEAN of Duke Law School, will step down in June 2018, he announced in a letter to alumni and friends on June 6.

“I thank my lucky stars and President Brodhead for giving me the opportunity to be dean of Duke Law,” said Levi. “We have something very special here in the culture of the place. I am proud of what we have accomplished in the past 10 years and what we are poised to accomplish in the years to come. I am also filled with a sense of gratitude to our wonderful faculty, staff, students, and alumni.”

Duke University Provost Sally Kornbluth praised Levi for his leadership of Duke Law.

“David has been a wonderful colleague in every way: innovative, creative, smart, and a pleasure to work with,” Kornbluth said. “He has led the Law School brilliantly and has set the stage for the continued success of a great school.”

Levi, who became dean in 2007, has presided over major expansions of faculty, research, academic programs, and fundraising at Duke Law. He also guided the Law School through a turbulent period in the legal economy and legal education resulting from the global financial crisis and subsequent recession.

Levi has taught courses on judicial behavior, legal history, and reforming the civil justice system in North Carolina. He is a fellow of the American Academy of Arts and Sciences, co-author of *Federal Trial Objections* and *Federal Civil Procedure Manual*, and recently served as chair of the American Bar Association’s Standing Committee on the American Judicial System and co-chair of the North Carolina Commission on the Administration of Law and Justice.

Levi is also a member of the American Law Institute, the nation’s leading law improvement organization, and became its president on May 24. ♣

## Among Levi's chief accomplishments during his tenure as dean:

- » raising \$123.2 million (as of June 6, 2017) from donors during the seven-year *Duke Forward* campaign, the largest in the Law School's history, including 12 new endowed chairs and 69 new endowed financial aid funds;
- » enlarging Duke Law's renowned faculty by hiring exceptional scholars and teachers in constitutional, corporate, criminal, environmental, health care, and international law, empirical studies, law and economics, legal writing and research, and clinical education;
- » increasing student aid by threefold, from \$5 million in 2007 to \$15 million in 2017, and guaranteeing summer fellowship support for students working in unpaid government and public interest positions;
- » expanding the Career and Professional Development Center to offer all students individualized career counseling and assistance throughout their education and help them find the right job for their skills and interests;
- » expanding clinical and experiential education, opening the Start-Up Ventures Clinic, International Human Rights Clinic, and Civil Justice Clinic, and growing the Environmental Law and Policy and Health Justice Clinics;
- » strengthening the Law School's global connections, including expanding the LLM for internationally trained lawyers, raising scholarship funds for promising international students, and building ties with faculties at universities outside the U.S.;
- » establishing the Center for Judicial Studies to increase understanding of the justice system and help improve its functioning and the Master's in Judicial Studies degree program for sitting state, federal, and international judges;
- » launching the Program in Law and Entrepreneurship to train lawyers to advise and lead new ventures in the innovation economy, including in North Carolina's Research Triangle region;
- » growing the Law School's presence in Washington through the Duke in D.C. integrated externship program and Duke D.C. Summer Institute in Law and Policy for undergraduates and early career professionals interested in the law and regulation;
- » establishing the Office of Diversity Initiatives to coordinate the Law School's support of underrepresented students and launch the PreLaw Fellowship program for diverse undergraduates;
- » expanding the Office of Public Interest and Pro Bono and student pro bono projects that serve the public in Duke's community.

## Pro bono project leads to commutations for low-level drug offenders

A TEAM OF DUKE LAW STUDENTS, faculty, and staff recently helped three federal inmates gain commutations of their lengthy sentences for low-level, non-violent drug offenses.

Beginning in the spring 2016 semester, the volunteers researched the eligibility of seven inmates for commutations under former President Barack Obama's Clemency Initiative, which prioritized applications from inmates who met specific criteria. Supervised by Associate Clinical Professor Jamie Lau '09, they prepared and filed petitions on behalf of five inmates, three of which were granted by the former president before he left office. Those individuals, among the 1,715 drug offenders to receive commutations from Obama, had their sentences reduced by several years.

The inmates the Duke team represented had been serving lengthy terms of incarceration imposed under outdated mandatory-minimum sentencing rules for convictions primarily relating to the possession or distribution of crack cocaine and would have received substantially lighter sentences under laws and guidelines now in place. In April 2014, the Obama administration announced that it would prioritize review of clemency petitions for inmates in that situation who had been imprisoned for at least 10 years if they also met four other criteria: they were non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; they did not have significant criminal histories; they demonstrated good conduct in prison; and they had no history of violence prior to or during their current term of incarceration.

Nicole Amsler '17, Boykin Lucas '17, Shannon Welch '17, and Felix Aden LLM '16 answered Lau's call for volunteers to handle petition requests last spring, as did Sarah Holsapple, a staff assistant who supports the Duke Law Center for Criminal Justice and Professional Responsibility and is a certified paralegal. They were connected with inmates seeking legal assistance by Clemency Project 2014, a coalition of criminal justice organizations that screened petitions for compliance with the Clemency Initiative's criteria before they were forwarded to the U.S. Department of Justice's Pardon Attorney.

After immersing themselves in the nuances of federal sentencing laws and guidelines, the volunteers compared the sentences their clients received to those that would have likely been imposed under current rules, and checked to see if any factors in their clients' records mitigated against a commutation. "The students had to vet the details of any infractions their clients had on their prison records," Lau said. "They also had to check for such disqualifying factors as an earlier violent crime." The volunteers got to know their clients and learn their post-release plans during telephone interviews and visits to the Federal Correctional Complex in Butner, N.C., where most were incarcerated.

Two Duke Law clients, Shon-Du Dawson and James Burns, received commutations after their applications were pre-screened by Clemency Project 2014. A third client, Michael Potts, was granted clemency based

## The Commons



L–R: Shannon Welch '17, Jamie Lau '09, Sarah Holsapple, Boykin Lucas '17, and Nicole Amsler '17

“Knowing that I played a small part in helping to reduce Mr. Potts’ sentence by several years is immensely satisfying.”

— Boykin Lucas '17

partly on his exemplary prison record, although he was disqualified from the initiative due to a 26-year-old conspiracy to commit armed robbery charge.

“Undoubtedly, it’s been one of my best experiences at Duke,” said Lucas, who handled two clemency petitions, including Potts’. “Knowing that I played a small part in helping to reduce Mr. Potts’ sentence by several years is immensely satisfying. What’s more, I’m confident that he’ll make the most of his commutation, which makes the news even sweeter.” Under the terms of his commutation, Potts will be released from prison in January 2019, after completing a residential drug-treatment program.

### Addressing the “human side and wastefulness” of over-criminalization

Potts’ sentence illustrates the sentencing disparities the Clemency Initiative sought to correct. In 1998, at the age of 24, the Greensboro, N.C., native was given a 30-year sentence for possessing a total of 9.2 grams of crack cocaine. Although it was a non-violent crime, the sentence was the minimum for which he was eligible, based on both the laws and sentencing guidelines mandating penalties for possession and distribution of crack cocaine that were higher than for the powdered form of the drug by a 100-to-one ratio. In 2010, Congress lowered its statutory crack-to-powder ratio to 18-to-one, and the U.S. Sentencing Commission subsequently lowered penalties for drug crimes across the board. If sen-

tenced today, Potts would likely have received a sentence ranging from 13 to 15 years, but he has served more than 18.

“Over-criminalization is something law students learn about in classes, but nothing compares to actually meeting people whose lives have been completely transformed, or taken away, by laws that over-punish,” said Amsler.

To Lucas, both Potts and his other client in Butner seemed “perfectly capable” of integrating back into society, yet were not scheduled for release for at least seven more years. “This drove home the idea that our criminal justice system saddles certain drug offenders, who tend to be from disadvantaged backgrounds, with draconian sentences going well beyond the time needed for rehabilitation.” Witnessing inmates talking with visitors left him with “a visceral impression that we lock up too many people for too long, without regard for the broader effects on families and communities,” he said.

In fact, the heavier federal sentences for crack cocaine than for powder, combined with other elements of state criminal justice policy, had a pernicious impact on minority communities where it was more prevalent, said James Felman '87, a partner at Kynes Markman & Felman in Tampa and a member of the Steering Committee for Clemency Project 2014. “It is well-documented that these longer sentences fell disproportionately on African Americans and Hispanics. And when you lock somebody up, it doesn’t just affect that person but their whole family and their whole network.”



James Felman '87

### A rewarding experience

Having long pushed for sentencing reform, Felman, the immediate past chair of the Criminal Justice Section of the American Bar Association, immediately saw Obama’s effort as a “once-in-a-lifetime” opportunity to address unfairness. In addition to representing inmates directly — of the 115 petitions he and his law partner filed since the start of the Clemency Initiative, 44 were granted — he encouraged Lau to get Duke Law students working on them, too, part of an “all-hands-on-deck” strategy to recruit as many lawyers as possible to the effort.

“It became evident early on to those of us on the Steering Committee that law students could do the work under the guidance of a professor or practitioner,” he said. “These were self-contained projects that a student could knock out in a semester with a potential payoff: getting somebody freed.”

Lau agreed: “This was a fantastic initiative and, I think, a good learning experience for our team. I wish we could have been involved earlier and been able to take on more clients.”

Holsapple’s client, James Burns, was released in March after serving 11 years of a sentence of more than 19 for selling crack cocaine to police informants. Under current rules his maximum sentence would have likely been for fewer than 12, but he was sentenced as a career criminal due to three previous low-level, non-violent drug offenses. A father of seven and grandfather of seven, Burns has spent the past eight years working for the prison-based textile manufacturer, with steadily increasing responsibilities.

“He’s a good guy and very grateful,” said Holsapple, who met with him several times. “He just wants to work and to spend time with his family. I think that’s something most of us can relate to.” She said that she was grateful for the opportunity to be a “small cog” in a large machine, including “legions” of pro bono attorneys nation wide. “It’s an unprecedented initiative to right some of the wrongs of the past, and I’m just proud to have been a part of it.”

Welch, who served as executive director of the Duke Law Innocence Project and was enrolled in the Advanced Wrongful Convictions Clinic, recalled a talk by Equal Justice Initiative founder Bryan Stevenson that she attended as part of her clinic experience: “He said, ‘Each of us is more than the worst thing we’ve ever done.’ The Clemency Project embodies this. These men and women have earned the opportunity not only for a second chance at life, but an affirmation from the president that they are a deserving person defined by more than this one mistake they made.”

Her client, Shon-Du Dawson, an inmate at the Federal Correctional Institution in Yazoo City, Miss., had been incarcerated for almost 13 years at the time his clemency petition was filed. Although a judge had already reduced his original 20-year sentence to under 18, it still far exceeded the 94 months recommended by prosecutors. His court-imposed sentence would have been lower under the current sentencing guidelines, Welch wrote in the petition, because two previous convictions for possession with the intent to sell cocaine and marijuana no longer qualify as “predicate felonies” that trigger a “career-offender” sentencing enhancement. While incarcerated, she reported, Dawson became trained in heating and air-conditioning repair and enrolled in apprenticeships, college courses, and parenting classes, having stayed closely in touch with two daughters who are now in their teens.

“What I took away was an overwhelming respect for Shon-Du,” said Welch. “I gained so much having to work through the federal guidelines and advocate for his position. But he had to, for almost 13 years, improve his life in the face of a lengthy sentence and a dangerous environment. He had to maintain connections with his fiancé and daughters and continue to support them while he was far away. He made my work easy.” ♡

**S**PEAKING AT THE Goodson Law Library’s sixth annual Alumni Author Event, **John Inazu ’00, E’97**, the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis, said the need for respectful discourse among those who hold deep and principled differences of opinion is foundational to democracy. Inazu, the author of *Confident Pluralism: Surviving & Thriving Through Deep Difference* (University of Chicago Press, 2016), described his goal as co-existence as opposed to perfect unity. “That doesn’t entail illusions that our differences disappear, but it forces us to pursue a common existence in spite of those differences,” he said.

Decrying the erosion of the right of association and the public forum, Inazu called for stronger governmental protection of difference and dissent, as well as individual and collective commitment to three virtues: tolerance, humility, and patience.



“... Instead of an ‘anything goes’ kind of tolerance, we can embrace a practical, enduring [one] for the sake of co-existence. That requires the hard work of distinguishing people from ideas. ... Each of us here holds ideas that other people find unpersuasive, inconsistent or crazy, and more pointedly, everyone in this room holds ideas that other people find morally reprehensible. The tolerance of confident pluralism does not impose the fiction that all ideas are equally valid or morally harmless. It does mean respecting people, aiming for fair discussion, and allowing the space to differ about serious matters.

“Humility goes a step further, in recognizing that others will sometimes find our beliefs and practices objectionable. We must also realize that we can’t always prove why we are right and they are wrong. But differently, humility recognizes that some of our most deeply held beliefs and intuitions stem from contested premises that other people don’t share. ... Humility and confident pluralism more broadly must leave open the possibility of right and wrong and good and evil in ultimate senses.

“... Patience points towards restraint, persistence, and endurance, encouraging efforts to listen and understand and empathize. We don’t have to accept or affirm as we do so, and it might turn out that patience leads us to a deeper realization of the error or harm of an opposing viewpoint. But we can at least assume a posture that leaves open a different possibility that moves beyond caricature dismissals of other people before we even hear what they have to say.

“These aspirations of tolerance, patience, and humility can facilitate creative partnerships across difference. This doesn’t necessarily mean that we will overcome ideologic difference. ... We can find common ground even when we don’t agree on the common good. But common ground begins on acknowledging the reality of our differences. Without the ability or the avenues to air real disagreement, genuine dialogue occurs less frequently, and our assumptions go unchallenged.” ♡

# Change agents

Duke Law faculty and students take on vexing legal and policy challenges

**T**HROUGH CLASSES, clinics, and independent study, Duke Law faculty and students have recently investigated a number of diverse legal and policy challenges and crafted evidence-based proposals for change. These include a program for reducing the high rate of eviction filings and judgments in Durham that will soon receive pilot testing, recommendations for Medicaid reform in North Carolina that were presented to state policymakers and community health advocates, an evaluation of North Carolina's school voucher program over its first three years of operation, and an analysis of the unintended effects of counter-terrorism financing rules on women's rights organizing and gender equality around the world that was presented to United Nations' agencies. »

## CIVIL JUSTICE CLINIC

### Stemming the tide of evictions in Durham

**W**ITH DURHAM'S DOWNTOWN and surrounding neighborhoods undergoing rapid gentrification, its inventory of affordable housing is decreasing at a similar pace. Durham County has the highest rate of eviction filings among North Carolina's 10 largest counties — about one for every 28 residents — as well as a high level of homelessness.



L-R: Charles Holton '73, Jesse McCoy, Ben Wasserman '17

Clinical Professor Charles Holton '73, who directs the Civil Justice Clinic, noted that evictions lead to a host of personal and social problems, including homelessness. "An eviction judgment becomes a blot on a credit record, which then impedes an individual's future ability to lease property, to borrow money, and to get Habitat for

Humanity housing, among other consequences," he said. "And evictions, particularly if sudden or forced, also have significant detrimental effects on the families involved and on communities, in terms of disruption of schools, health care, and family interactions." Even when it becomes clear that a tenant will have to vacate a leased property, a voluntary move is preferable to a court order, Holton said.

During the spring semester, Holton and Advanced Civil Justice Clinic student Ben Wasserman '17 designed a process for reducing forced evictions in Durham. The Eviction Diversion Program, on which lawyers at Legal Aid of North Carolina (LANC) also provided input, has been accepted by Durham County court and social services administrators as a pilot program with a projected start date of July 1. Wasserman also wrote a scholarly article on the initiative, which aims to decrease the number of eviction proceedings and judgments, provide increased stability to landlords and tenants, and reduce homelessness.

Having studied an eviction diversion program in Michigan last spring, Holton first assigned a fall-semester clinic student, Bryan O'Brien '17, to investigate how a similar initiative might work in Durham. As he canvassed available resources, O'Brien found that tenants facing emergencies can apply for funds through Durham's Department of Social Services, yet due to their lack of awareness, many don't — and money goes unused. Wasserman, who picked up the project in the spring after handling a fall clinic caseload that included landlord and tenant matters (and also made it the focus of an independent study), said his task was largely to coordinate information and resources through a clear process.

His proposal described a program to help tenants "who uncharacteristically miss a rent payment" to remain in their homes, while landlords secure judicially-supported guarantees of rent payment and avoid the costs of litigation and finding new tenants. As designed, the program could be used to divert eviction at three different points — when the tenant receives a late rent notice, at the time of a summary ejectment filing, and after an adverse judgment — with resources available at each stage to help facilitate a negotiated resolution between the landlord and tenant. As part of the proposal, Wasserman developed a host of resource materials, including an informational brochure directed at both landlords and



tenants, intake questionnaires for DSS social workers, and templates for court motions, settlement agreements, and consent orders.

Making landlords and tenants aware of the pilot program's existence and training social workers to evaluate renters' eligibility for emergency funds and spot any need for legal assistance are key to its success, Holton and Wasserman agree.

Jesse McCoy II, who joined the Civil Justice Clinic in April as the inaugural James Scott Farrin Lecturing Fellow and supervising attorney, will play a substantial role in implementing the pilot Eviction Diversion Program. A veteran LANC attorney, he has extensive experience with landlord-tenant disputes in Durham County.

In addition to raising awareness among renters facing temporary setbacks that financial help may be available and helping avert the potentially disastrous collateral consequences of forced eviction, McCoy said the program could ease county courts' workload.

"We anticipate it will ultimately increase judicial efficiency by reducing court docket sizes for eviction through purging cases that can be easily resolved outside of court without need for litigation," he said. "The reduction in court cases could assist judicial officials in refocusing their attention to more complicated cases involving substandard habitability concerns, unfair debt collections, and other unfair rental practices."

Wasserman said he is gratified to leave the pilot program as a legacy of his time at Duke Law and in the clinic: "Taking on this project seemed to me like a fantastic way to take what I had learned over the fall semester and make a lasting, positive impact on Durham by implementing a policy change that could potentially impact the lives of thousands of residents." ♡

## DUKE UNIVERSITY BASS CONNECTIONS

# Improving care, reducing costs through N.C. Medicaid reform

**N**ORTH CAROLINA'S MEDICAID PROGRAM constitutes 32 percent of the state budget and provides health-insurance coverage to 18 percent of its population. And as an interdisciplinary team of Duke faculty and students note in a report on Medicaid reform in North Carolina, significant health disparities persist among the insured across income, geography, education, and race. With federal funding likely to be reduced in future budgets, and with inflamed rhetoric surrounding Obamacare and its repeal or replacement, Medicaid reform is the very definition of a hot-button issue in a state with a deep partisan divide.

Through a yearlong Bass Connections class organized by Professor Barak Richman and co-taught by Clinical Professor Allison Rice and others, a group of graduate and undergraduate students crafted recommendations for Medicaid reform intended to reduce the incidence of poor health, improve access to health care, lower costs, and garner bipartisan support. The Duke North Carolina Medicaid Reform Advisory Team presented their report to policymakers, health care advocates, and members of the public in Raleigh on April 25 and submitted their core recommendations to the state secretary of health and human services in May as public comments in the official process of Medicaid reform.

"This always has been structured as an effort to use the university as a civic institution dedicated to public welfare and to finding nonpartisan, constructive middle ground," said Richman, the Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration, who is an expert on health care policy. "Our central narrative and question is: How can we best use our limited Medicaid dollars?"

A large portion of the students' research, which was co-sponsored by Duke's Margolis Center for Health Policy, was directed at identifying successful policies and practices in other

states and ways they might be adapted for implementation in North Carolina. Their central recommendations highlight the importance of increasing access to care, transitioning gradually to managed

care, integrating and coordinating care and introducing an innovative, holistic approach to the care of patients who qualify for both Medicare and Medicaid, and investing in educational and technological innovations to improve health care delivery. Among the team's specific recommendations:

- » that North Carolina's planned introduction of Medicaid Managed Care should ensure the market includes "robust" choice and competition;
- » that any programs aimed at incentivizing healthy patient behavior should "be within a simple, streamlined Medicaid design" to reduce patient confusion and lower state administrative costs; and
- » that the small percentage of "super-utilizers" of Medicaid, who account for a disproportionate share of total costs, should be targeted by a multidisciplinary "hotspotting" approach to holistically address such matters as housing, social, and environmental factors that influence health outcomes.

Shanna Rifkin '17, who worked on health policy research at the Urban Institute prior to law school, brought a legal perspective to the cross-disciplinary team that also involved graduate students studying business, medicine, nursing, and policy. She supervised two under-



Shanna Rifkin '17 speaking to Medicaid stakeholders in Raleigh, April 25

## The Commons

graduate students who investigated how six other, mostly Southern, Republican-controlled states handle care for individuals who are dually eligible for Medicaid and Medicare and then considered reforms that might work in North Carolina.

“We ended up thinking about the ‘duals’ in terms of the continuity of care they receive, the quality of care, and the cost of care,” she said, noting that they account for 17 percent of North Carolina’s Medicaid population but consume more than 30 percent of expenditures. “That’s in large part because they are really poor and really sick, but also because Medicare, which covers acute care, and Medicaid, which covers long-term care, do not work together.” While improving the interaction of the two systems is a cornerstone of her team’s reform proposals and emulates national health-reform strategies, they also found that a hotspotting approach, the focus of another team’s research, would likely improve care and reduce costs.

“It’s extremely innovative,” Rifkin said. “It looks at the social determinants of health care and things we know contribute to the high cost of care but are often

overlooked in health policy. If someone is dual-eligible for Medicaid and Medicare, they are likely also eligible for food stamps and other programs. How do we streamline enrollment and stabilize their housing and make sure they have a healthy diet? Addressing those issues will reduce health care costs.”

“I work every day with low income clients for whom access to high-quality, affordable health care can be a life or death matter, and many depend on Medicaid for their survival,” said Rice, who directs the Health Justice Clinic. “Medicaid is an incredibly complex program and I was blown away by the students’ ability to wrap their heads around it and make some well-researched, practical recommendations.” ♣

### CHILDREN’S LAW CLINIC

## Grading N.C.’s school voucher program

**S**CHOOL VOUCHERS ARE AT THE CENTER of another highly charged policy debate in North Carolina and across the country. While critics claim that offering parents tax-supported grants to help pay tuition at private schools simply siphons funds away from public education, supporters invoke parental rights to determine their children’s educational path and seek better academic outcomes. More than 30 states have voucher programs and the new U.S. secretary of education is an avid proponent of school choice.

In late March, the Children’s Law Clinic released a report analyzing the operation of North Carolina’s Opportunity Scholarship Grant Program over its first three years, making recommendations for improvements in educational standards and accountability. The program, which offers grants to low-income students of up to \$4,200 to attend private schools, was used by 5,500 students in the 2016-2017 school year. The General Assembly has authorized 2,000 more vouchers each year until 2027, bringing the total to 25,000 at a total expenditure of \$900 million.

“The program is still in its early stages, but given that it is slated to grow significantly over the next 10 years, North Carolina policymakers are well-served to take a preliminary look at how it’s working,” said Clinical Professor Jane Wettach, director of the Children’s Law Clinic, who wrote the report. She pointed out that the program’s design impedes a thorough analysis, because only the aggregate performance of students at schools that enroll more than 25 voucher students — a mere 10 percent of schools involved — is made public. According to the report, accountability requirements for private schools receiving the state vouchers are among the weakest in the country. “The schools need not be accredited, adhere to state curricular or graduation standards, employ licensed teachers, or administer state end-of-grade tests,” she said.

Wettach described the voucher program as “well-designed to promote parental choice,” particularly for parents who want their chil-

dren to attend religious schools: 93 percent of the vouchers issued to date have been used to pay tuition at parochial schools. The program is poorly designed to promote better academic outcomes for students than they would have at public schools, she found, stating that “limited and early data” indicates that more than half of the students using vouchers are performing below average on nationally standardized reading, language, and math tests.

These early North Carolina data are consistent with national data that show students with vouchers do not do better academically when they switch to private schools, and often do more poorly than peers who remain in public school.

Wettach recommended amendments to the voucher program targeted at improving its accountability and potential for improving the academic performance of participating students, including requiring all participating private schools to offer a public school-equivalent curriculum, set “reasonable” qualification standards for teachers, and administer standard state end-of-grade tests and report all results. The report also called for requiring adherence to public school standards regarding number of instructional hours and days, prohibiting discrimination in schools receiving voucher support, increasing financial review of private schools receiving vouchers, and strengthening regulators’ oversight of schools that consistently fail to meet educational standards or removing them from the voucher program.

“We need sufficient accreditation requirements to ensure that if taxpayers are spending money to support children in private schools, those children are getting an adequate education,” said Wettach. “In my view, we should not be supporting schools that are failing to prepare students to successfully participate in the democracy and the economy when they graduate.” ♣



Jane Wettach

# Assessing the costs of counter-terrorism financing rules on grassroots women's organizations

**S**INCE 9/11, the international community has brought a new urgency to targeting terrorism financing through sanctions, measures relating to criminal law, and new reporting requirements for banks. But according to a report released in March by the Duke Law International Human Rights Clinic and the Netherlands-based Women's Peacemakers Program (WPP), these efforts have hurt grassroots initiatives aimed at peacemaking and gender equality by cutting off their access to donor funding and banking services.

Over three semesters, clinic students studied the effect of countering terrorism financing rules on gender equality and women's rights organizing and organizations around the world. Working under the supervision of Clinical Professor Jayne Huckerby, the clinic director, and Supervising Attorney Sarah Adamczyk, the students contributed to a report titled "Tightening the Purse Strings: What Countering Terrorism Financing Costs Gender Equality and Security." The analysis was released in Geneva during a March meeting of the U.N. Human Rights Council and also during the U.N.'s 61st annual Commission on the Status of Women in New York.

The project was initiated after WPP, which supports grassroots women peace activists and advocates for a gender perspective in building peace, began to encounter difficulties in transferring money to its partner organizations in conflict regions. Speaking at Duke Law on March 22, WPP Executive Director Isabelle Gueskens said they tracked the source of the problem to ways in which countering terrorism financing rules unduly focused on how civil society institutions and NGOs could be used to channel illicit funds. This focus involved a marked increase in bank de-risking and governmental controls.

Concerned that reduced access to banking services and financial transfers could undermine the goals of multiple U.N. Security Council resolutions that recognized women's key role and right to support and participate in peacebuilding, the clinic and WPP designed a project by which WPP undertook surveys of 60 women's rights, human rights, peace, and security organizations primarily operating in conflict and post-conflict settings to find out whether and how they were challenged in accessing funds and how that affected their activities and beneficiaries. At the same time, clinic students interviewed government and inter-governmental agencies, NGOs, and philanthropic organizations to determine whether and what changes they were making to the granting and funding practices, while also canvassing financial institutions about their countering terrorism financing practices and undertaking significant secondary research.

The findings: 86.67 percent of the grassroots groups surveyed reported being "squeezed" acutely by attempts to counter terrorism, Huckerby said at the Duke Law presentation, where spring-semester clinic students reviewed the key negative impacts that affect organizational operations and viability. Challenges in accessing funds reduced resources and operations for most of the organizations, many of which lack financial resilience due to their small size and shoestring budgets. Some organizations said they chose not to apply for certain grants, fearing that they would be labeled or "lumped into the same pot" as terrorists, said Glenda Dieuveille '17. With many foreign donor groups also favoring funding



## TIGHTENING THE PURSE STRINGS:

What Countering Terrorism Financing Costs Gender Equality and Security  
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larger, established international organizations and sometimes turning down engagement with projects in regions beset by terrorism — exactly where grassroots efforts seek to counter terrorist influence — services to women and girls are reduced across the board, said Meaghan Newkirk '18. "Particularly in areas under terrorist control, reduced ability for these groups to operate may result in gendered effects, for example with women and girls becoming reliant on terrorist organizations for service provision."

The students found that excessive delays in transfers of donor funds caused by bank de-risking practices often amounted to "effective account closure," said Nathan Blakney '17. Rym Khadhraoui LLM '17 noted that the grassroots groups also reported being unable to cope with the administrative burdens and prohibitive costs of the countering terrorism financing rules' due-diligence requirements. Khadhraoui quoted the words of an organization working in Iraq: "Organizations who operate in the parts controlled by ISIS cannot access any funds anymore. This cripples them even more."

Wojciech Maciejewski LLM '17 described the impact of harassment, sometimes state-sponsored, on activists operating in repressive societies. Because of countering terrorism financing rules, many resort to carrying cash in conflict areas and across borders and also borrow from or process financial transfers through accounts of friends and family. Doing so is both dangerous and potentially illegal, and adds to the enormous pressure on the activists involved, he said.

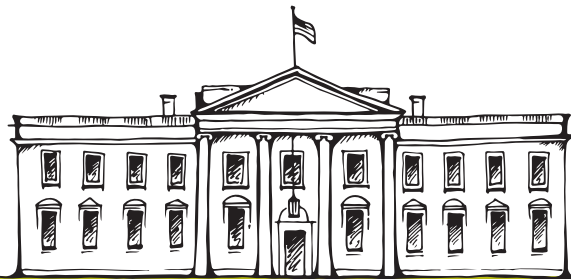
While counter-terrorism rules and sanctions may be gender-neutral on their face, the report documents the ways they discriminate in practice, and implicate governmental obligations under international human rights law to prohibit discrimination on the grounds of gender and sex, said Huckerby. "We also remind governments they need to ensure equality, including in access to financial services, and when there is a violation of international human rights law, there must be a right of redress."

Adamczyk pointed to the report as a starting point for complex advocacy to achieve policy changes in relevant practices at the inter-governmental, state, civil society, bank, and donor levels. Donor restrictions rooted in counter-terrorism financing rules are especially counter-productive, she observed. "There is policy incoherence between wanting to achieve gender equality and programming for women and at the same time making it actually impossible to get funding to where it's needed." ♡

# Notable & Quotable

“... America’s global leadership cannot be maintained in the face of hard power opponents like Russia, China, North Korea, Iran, as well as terrorist entities like ISIS, absent preserving its place as having the world’s most powerful military. No truly objective observer can say that the U.S. military doesn’t need more resources — and this is something that predates the rise of Trump. Do we really think that our diplomats will have the leverage they need with, for example, an Air Force that is the smallest it has ever been, and flying airplanes averaging 27 years old?”

— Professor **Charles Dunlap Jr.**, a retired U.S. Air Force major general and former deputy judge advocate general, cautioning against widespread panic over President Trump’s “hard power” foreign policy and budgetary priorities. (*Just Security*, March 29, 2017)



“Knowing that Trump may well challenge the authority of the judiciary and the media after an attack, it is important for judges, reporters, and civil society more generally to be braced for it and to be very clear about who bears responsibility for any national security failings.”

— Professors **Curtis Bradley** and **Neil Siegel**, warning against possible attempts by the administration to undermine institutions that check presidential power through a “blame-shifting narrative” evidenced by the president’s statements and tweets following court rulings enjoining his travel ban. (*Lawfare*, Feb. 9, 2017)

“It’s fair to say that if you live in a red state and you have most of the branches of the state government controlled by Republicans, those states have tended to loosen their firearms regulations. Whereas if you live in a blue state, those states have tended to tighten them up — not uniformly, and there are always exceptions. ... I think it’s fair to say gun politics very much mirrors the divided politics of the United States.”

— Professor **Darrell Miller** on states’ readiness to engage on gun-related legislation versus the relative reluctance of Congress to do so. (*ABA Journal*, April 25, 2017)

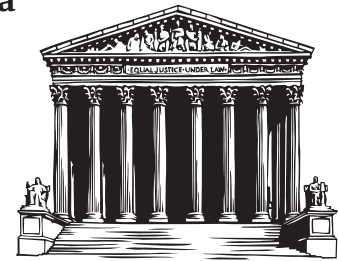
“ ... [G]overnment policies are basically a bundle of political priorities that are brought by new politicians and facts and technical expertise brought by civil servants. If we bring only political priorities and no expertise, then we end up getting policies which are not based in facts. If we bring only technical expertise, then we get policies which are not responsive to the electorate. So you need both.”

— Professor **John de Figueiredo**, the co-author of a study indicating that the highest-ranking cadre of federal civil servants, members of the Senior Executive Service, leave their posts in large numbers in the year after elections, with the departure rates highest when the mission of the agency is at odds with the ideological leanings of the new president. (“All Things Considered,” Dec. 30, 2016)

“Research shows that poor children who attend school with wealthier classmates perform an average of two grade levels ahead of poor children who attend school with other poor children. Poor children in those economically mixed classrooms are 68 percent more likely to go to college, according to a Century Foundation study. This benefits us all.”

— Clinical Professor **Jane Wettach**, criticizing the nomination of Betsy DeVos to helm the U.S. Department of Education and arguing that the nominee’s belief in school choice is misplaced and overlooks the “real grizzlies” that threaten public education: economic and racial segregation in and chronic underfunding of schools. (*Medium*, Jan. 30, 2017)

“Judge Gorsuch encouraged us to read and research until we could read and research no more. He demonstrated an endless desire to reach the crux of each legal issue before him. He warned against shortcuts and urged us to pursue a fulsome understanding of the nuance and complexity of the legal and factual issues in each case.”



— **Katherine Yarger '08**, writing with another former clerk to then-Judge Neil Gorsuch about lessons learned from their clerkships with him on the U.S. Court of Appeals for the Tenth Circuit (*The Federalist*, Feb. 15, 2017)

“... [F]ocusing on the appearance of a woman in politics isn’t a problem just because it’s unfair or mean-spirited. Describing women as fat or ugly allows critics to dismiss female politicians (or activists) without engaging with their ideas.”

— **Meredith Simons '17**, writing that the outpouring of “fat jokes” made by critics following the Jan. 21 Women’s March on Washington continued a long, bipartisan tradition of denigration. She quoted Professor **Katharine Bartlett** in noting that insults about women’s appearance are “an attempt to hurt and to punish” women who are seen as violating gender norms: “If you can say something about their appearance, you can put them down.” (*Washington Post*, Jan. 26, 2017)



John Simpkins '99

In the classroom

# Economic Growth and Development in Africa

**N**ELLY WAMAITHA LLM '17, an attorney from Kenya, describes herself as a skeptic of foreign aid structures and delivery in Africa. “I don’t think Africa’s problems can be solved with some Herculean effort that Africa does on its own, it’s obviously going to be a cooperative effort,” said Wamaitha, who practiced corporate law in Nairobi and London and studied theology at Oxford University before coming to Duke. “That having been said, the world has really botched up Africa in the past.”

A spring-semester seminar titled Economic Growth and Development in Africa offered Wamaitha and 12 classmates, a mix of JD and LLM students and PhD candidates from the Nicholas School of the Environment, a chance to consider how development policy could be improved. Taught by John Simpkins '99, the former general counsel of the United States Agency for International Development (USAID), the students examined development from an array of perspectives: those of host-country and foreign governments, businesses, for-profit and nonprofit development agencies in the private sector, philanthropic organizations, and project-finance lawyers. In addition to writing weekly papers reacting to their assigned readings, they prepared capstone papers in which they researched specific policy challenges, made recommendations, and analyzed the likely impacts of those choices.

Wamaitha focused her report on “illicit financial flows” (IFFs), tackling the problem of capital that is generated in Africa but does not stay there. IFFs are mainly facilitated by the actions of multinational corporations and crime. Corruption in Africa makes a much smaller contribution to IFFs than is generally assumed, while tax evasion and avoidance by multinational corporations

with African operations is particularly problematic, Wamaitha said. Bristling at the common perception of Africa as “a taker, not a giver,” she said “study after study has shown that Africa is a net creditor of the world because of this illicit flow of capital.

“This is money that should be paid by corporations as taxes to African governments, but they find ways not to pay, some of them legal and some not legal. The money Africa loses is actually absorbed into the economies of its development partners.”

Among Wamaitha’s policy recommendations: that aid-granting nations mandate disclosure of income generated in Africa by multinationals in order to ease tax collection and that they target aid at improving tax legislation, inspection, and regulation within African nations. “There is a lot that can be done on a country-to-country level between the development partners and African governments to stop this out-flow,” she said.

Her classmates’ policy papers reflected the diversity of professional interests and experience the students brought to the seminar, addressing such matters as intellectual property protections for traditional knowledge, how China’s mix of impact investment and project finance is working to promote development on the continent, how ethnic heterogeneity might impede economic growth in Côte d’Ivoire, land-tenure reform and land ownership as a base generator of economic growth in Ethiopia and Rwanda, marine-resource management in Tanzania, and minority shareholder protection in South Africa.

In addition to giving his students a foundation in law, history, politics, and culture relevant to the sub-Saharan countries they studied, Simpkins said he aimed to help them understand how to produce policy analysis that would be relevant in a professional context. In crafting their capstone papers, they were instructed to imagine they were writing for someone who would demand a clear and concise statement of the challenge being addressed and the solutions proposed, and an equally full and concise analysis of their potential implications if implemented.

He also engaged his students in simulation exercises, such as one involving a negotiation between a South African company and the government of Botswana over a mineral lease. Following the exercise, they considered how that case actually unfolded. “It gave the students a better sense of what some of the issues are — the legal issues as well as some of the cultural and historical considerations that arise when a South African company wants to do business in Botswana,” he said. “They saw how many things that exist as atmospherics around the actual deal itself can play an important role in its consummation.”

Simpkins credits a practice-oriented seminar at Duke Law that engaged him in research and analysis for the Constitutional Court of South Africa with helping confirm his long-term interest in a career in international development. Returning to teach, he was gratified, he said, by the level of engagement and the diversity of insight among his students, some of whom had previously worked in development or in Africa: “It was truly an atmosphere in which people were learning from each other.”

John Epling JD/LLM '17 agreed, noting that he appreciated the interdisciplinary background of his classmates, such as those of the internationally trained attorneys from the LLM program and graduate students studying energy and environmental policy, and praising the way Simpkins structured the seminar. Epling said he came away with a “holistic” exposure to the challenges and dynamics at play in Africa and a range of ideas and approaches that he thinks will be useful as he begins practice at Allen & Overy in London, where he is likely to be exposed to transactions in Africa and other emerging markets.

“He had a very balanced approach,” said Epling. “We had opportunities to look at some systemic issues, but then went into granular detail and looked at specific case studies in specific countries. We looked at constitutional issues and heard from lawyers from an international law firm that does project financing in Africa. Each component informed the other in interesting ways.”

For his final paper, Epling investigated constitutional mechanisms for insulating Uganda — a country devastated economically by the dictatorship of Idi Amin in the 1970s — from military coups, in the interests of facilitating economic development. Epling, who witnessed economic development challenges in Afghanistan during a 2012 deployment as a U.S. Marine Corps officer, said he entered the seminar with a longstanding interest in development in Southeast Asia and the Middle East, as well as in nations’ transition from military to democratic rule.

“I was interested in using Uganda as a case study, not just to inform my understanding of military regimes in Africa, but also to see if I could gain insights into military regimes and constitutional reform that might be applicable in other parts of the world as well,” he said.

The class had its genesis in a student-run ad hoc seminar on development trends in Africa designed by Liz Wangu '16 in her third year and supervised by Professor Trina Jones. Simpkins, Jones, and Wangu submitted the course proposal for Economic Growth and Development in Africa to the curriculum committee, and Wangu, now a first-year clerk at Clifford Chance in Washington, D.C., returned to Duke in March to lead a class session on project finance with one of her law firm colleagues.

“Coming back to Durham and seeing how the idea to develop coursework and programs focused on Africa had come to life was beyond gratifying,” she said. “I truly believe that Africa is on the rise and that there are pivotal roles for attorneys to be involved in its growth story. I am also especially thankful to John Simpkins and Professor Jones for being so instrumental in creating such an initiative at Duke Law.” ♡

**D**ELIVERING THE ANNUAL DAVID L. LANGE LECTURE in Intellectual Property Law (formerly the Meredith and Kip Frey Lecture), Harvard Law Professor **William W. Fisher** offered a framework for the legal treatment of indigenous people’s traditional knowledge when it is adapted into Western medicines or cultural expression, the subject of his forthcoming book. Noting that the matter is currently under consideration at the World Intellectual Property Organization, Fisher, the WilmerHale Professor of Intellectual Property Law and faculty director of the Berkman Center for Internet and Society at Harvard, explained why a “distributed” legal regime



William W. Fisher

would achieve certain essential goals: to increase attribution, respect, and the redistribution of material resources; to avoid the assignment of property rights, which would “function to impede both the use of traditional knowledge and will generate undesirable high transaction costs;” and to respond to a wide diversity of circumstances and values. He outlined two ways such a framework could operate, beginning with “the delegation mode.”

“... Suppose that we modified the TRIPS agreement or some other international agreement to include the following provision: ‘It shall be a defense to a claim of patent infringement that the inventors in developing the protected product or process relied substantially on materials or knowledge taken from a member country in violation of that country’s laws.’...

“So think about the effect of such a provision: In practice ... defendants in intellectual property suits in developed countries which had adopted such a provision would have a weapon in their hands. They would become private attorneys general seeking to invalidate the entitlements of the plaintiffs on the grounds that the plaintiffs had failed to respect the laws of ... Jamaica, Costa Rica, Ghana, and so forth. Aware of this threat, commercial users of traditional knowledge would abide by local norms or negotiate with the relevant groups for permission. So the net effect is you distribute to countries lawmaking authority with respect to commercial use of the traditional knowledge, but not non-commercial uses. That’s the first of the two.

“Here’s the second [and] this is closer to the proposal that is more likely to get adopted in Geneva, with some significant adjustments: Suppose that instead of creating a mandatory term of the sort I just described, you instead have a more modest regime in which sellers of all products that are based on traditional knowledge must disclose both their cultural provenance — where they came from — and how they were made. ... And at the same time, you encourage the groups from which such things have been or are likely to be taken to articulate their expectations of fair treatment.

“What will the intersection of these two things do? It will energize two forms of pressure, the market and social sanctions, which ... has been the key impulse for corrective negotiation in every instance.” ♡

## The Commons



### Cole '17 receives two-year Skadden Fellowship

**O**LIVIA COLE '17 HAS RECEIVED a two-year Skadden Fellowship to help veterans with a range of legal needs, including accessing benefits.

Cole will work with Swords to Plowshares, a San Francisco nonprofit that provides aid to veterans in the greater Bay Area. Her focus will be on women veterans, a fast-growing subset of the homeless population with a unique set of barriers to receiving benefits. She is one of 30 recipients of the prestigious fellowship that supports a “legal Peace Corps” by funding their post-graduate legal work with underserved and marginalized citizens.

Cole's three years as a Duke Law Veterans Assistant Project (VAP) volunteer and her family's history of military service kindled her interest in working with veterans after graduation, and her experience serving clients in the Health Justice and Civil Justice Clinics helped advance her Skadden application, she said.

During law school, Cole, a Robert N. Davies Scholar, has served as president of the Government and Public Service Society and as a volunteer for Lawyer on the Line, the Cancer Pro Bono Project, the Volunteer Income Tax Assistance project, Middle School Mock Trial, and the Southern Justice Spring Break public service trip. She worked with California-based public interest organizations over two summers, holding positions at the Law Foundation of Silicon Valley and the Public Interest Law Project.

Director of Public Interest and Pro Bono Kim Burrucker praised Cole's leadership in VAP, which pairs students with attorneys to research, file, and appeal disability claims on behalf of American veterans before the Veterans Administration. Much of that work dovetails with the sort of advocacy she will do in her fellowship, Cole said.

Kate Richardson, director of the legal services program at Swords to Plowshares, said the unique problems of women veterans may help explain an explosion in their rate of homelessness, which has tripled in the past five years. “Women veterans are now more likely to be homeless than their male counterparts,” she said. “These veterans are difficult to reach. They frequently do not seek services and many do not self-identify as veterans. These institutional barriers have significant effects on women veterans' ability to avoid or recover from homelessness.”

Cole's public interest work at Duke Law makes her a perfect fit for Swords to Plowshares, said Richardson. “We have been very impressed with [her] demonstrated commitment to poverty law and veteran legal services and we are thrilled to work with her to ensure the Bay Area's homeless women veteran population has access to the VA benefits they have earned.” ♡



Ocoszio Jackson '17

### Jackson '17 and Lott '17 selected for executive branch Legal Honors Programs

**O**COSZIO JACKSON '17 AND JASMIN LOTT '17 will begin their careers with the federal government after navigating the highly competitive selection process for the Legal Honors Programs in two executive branch agencies. For each, gaining entrance to the 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. Jackson will enter the Department of Housing and Urban Development's Legal Honors Program, working out of the New Orleans' field office. Lott was selected for the program in the Department of Justice. Both students credit their interests in public service and a desire to uplift people in need as motivation for pursuing these positions.

Jackson said he learned of the importance of stable housing early on while living with his grandmother. He recalled there was a home across the street that he later found out was a government-subsidized home. “There were families that were constantly in and out of that home. I always wondered, ‘Why do we always have new neighbors? Why do they have to leave?’” he said. “By contrast, we had a place we knew was ours — where we felt safe.”

Jackson, who majored in political science at Morehouse College, said he became interested in housing finance during the market crash. HUD came onto his radar during his second year at Duke Law when





Jasmin Lott '17

the community surrounding his alma mater — the West End of Atlanta — received a \$30 million redevelopment grant. After working for GSK in Durham and the Brennan Center for Justice in Washington, D.C., during his 1L summer, Jackson spent the following summer at K&L Gates in Washington.

Lott, who has a strong interest in civil rights, looks forward to returning to the Department of Justice, where she held a Duke in D.C. externship last fall. She said recent conflicts between police and communities of color influenced her interest in pursuing a career in criminal justice. “It’s become an even more important issue to me personally because I’ve seen the unraveling of Ferguson,” she said. “Once I got here, I saw where the need was.”

She credits the experience gained from working in the Civil Justice and Children’s Law Clinics for helping her get practice-ready and learn how to phrase questions and dig for answers. “I’ve gotten a lot of concrete skills by actually working on cases, and, frankly, being able to talk about actual substantive legal work that I’ve done in interviews helped me,” she said. Lott spent her 2L summer working for both the NAACP Legal Defense & Educational Fund, where she assisted with civil rights litigation, and Neufeld Scheck & Brustin, working on discovery review in civil litigation related to wrongful convictions and police misconduct.

“Just seeing how egregious some of the civil rights violations were and getting the sense that these officers felt like they were above the law was very infuriating for me, but it was powerful to feel like I was in the position to do something about it,” she said. ♡

## Bakst '17 receives two-year Equal Justice Works Fellowship

**E**LENI BAKST '17 HAS RECEIVED a two-year Equal Justice Works fellowship, sponsored by the Ottinger Foundation, to establish a medical-legal partnership to benefit immigrant families and unaccompanied children and to augment medical and mental-health services available to immigrant families and unaccompanied minors on Long Island, N.Y.

Bakst will work with Human Rights First to incorporate input from physicians and mental-health professionals into the organization’s policy advocacy against immigrant and refugee detention through strategic communications, on-site study of family detention centers, a national conference of medical, legal, and mental-health advocates, and a report scheduled for release in 2019. She will also work to increase the numbers of medical and mental-health providers offering services to newly arrived children and families on Long Island, which has a large influx of immigrants from Central America.

The perspective of these professionals is critical, Bakst said, both for assessing the long-term effects of detention on children and families and on individual asylum cases, where expert testimony vastly improves the chances of claims being granted. Mental-health workers also can help children “to find their voices in a safe and protected way” if called to testify on their own behalf in asylum cases, she said.

Statistics released by U.S. Customs and Border Protection show that 59,692 unaccompanied minors and teenagers were detained in 2016 fiscal year, a 49 percent increase from the previous year.

Bakst traces her longstanding interest in human rights and the challenges faced by immigrants to her mother’s and father’s experiences fleeing Tunisia and Poland, respectively, because of threats posed to Jews. After majoring in international relations and affairs at American University and stints volunteering as an English teacher in Chile and in Amnesty International’s Human Rights Education Service Corps and interning at the Department of Justice, Bakst taught English to adult ESL students for the Northern Manhattan Coalition for Immigrant Rights.

At Duke Law Bakst has pursued her goal of addressing domestic human rights issues through classes, clinics, summer public service work, and by organizing a Southern Justice Spring Break service trip to a federal immigrant detention center in Dilley, Texas, where she offered legal support to detained mothers and children who, if released, would likely file for asylum. During her 2L summer she worked as a U.S. policy and advocacy intern in the Washington, D.C., office of the International Rescue Committee, where she was charged with developing a comprehensive packet of information on issues faced by unaccompanied child migrants from Central America.

She credits her second-year investigation of the effects of counterterrorism financing measures on women’s advocacy groups in the International Human Rights Clinic with giving her skills in information-gathering and reporting that will facilitate her fellowship goals. A subsequent semester-long externship in the Office of the United Nations High Commissioner for Human Rights in Geneva, during which she put such issues as violence against women and racism into an international human rights framework with a legal analysis, further deepened her skill set, she said. ♡

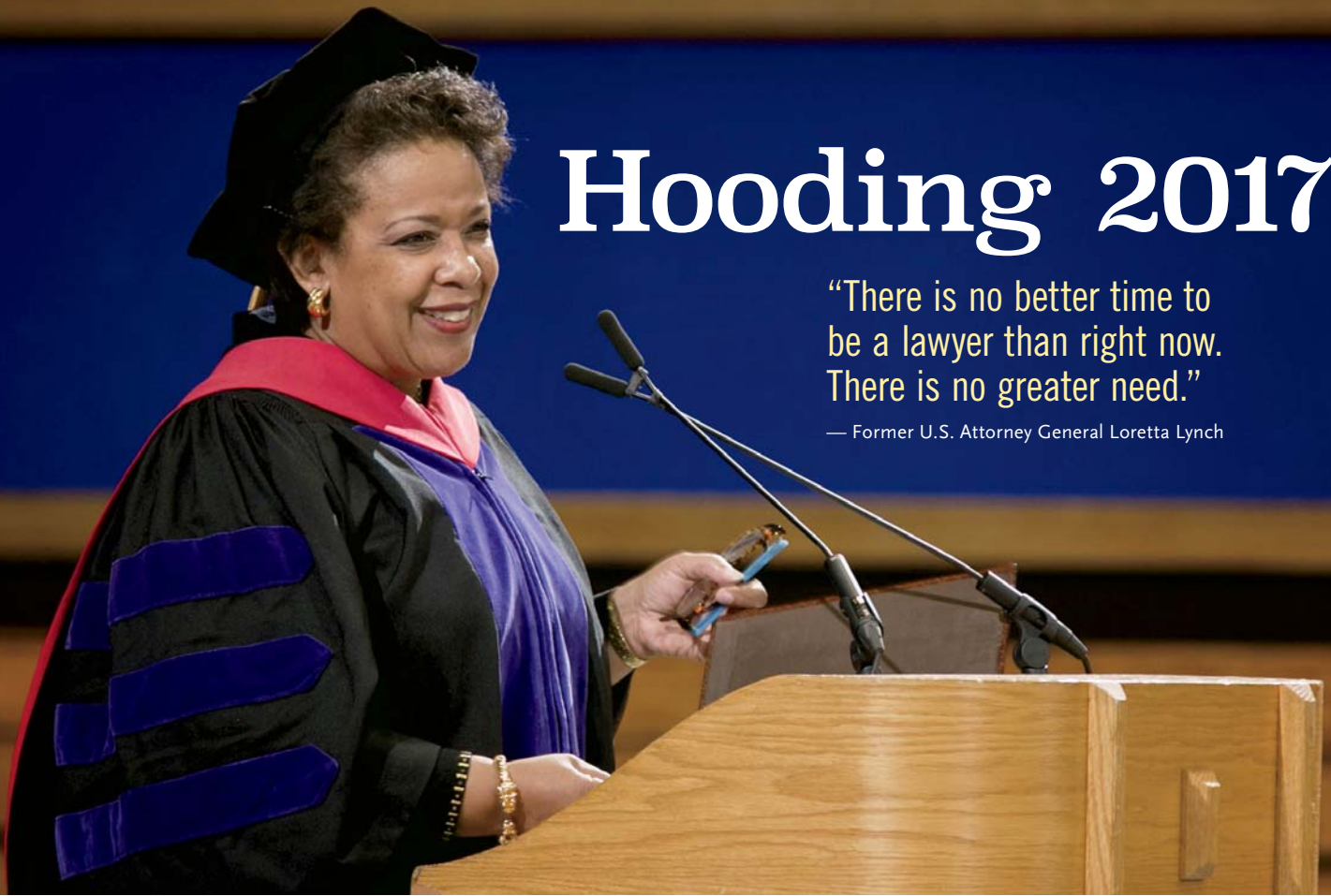


Eleni Bakst '17

# Hooding 2017

“There is no better time to be a lawyer than right now. There is no greater need.”

— Former U.S. Attorney General Loretta Lynch



Russell Jones Jr. '80 hooding his daughter, Elizabeth "Libby" Jones '17

**F**ORMER U.S. ATTORNEY GENERAL Loretta Lynch advised the members of the Duke Law Class of 2017 to use a simple question as a guiding principle in their legal careers: “What is my responsibility to those who I may never know?”

Addressing the graduates at their hooding ceremony May 13 in Cameron Indoor Stadium, Lynch said that filtering their work through that prism will clarify “the many ways the law is ripe for growth and change, and the many ways you can be that change.”

Lynch, who was sworn in as the nation’s 83rd attorney general on April 27, 2015, and served until January, spoke to graduating students of a number of Duke Law degree programs. These included 222 JD graduates, 12 of whom also received a master of laws — LLM — in international and comparative law, two who also earned the LLM in law and entrepreneurship, and 13 who also received a graduate degree from another school at Duke University. In addition, 92 internationally trained lawyers received an LLM in American law, and eight LLM graduates completed Duke Law’s one-year degree in law and

entrepreneurship. Two graduates received the SJD, the highest degree in law.

At the time of her graduation from law school, Lynch said, she never imagined having the opportunity “to play even a small role in big decisions.” But she did, as a private lawyer with an active pro bono practice, as U.S. attorney for the Eastern District of New York under Presidents Clinton and Obama, and then as the nation’s highest law enforcement officer.

“When I sat where you are today, I never imagined that I would be able to play a role in extending the protection of the law for our LGBTQ friends, relatives, brothers, and sisters, or in mending the relationship between law enforcement and the communities that we serve,” she said. “But being able to do so has been the honor and, in fact, the joy of my life.”

She added that each graduate could leave a similar mark: “You don’t have to become attorney general to leave an impression. It is not the title on the door, it is the passion in your heart. That’s what will make a difference in the world you are about to enter.”

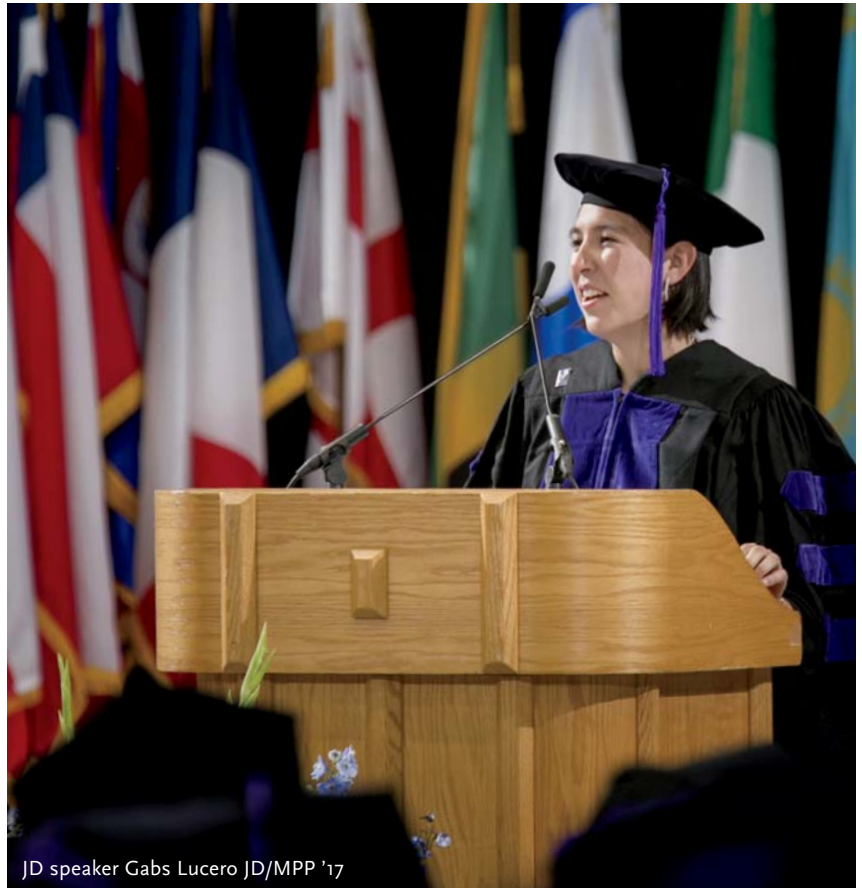
A native North Carolinian raised largely in Durham, where her parents still live, Lynch spoke at length about the centrality of law to solving such hot-button questions as who qualifies for citizenship, who bears responsibility for addressing climate change, voting restrictions, and the lack of access to civil and criminal justice. “There is no better time to be a lawyer than right now,” she said. “There is no greater need.” She urged the graduates to be “champions” for those who feel they can’t fully participate in the American dream: “You are the men and women entrusted by our society with the pursuit of justice.”

Lynch ended her remarks by reminding them that social progress often is made slowly and can be fragile. “But it is possible,” she said, pointing to the Supreme Court’s affirmation of same-sex marriage, once thought to be “inconceivable,” the elimination of many barriers to women’s advancement, and the fall, in her home state, of laws that once denied her and other black Americans entry into certain restaurants and other public places. “Today I stand before you having served as our nation’s chief law enforcement officer for our nation’s first black president.

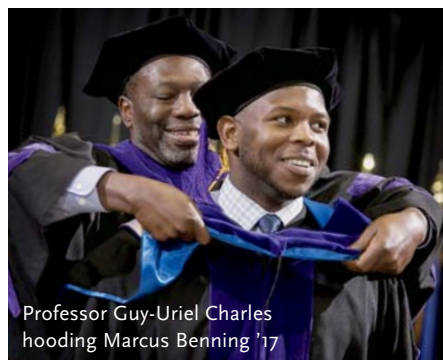
“Change is possible, even if you think it will never come,” she said. “And as I look out over all of you today, it’s not just what you’ve done, but what you are about to do with your talent, your energy, your passion.” Telling the graduates they will find challenges and friendship, adversity, and opportunity throughout their careers, she also assured them they will find “something that touches your heart.”

Speaking on behalf of the international LLM graduates, Michelle Mansour said they had started their year at Duke Law as colleagues, but were leaving “as a family.” At Duke Law, she said, “We all became the best version of ourselves,” united by the values of tolerance, respect, discipline, integrity, and commitment. “Let us carry them with us wherever we go, the world is in dire need of advocates of true values,” said Mansour. “Let us count our blessings, because we have earned an education that few people have access to. My friends, it is our time to explore the endless possibilities the world is giving us.”

JD class speaker Gabs Lucero, newly commissioned as a second lieutenant in the U.S. Army after serving in Duke University Army ROTC, said she was honored to have served with her classmates through their time at Duke Law. “I have confidence that each of us will continue to serve in some capacity — through a public interest career, pro bono work, and in our everyday lives,” said Lucero, who also received a master of public policy from the Sanford School of Public Policy. “As lawyers we have a duty of service, fidelity, and integrity. As we



JD speaker Gabs Lucero JD/MPP '17



Professor Guy-Uriel Charles hooding Marcus Benning '17



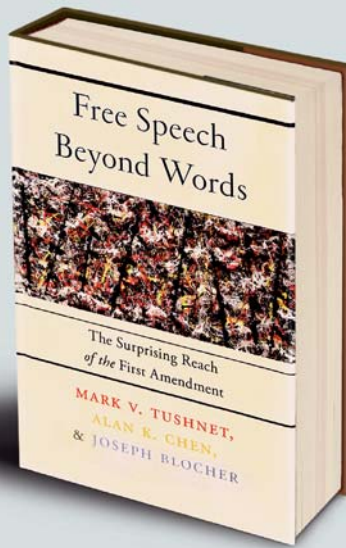
LLM speaker Michelle Mansour '17

say in the Army, when faced with a difficult choice, we have the duty of making the hard right decision, rather than accepting the easy wrong.

“Even in the smallest of moments, your kindness and service can be the difference between a profession that seeks to control and a profession that protects those most vulnerable.”

Dean David F. Levi welcomed the Class of 2017 to the family of Duke Law graduates: “You have earned the right to join our distinguished body of alumni who practice law and serve the common good all over the world. Congratulations on your accomplishments and on your bright futures.

“Our hope is that we will continue to share much in the years to come and that you will be a presence on our campus and in our lives just as we will be in yours.” ♡



Joseph Blocher

## Protecting art, music, and nonsense

**Blocher's new book asks how and why First Amendment applies to art and speech without words or clear meaning**

**I**N A NEW BOOK, Professor Joseph Blocher and two colleagues probe the legal justifications for extending First Amendment coverage to three often abstract forms of expression: non-representational art, instrumental music, and nonsense.

Blocher, whose research agenda also includes the Second Amendment, capital punishment, and property, was delving into meaning as a component of speech when he teamed up with Mark Tushnet of Harvard Law and Alan Chen of the University of Denver Sturm College of Law to write *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (New York University Press, 2017). “We realized we were all working on related problems — Mark on non-representational art, Alan on instrumental music, and me on nonsensical speech,” Blocher said. “And we were all coming up with an uncomfortable conclusion, which is that while each of those subjects is clearly covered by the First Amendment, it’s very difficult to say why.”

Blocher talked to *Duke Law Magazine* about the trio’s efforts to fill this gap in First Amendment doctrine and theory — “to give intellectual heft,” he said, to answers that seem intuitive.

**DUKE LAW MAGAZINE:** What is the commonality among non-representational art, instrumental music, and nonsensical speech as forms of communication?

**JOSEPH BLOCHER:** All three can express something important, but don’t necessarily do it in a way that involves meaning in a traditional sense. Put in another way: non-representational art, instrumental music, and nonsense can all be quite expressive, but not in ways that fit comfortably with the typical rationales for protecting speech.

**DLM:** Why is it important to drill down further into how and why these forms of expression are covered?

**JB:** As a practical matter, a lot of everyday expression doesn’t contain articulable ideas as such. We communicate with one another through gesture, through tone, through rhythm and rhyme, and it’s very important to know whether those methods of expression are covered by the Constitution. We think they are.

**DLM:** What got you working on nonsensical speech in the first place?

**JB:** I had been very interested in the concept of meaning — how words convey or don’t convey meaning. So I had been reading a lot of philosophy of language to get a handle on that problem, and it became clear how many of the issues translate almost directly into the legal context. As lawyers, we constantly deal with words and their meaning and need to understand where everything comes from. And that’s especially true in the First Amendment, where speech is the central concern. If speech is about conveying ideas, what about expression that doesn’t transmit any particular meaning at all?

**DLM:** What are some examples of this sort of nonsensical speech?

**JB:** A few that would be familiar to people are the poem “Jabberwocky,” the song “I am the Walrus,” and, in the law, the “Bong Hits 4 Jesus” case. Those aren’t expressions which in any way convey a particularized message, but I think intuitively most people regard them as speech. And I think they’re right.

“Bong Hits 4 Jesus” was a 2008 Supreme Court case called *Morse v. Frederick* in which the justices upheld the suspension of a high school student who held up a banner at an off-campus event with that message. The majority said that the words could be

understood as a pro-drug message. The student and the dissenting justices said that it's just nonsense, not advocacy. He just had a sign, and when you parse it, the words don't make a lot of sense.

So those are just a few examples of ways that these sorts of questions can come to court.

**DLM:** Why do you ultimately favor a “use-meaning” approach to assessing what forms of nonsensical communication might be covered?

**JB:** There are at least two ways to think about how a word can have meaning. One is that it can represent an idea. We call that representational meaning. The other is that words get meaning just based on how they're used. That's use-meaning. And I think use-meaning better captures what the First Amendment is all about. Speech, including the Constitution's version of speech, is a social practice. It's something you do with other people. So the use is the thing.

What was interesting to me is that that's the same conclusion linguistic philosophers have largely come to, especially in the last century. They are asking some of the same questions and coming to some of the same conclusions. And so what the chapter on nonsense does is try to show how those two inquiries actually can learn from each other.

**DLM:** In the last chapter, you speculate on the potential reach of this line of analysis to such forms of expression as dance, video games, data, and even cooking.

**JB:** Form and context are what we care about. Although we're using a lot of high theory, in some respects, we are arguing that these are questions that have to be answered closer to the ground than free speech scholars sometimes do. We don't think it's a question just for armchair contemplation — whether, for example, cooking counts as free expression. You have to consider the social context of it: What does it mean in people's lives? The same is true for dance, video games, and other things that sometimes come before the Court.

Whether dance or cooking or sports get classified as constitutional speech depends in large part on whether and how the government tries to regulate them. And sometimes it does! So it's not inconceivable to me that some of those things will, perhaps increasingly, result in First Amendment holdings, and then we hope that we'll have given a better structure for courts and scholars to justify the conclusions that most people already believe to be right. ♡

# Distinguished professorships

## Griffin, McAllaster, and Miller honored

**P**ROFESSORS Lisa Kern Griffin, Carolyn McAllaster, and Darrell Miller have been honored with Distinguished Chair awards from Duke University. Their distinguished chairs take effect on July 1.

Dean David F. Levi nominated the three for their respective chairs upon the recommendation of those members of the law faculty who already hold distinguished chairs. To qualify for a chair at Duke as a research scholar, a faculty member must have amassed a substantial record of intellectual achievement and be one of the leading thinkers in his or her field. To qualify as a clinical professor, the faculty member must have made an outstanding contribution to clinical practice and teaching in a particular field of advocacy and service. The award of a chair recognizes past achievement and predicts future accomplishment. In addition to their signal achievements in scholarship and clinical practice, Levi noted that each of them is a superb institutional citizen. »



### Griffin receives inaugural Carroll-Simon Professorship in Law

Griffin, who joined the Duke Law faculty in 2008, is a scholar of evidence theory, constitutional criminal procedure, and federal criminal justice policy. Her recent work concerns the status and significance of silence in criminal investigations, the relationship between constructing narratives and achieving factual accuracy in the courtroom, the criminalization of dishonesty in legal institutions and the political process, and the impact of popular culture about the criminal

justice system. Prior to entering the legal academy, she spent five years as a federal prosecutor in Chicago.

An elected member of the American Law Institute, Griffin has testified before the United States Congress on proposed revisions to the fraud statutes and written recent amicus briefs to the Supreme Court. She clerked for Judge Dorothy Nelson of the United States Court of Appeals for the Ninth Circuit and Justice Sandra Day O'Connor of the Supreme Court of the United States.

Griffin, who came to Duke Law from UCLA, is known as an excellent teacher and mentor to students and was the recipient of the Duke Bar Association's 2011 Distinguished Teaching Award. She graduated

## The Commons | Faculty Focus

from Stanford Law School, where she served as president of the *Stanford Law Review* and was elected to the Order of the Coif.

“Lisa Griffin is a thoughtful and productive scholar of criminal procedure,” said Levi. “Colleagues in her field praise the scope and originality of her research and scholarship, such as her exploration of the role of psychology and mental states in criminal liability, and her combination of deep institutional knowledge and incisive doctrinal and theoretical analysis that she brings to each project.”

Students admire Griffin for “her brilliance and professionalism,” Levi said. “She is a particularly strong role model for students considering careers in public service and is generous to students with her time and insights.”

Candace Carroll '74 and Leonard Simon '73 established the Carroll-Simon Professorship in Law in 2012 with matching funds from the Star Challenge Fund. The San Diego-based couple, who have enjoyed successful practices in appellate advocacy and complex litigation, respectively, are longtime supporters of the Law School and the university, directing much of their philanthropy towards financial aid through an endowed scholarship and summer public interest fellowships, as well as numerous other initiatives. They serve on the leadership committee for the Law School's *Duke Forward* fundraising campaign, and both have taught at Duke Law as visiting professors. Carroll is also a long-time member of the Duke Law Board of Visitors.

“I am really very grateful to receive a distinguished professorship at Duke University and especially pleased that it is named for our graduates Candace Carroll and Leonard Simon,” said Griffin. “They have long been dedicated supporters of Duke Law students and the legal profession. It is an honor to be recognized in this way and humbling to be associated with the Carroll-Simon Professorship and their legacy of integrity, generosity, and leadership.”



### **McAllaster named inaugural Colin W. Brown Clinical Professor of Law**

McAllaster is the founder of the Health Justice Clinic at Duke Law (formerly the AIDS/HIV and Cancer Legal Project), directs the HIV/AIDS Policy Clinic, and teaches a course on AIDS and the Law. A national leader in HIV/AIDS policy, McAllaster is also project director of the Southern HIV/AIDS Strategy Initiative (SASI), an initiative of the Health Justice Clinic, which works with HIV advocates in the South and a Duke research team to develop data-driven policy solutions to ending HIV and AIDS in the region.

McAllaster established the AIDS Legal Project in 1996. The clinic allows students to develop practical skills while offering a range of services to those clients, including litigating complex disability benefits and discrimination claims. The clinic now also serves qualifying clients with legal matters stemming from cancer diagnoses.

In 2014, McAllaster received the American Bar Association's Alexander D. Forger Award for Sustained Excellence in the Provision of HIV Legal Services and Advocacy. She was awarded a Positive Leadership Award by the National Association of People with AIDS in 2012.

McAllaster focused on civil rights and plaintiffs' litigation in private practice before joining the Duke Law faculty in 1988. She was a founder and first

president of the North Carolina Association of Women Attorneys.

“Carolyn McAllaster is renowned for the exceptional passion, dedication, and excellence she brings to her advocacy on behalf of people living with HIV and AIDS” said Levi. “Her contributions to HIV and AIDS law, policy, and practice are unparalleled — at Duke, in Durham, in the Southeast, and internationally.

“Professor McAllaster is also a highly effective teacher and mentor who immerses students in both the big policy questions their clients face and the necessity of compassionately addressing their individual legal needs,” Levi said.

The Colin W. Brown Clinical Professorship was endowed in 2016 by JM Family Enterprises, with matching funds from The Duke Endowment, as a tribute to Brown '74, the president and chief executive officer of the Deerfield, Fla.-based company. Brown, a member of the Duke Law Board of Visitors and longtime scholarship benefactor at Duke Law, has been recognized for his leadership of the family-owned business, one of the largest private companies in the United States. It has been ranked on *Fortune* magazine's list of “Best Companies to Work For” for more than 18 years.

“I am thrilled to be named the first Colin W. Brown Clinical Professor of Law,” said McAllaster. “I very much appreciate Colin Brown's generous support of Duke Law School and am honored to have the work of the Duke Law School Clinical Program recognized in this way.”



### **Miller receives Melvin G. Shimm Professorship**

Miller writes and teaches in the areas of civil rights, constitutional law, civil procedure, state and local government law, and legal history. He has emerged as one of the leading scholars of the Second

Amendment, and his scholarship on the Second and Thirteenth Amendments has been published in leading law reviews and cited by the Supreme Court of the United States, the United States Courts of Appeals, the United States District Courts, and

in congressional testimony and legal briefs. Constitutional equality is another emerging focus of study for Miller.

At Duke Law, Miller teaches Civil Procedure, Civil Rights Litigation, State and Local Government Law, and a seminar on the Second Amendment.

Before coming to Duke in 2013, Miller was a member of the faculty of the University of Cincinnati College of Law, where he twice received the Goldman Award for Excellence in Teaching. Prior to joining the academy, he practiced complex and appellate litigation in Columbus, Ohio. He is a former clerk to Chief Judge R. Guy Cole Jr., of the United States Court of Appeals for the Sixth Circuit.

Miller graduated *cum laude* from Harvard Law School and served as an editor of the *Harvard Law Review*. In addition to his law degree, Miller holds degrees from Oxford University, where he studied as a Marshall Scholar, and from Anderson University.

“Darrell Miller is a thoughtful constitutional law and civil procedure scholar. He has the ability to think about legal problems from a broad theoretical perspective while at the same time bringing his experience to bear on how the system will actually operate under different approaches,” Levi said. “I had the pleasure of teaching and working with Professor Miller last year as part of our work with the North Carolina Commission on the Administration of Law and Justice and found him to be a most thoughtful, dedicated, and engaged scholar, law reformer, and teacher.”

The Shimm Professorship was previously held by David Lange, who took emeritus status in 2016. Shimm, who died in 2005, was a member of the Duke Law faculty for 43 years.

“I’m honored to receive the Melvin G. Shimm Distinguished Professorship at Duke Law School and grateful to the family, friends, students, and supporters of Professor Shimm who made this endowed chair possible,” said Miller. “During his long career at Duke, Melvin Shimm was an indefatigable scholar, editor, teacher, and institution-builder. He was a man to take risks and to work for what he thought was right. As I take up his chair, I think of my late father, a factory worker with a high school education, and how he would have reacted to news of this award. I suspect Dad would have taken me aside, and with pride and admonition, said: ‘Remember, Son, that chair isn’t meant for sittin’.’” ♡

## Scholar of criminal law, procedure, and criminology joins governing faculty

**B**EN GRUNWALD, a scholar of criminal law, criminal procedure, and criminology, will join the governing faculty on July 1 as an assistant professor of law. He comes to Duke Law from the University of Chicago Law School, where he is a Bigelow Teaching Fellow and lecturer. Before teaching at Chicago, Grunwald clerked for Judge Thomas Ambro of the United States Court of Appeals for the Third Circuit.

Grunwald, who received a BA in philosophy and sociology, an AM in statistics, a JD, and a PhD in criminology from the University of Pennsylvania, applies doctrinal analysis and empirical methods to evaluate rules of criminal procedure, often challenging prevailing assumptions about how those rules operate. His most recent work involves an examination of whether open-file discovery policies serve as a check on prosecutorial power. His other areas of research include the effects of private policing in high-crime areas, the correlation between sentencing guidelines and sentencing fairness, and the optimal age of majority for separating the juvenile and adult justice systems.

“The various crises in American criminal justice are among the most urgent public policy issues of our time,” said Samuel Buell, the Bernard M. Fishman Professor of Law and a former federal prosecutor. “Those crises — in incarceration, policing, legal representation, and other areas — can only be addressed successfully if we more precisely understand their causes and consequences, which are matters requiring rigorous empirical inquiry. Ben Grunwald brings exactly the skills and passions to the critical questions in these areas that are necessary for them to be subject to successful attention and investigation.”

Grunwald’s interest in questions of criminal justice policy and procedure emerged during his undergraduate study of sociology and was confirmed during his post-graduate research at the Urban Institute’s Justice Policy Center. “I became fascinated by the enormous discretion the criminal justice system bestows on actors in the system, many of whom are unelected,” he said. His observation of the need for more empirical analysis in the fields informed his graduate studies.

In his article, “The Fragile Promise of Open-File Discovery,” forthcoming in the *Connecticut Law Review*, Grunwald examines whether the emerging practice of having prosecutors turn over all their files to defense attorneys — considered by many scholars a centerpiece of criminal justice reform — results in fairer outcomes for defendants. Applying



Ben Grunwald

“The various crises in American criminal justice are among the most urgent public policy issues of our time. Ben Grunwald brings exactly the skills and passions to the critical questions . . . that are necessary for them to be subject to successful attention and investigation.”

— Professor Samuel Buell

a theoretical approach to the question and undertaking an empirical study of the effects of open-file statutes in North Carolina and Texas, Grunwald concludes that the benefits of full discovery alone are vastly overstated.

“The project tries to understand how requiring prosecutors to hand over all their files to defense attorneys can influence and reshape the criminal process and whether it results in more rational case outcomes,” Grunwald said. Legal scholars largely support open-file discovery, he notes in his paper, but claims of a fairer process and increased judicial efficiency “are based largely on intuition and anecdotal data without extended theoretical analysis or systematic empirical testing,” he writes.

His study of the Texas and North Carolina cases led Grunwald to conclude that, while open-file statutes resulted in increased disclosure from prosecutors and better enforcement of defendants’ Fourth Amendment rights, the data “provide little evidence that open-file discovery had much of an effect on charging, plea bargaining, sentencing, trial rates, or time-to-disposition” in either state.

“While I cannot rule out all theoretical possibilities,” Grunwald writes, “this pattern of results is most consistent with the theory that, due to heavy caseloads, defense attorneys lacked the time and resources to use the file to their clients’ advantage. The potential effects of open-file might also have been mitigated by the adaptive behavior of police and prosecutors in the collection of evidence and assembly of the file.”

Grunwald has also researched and written about the long-term effects of Project Safe Neighborhoods (PSN), a federally-funded initiative to stem violence in high-crime areas. In “Project Safe Neighborhoods in Chicago” in the *Journal of Criminal Law & Criminology*, Grunwald and co-author Andrew Papachristos examine data related to the initially successful program, which created an interagency

team that combined community outreach and severe sentencing for certain firearm-related offenses. The paper finds that, although the project may have had early success in two small, high-crime neighborhoods, that success wasn’t sustained when the program was later expanded to the rest of the city.

The paper recommends steps for further evaluation of data to determine the specific causes for the program’s decline in effectiveness, though Grunwald and Papachristos note that the program’s expansion was not accompanied by an increase in resources. Another potential cause, the authors note, is that “the effects of large-scale social interventions can dissipate over time. It is possible, for example, that focused deterrence strategies like PSN exert a short-term shock on homicide rates that dissipates over time as residents become accustomed to the new and more punitive criminal justice ‘regime.’”

Grunwald is also currently working on an article examining how appellate courts decide whether to publish their opinions. This decision is important because only published opinions establish binding precedent on future cases; unpublished opinions apply only to the parties in a particular case. “When judges sitting on a multi-judge panel can’t reach agreement on the outcome of a case, the standard view says that they have two options,” he explains. “They can hash it out in private, negotiate, and publish one precedential opinion, or they can issue an opinion with majority opinion and dissent.” The paper provides empirical evidence that divided panels have a third option: They can engage in a practice Grunwald calls strategic publication, by issuing an unpublished opinion, and thus relieving the pressure of precedential weight.

In his first semester at Duke Law, Grunwald will teach Criminal Law. His other teaching interests include criminal procedure, torts, empirical legal studies, and evidence.

“I’m incredibly excited about coming to Duke for many reasons, and one of them is the fantastic criminal law faculty from whom I can learn an enormous amount,” Grunwald said. “The faculty writes about criminal justice issues from a variety of different perspectives, and so many, especially those working in the clinical program, have deep criminal law experience.” ♡





**R**alf Michaels, the Arthur Larson Professor of Law, challenged the legal and social rationales behind many European countries' "burqa bans" when he delivered the annual Bernstein Memorial Lecture in Comparative Law. When France outlawed Islamic face veils in 2010, many considered this a French eccentricity, yet other countries have since enacted similar legislation or are considering doing so. In his lecture, co-sponsored by the Center for International & Comparative Law and the Office of the Dean, Michaels discussed three broad justifications used by Western secular states for enacting face-veil bans. He focused primarily on the concept of "living together," a foundational concept of French nationalism articulated by the 19th-century historian Ernest Renan, who characterized a nation as "a soul, a spiritual principle" animated, in part, by demonstrations of its citizens' consent and desire to co-exist and collectively "forget" inter-religious wars and conflicts that predate formation of the state.



"The modern legislature ... imposes that obligation on each individual — on the citizens of the French nation. To quote the [French] minister of justice again: 'This living together necessarily encompasses a refusal to withdraw to oneself, a refusal to reject the other, which sustains communitarianism. Living together supposes acceptance of the gaze of the other.

"... I've explained that the French burqa ban is quintessentially French. It is not based upon generalizable ideas about the liberal state, freedom of ideas, etcetera. It rests on a quintessentially French idea. And so we should think in comparative law that this could not travel — it should not travel. ... Indeed, to some extent that's true. ...

"But when we look broader ... first, we see that the Belgian legislature rested its own ban almost entirely on the same justifications as the French legislation. And this seems quite a stretch, actually, for Belgian society. Belgium as a country has far less of the cohesion that Renan celebrates and requires. It is certainly not a country in which people have left their regional identities behind in favor of the nation. So living together here becomes something of a facile import in order to support a ban that it cannot really carry in the Belgian context.

"And then, of course, we see that other countries banning face veils rest on other justifications. In Germany, we still

find a curious primacy for Christian values which are translated into secular values. If the state prioritizes symbols of Christianity over those of other religions, it does so somewhat implausibly with the argument that these symbols now represent Western secular values. In other words, they are no longer Christian, they are somehow about something else — something that, by the way, the Christian church in Europe has opposed, the idea of the crucifix as just some decoration on the wall.

"... [E]ven in England we have seen proposals for face veil bans. UKIP made much of its fame through demanding such a ban. ... And polls suggest that two-thirds of the English would favor such a ban. So Britain's tradition of freedom and fairness has become, in this definition at least, something of a minority.

"So that relativizes, to some extent, the argument that I made earlier. I suggested that the French ban on face veils rests on peculiarly specific French characteristics. At the same time we see that those reflect broader anxieties in the Western liberal state. When confronted with the exotic, the other, the face veil, it responds in a way that tries to reconstitute its own substantive identity ... and does so through law and legal regulation." ♡

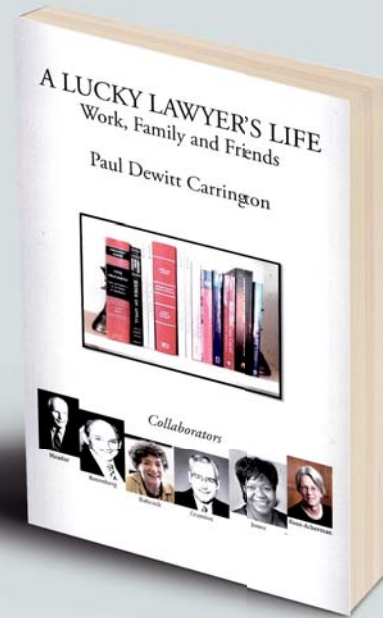
## The Commons | Faculty Focus

Professor **Stephen E. Sachs** has been elected to membership in the American Law Institute (ALI).

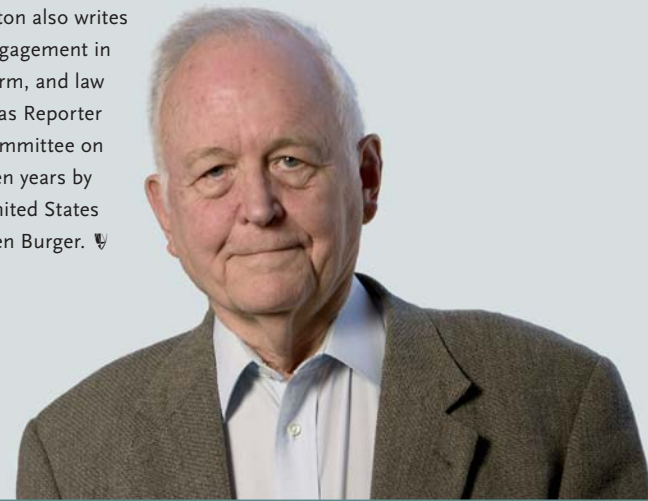
ALI members are distinguished lawyers, judges, and legal academics who produce scholarly work to clarify, modernize, and otherwise improve the law through publication of the highly influential Restatements of the Law, model statutes, and principles of law.

Sachs is a scholar of civil procedure, constitutional law, Anglo-American legal history, and conflict of laws whose research spans a variety of substantive topics focusing on the history of procedure and private law and its implications for current disputes. His research interests include federal jurisdiction, constitutional interpretation, sovereign immunity, and the legal status of corporations. He teaches Civil Procedure, Conflict of Laws, and seminars on constitutional law. He is a member of the Judicial Conference's Advisory Committee on Appellate Rules and an adviser to the ALI's project on the *Restatement of the Law (Third), Conflict of Laws*.

Sachs joined the Duke Law faculty in 2011 after practicing in the litigation group of Mayer Brown in Washington, D.C. He clerked for Chief Justice John G. Roberts Jr. during the 2009-2010 Supreme Court term and for Judge Stephen F. Williams on the U.S. Court of Appeals for the D.C. Circuit in 2007-2008. ♣



**Paul D. Carrington**, the Harry R. Chadwick, Sr. Professor Emeritus of Law, has published a memoir, *A Lucky Lawyer's Life: Work, Family and Friends* (Xlibris, 2016). Dedicated to his late wife, Bessie, he writes of their family life over 64 years and his 50-year academic career, during which he taught at 14 American law schools and five in other countries. One chapter, titled "Deaning," recounts Carrington's tenure as dean at Duke Law from 1978 to 1988. Apart from faculty recruiting, he writes of such lasting legacies as partnering with the Alaska Bar Association to establish the *Alaska Law Review* as a student-run journal at Duke, integrating legal ethics into the required Duke Law curriculum, establishing the Private Adjudication Center, which handled alternative dispute resolution in litigation around the world, the expansion of the Law School's international LLM program, the admission of its first Chinese students as Nixon Scholars, and the establishment of the first summer institute focused on transnational law. Carrington also writes of his extensive engagement in politics, court reform, and law reform; he served as Reporter to the Advisory Committee on Civil Rules for seven years by appointment of United States Chief Justice Warren Burger. ♣





Clinical Professor **Michelle Nowlin JD/MA '92**, the supervising attorney in the Duke Environmental Law and Policy Clinic, is chairing the Association of American Law Schools Section on Agriculture and Food Law, which serves as a forum for the exchange of ideas in those areas. As chair, she is organizing programming on the topic of “Legal and Policy Tools for Dairy in a Changing Climate” for the section’s January 2018 meeting in San Diego. She is also serving as Vermont Law School’s Distinguished Sustainable Agriculture and Food Systems Scholar for the summer of 2017, which includes delivering an address titled “Climate Change and Environmental Justice: Competing Considerations for Biogas Production.”

At Duke Law, Nowlin teaches a course titled Food, Agriculture and the Environment: Law & Policy in addition to her clinic work and related teaching, which, in the spring semester, included overseeing advanced clinic students in preparing comments related to mining the ocean floor to the International Seabed Authority, with Professor Stephen Rody '76. Over the past academic year she also led an interdisciplinary Duke Bass Connections class that examined agricultural animal waste management policies and practices through the lens of global health and climate change, looking at technology solutions that are available to address those twin issues. Along with Emily Spiegel '14, a former Stanback Fellow in the Environmental Law and Policy Clinic, Nowlin has recently published “Much Ado about Methane: Intensive Animal Agriculture and Greenhouse Gas Emissions,” in *Research Handbook on Climate and Agricultural Law*, Mary Jane Angelo and Anél du Plessis, eds. (Edward Elgar Publishing Limited, 2017). ♡

**Jedediah Purdy**, the Robinson O. Everett Professor of Law, is leading a multidisciplinary project titled “Rethinking Humanity’s Place in an Anthropocene World” at Duke’s Kenan Institute for Ethics, along with Norman Wirzba, professor of theology, ecology, and agrarian studies at Duke Divinity School and a Kenan Institute senior fellow. The project, funded by a four-year grant of \$550,000 from the Henry Luce Foundation, seeks to transform and redirect academic disciplines so they can better prepare communities to meet the health, sustainability, and justice challenges of the Anthropocene, the current geological age in which human activity has been the dominant influence on Earth’s geology and ecosystems. Questions of theology and law are intended to provide a dual orienting focus while drawing in perspectives from a wide range of other disciplines. The project includes an intensive multidisciplinary working group in which scholars will engage the topic through conversation, monographs, and essays; a university-wide graduate seminar taught by Purdy and Wirzba on the project’s themes; public lectures and panel discussions; and research projects for graduate students.

Purdy’s scholarship and teaching focus on constitutional, environmental, and property law, as well as legal theory. He also writes on issues at the intersection of law and social and political thought. His most recent book is *After Nature: A Politics for the Anthropocene* (Harvard University Press, 2015). ♡



**Steven Schwarcz**, the Stanley A. Star Professor of Law & Business, has recently earned three international honors relating to his research. He been awarded the University of Edinburgh Law School’s prestigious MacCormick Fellowship as well as a distinguished visiting professorship with the University College London Law Faculty for the spring 2018 semester. In addition, the United Nations Commission on International Trade Law (UNCITRAL) has selected two proposals by Schwarcz, one on a model-law approach to sovereign debt restructuring, and another on

corporate governance and systemic risk, for its 50th anniversary Congress, which begins in Vienna, Austria, on July 4. Schwarcz will formally present the first paper at the Congress.

A founding director of Duke’s interdisciplinary Global Capital Markets Center (now the Global Financial Markets Center), Schwarcz is also senior fellow with the Centre for International Governance Innovation. His areas of research and scholarship include insolvency and bankruptcy law; international finance, capital markets, and systemic risk; and commercial law. (Read more, page 34.) ♡

**T**O WHAT EXTENT was the exercise of authority under slavery constrained by law? That was the broad question posed by **Rebecca J. Scott**, the John Hope Franklin Visiting Professor of American Legal History, in her Robert R. Wilson Lecture, titled “Adjudicating Status in a Time of Slavery: Luisa Coleta and the Capuchin Friar (Havana, 1817).” Scott, the Charles Gibson Distinguished University Professor of History and Professor of Law at the University of Michigan, who taught at Duke in the spring semester, argued that the determination of status, in fact, “rested on a tangled relationship between the law of persons and the law of property, and on very deep uncertainties about how one polity would deal with undocumented refugees from another.”

Scott related how a young woman named Coleta, emancipated from slavery in Haiti by the revolution of 1793-94, became a war refugee in Havana, where she spent the next 20 years in forced servitude, despite the complete absence of evidence of ownership by her putative mistress. One by one, Coleta’s children were inscribed by that mistress as “slaves” in the church records of baptism.

On her deathbed in 1817, Coleta finally found leverage with which to seek to free her three daughters. She refused absolution through last rites unless the attending friar would transcribe her final confession and submit her words to a judge in order to initiate a suit for freedom for them. Although her daughters were eventually deemed to be free by a Cuban court in 1824, Scott’s co-author, Cuban historian Carlos Venegas, recently discovered that their status had never been altered in the parish records, which still declared them slaves.

“So had the law adjudicated their status? Maybe. By the end of the lawsuit they were no longer under Madame Lorignac’s direct control. But were they perhaps ‘free’ in the same sense in which their mother had spent 20 years in Havana as a ‘slave’? That is to say, certain social performances would be taken to be indices of their status?”

“Our initial documentation of these events took the form of a substantial file generated by a court of first instance, and we naturally framed our analysis around the theme of legal adjudication. But that legal process operated within an iron triangle of presumption, performance, and possession, one which had conferred impunity on Lorignac during the years between 1796 and 1816 when she held Coleta.

“The legal presumption of status for Coleta’s daughters was in effect split in two by the 1824 decision. The birth registry still identified them as slaves, while a court transcript held them to be free.

“They were no longer in the possession of Lorignac. One daughter was in an orphanage, another had been placed in the custody of a local notable. What of performance? Could the daughters make sure, in the years ahead, that no one would be able to exercise over them any of the powers that conventionally attached to the ownership of property in persons? As Coleta’s story had shown, the exercise of such power could lead imperceptibly to the attribution of the corresponding status.

“In effect, the responsibility of demonstrating self-possession remained with the daughters themselves. Each would have to continue to be seen to be mistress of her own person.

“Coleta’s deathbed gamble had won them freedom at law, but they would in practice have to keep winning that freedom in the years to come.” ♡



Rebecca Scott



Senior Lecturing Fellow **Anne Gordon**, director of Duke Law School’s externship programs, was named, in January, a 2017 North Carolina Fellow by New Leaders Council (NLC). The nonprofit NLC works to recruit, train, and promote future “progressive political entrepreneurs” — community, business, and political leaders who are committed to preserving a strong democracy, social justice, and equal opportunity. There are 800 fellows nationally in the 2017 class.

Before joining Duke Law in 2016, Gordon taught at the University of California, Berkeley School of Law, where she helped lead the Appellate Advocacy Program and served as a senior research fellow at the California Constitution Center. Her research focuses on the constitutional right to education. She spent the 2015-2016 academic year as a distinguished visiting professor at Instituto Tecnológico de Monterrey in Puebla, Mexico, teaching professional skills and comparative constitutional law. Gordon also has served as a staff attorney with the Ninth Circuit U.S. Court of Appeals and practiced criminal appellate law and capital habeas with the Habeas Corpus Resource Center and the Fifth and Sixth District Appellate Projects. ♡

# Danner, leader in evolution of law library and librarianship, to retire

**A**RCHIBALD C. AND FRANCES FULK RUFTY Research Professor of Law Richard A. Danner, considered one of the preeminent law librarians in the country and a giant in the field of law librarianship, will retire July 1 after more than 35 years at Duke Law School.

Danner, who is also the senior associate dean for information services and director of the J. Michael Goodson Law Library, joined Duke Law School in 1979. He was honored this year with the Marian G. Gallagher Distinguished Service Award from the American Association of Law Libraries (AALL) and the Duke Law Alumni Association A. Kenneth Pye Award for Excellence in Education.

“As our Rufty Professor and library director, Dick has been a transformative figure in the field of law librarianship, helping the entire field transition into the digital age,” said Dean David F. Levi. “He has done the same for us at Duke, taking us from the concept of the library as an archive and study hall to the library as a collaborative research center. The future of the Goodson Library at Duke Law looks very good thanks to Dick’s dedication and creative vision.”

Danner has been at the forefront of understanding information technology and electronic publishing and their impacts on legal education, research, and scholarship. Under his leadership, Duke became the nation’s first law school to offer free open access to the text of its student-edited journals online, in 1998. Danner also led the creation, in 2005, of the Duke Law Scholarship Repository, a full-text archive of open-access publications by faculty and affiliates, which has since generated nearly 12 million downloads.

“He moved the library from the book era to the electronic era,” said Brainerd Currie Professor of Law James D. Cox. “His national visibility on this issue speaks to how lucky we are to have Dick here.”

In 2009, Danner encouraged directors at 12 of the country’s top university law libraries to call for law schools to stop publishing law journals in print entirely while making electronic versions available for free online. The proposal, which was titled “The Durham Statement on Open Access to Legal Scholarship” because it was initially crafted at a meeting during the November 2008 dedication of the Goodson Law Library and Star Commons at Duke, argued that electronic publication was not only more economical at a time of financial uncertainty for law schools but also allowed scholars to greatly expand the reach of their work into other

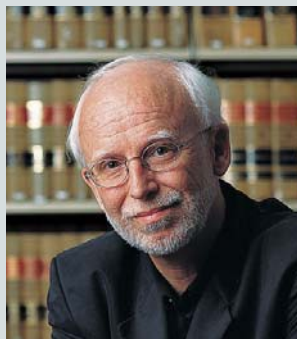
countries and disciplines. Duke Law has since ended print publication of all but two of its journals.

“Dick is the original modest hero,” said James Boyle, William Neal Reynolds Professor of Law and a scholar of copyright and intellectual property law. “There is no person in the library community who has done more to preserve and extend the ideal of openness: that everyone should have access to knowledge and scholarship. Dick made sure that Duke’s journals were all available for free on the open web, from the moment that the web existed. He wasn’t just ahead of the curve. He *drew* the curve. I am proud to have had him as a colleague.”

Danner has overseen major changes to the Law School’s physical plant, too, through a series of expansions and renovations that modernized learning and research spaces. He led the 2008 renovation of the library, which expanded the main floor and mezzanine communal spaces with large tables for individual and collaborative study, a two-story window wall, and easy access to library, media, and computing services.

“The space just works, and it’s really a monument to his understanding of the role of the law library in the Law School community,” said Professor Thomas B. Metzloff, who has worked closely with Danner on a variety of renovations throughout the building beginning in the late 1990s, including a complete refurbishing of all of the Law School’s classrooms and learning spaces between 2010 and 2016 that introduced cutting-edge instructional and presentation technology. “I think the space he created in the library is going to be a great legacy to his vision. I’m just profoundly impressed every time I think about the space and what he did. And he did that for the whole Law School.”

Danner has also taken leadership roles in professional organizations related to law libraries and legal education. He served as president of AALL in 1989-90, chaired several AALL special committees and task forces, and edited AALL’s *Law Library Journal* from 1984 to 1994. AALL presented him with its Distinguished Lectureship Award in 2014. Danner



“He is the single greatest leader in law librarianship in the last 50 years.”

— Michael Chiorazzi, associate dean for information services at the University of Arizona James E. Rogers College of Law

## The Commons | Faculty Focus



also served as first vice-president of the International Association of Law Libraries from 2004 to 2010. He has been active in the Association of American Law Schools, serving on the Executive Committee from 2002 to 2004, and in the American Bar Association Section on Legal Education and Admissions to the Bar, serving on numerous law school site visit committees.

“He is the single greatest leader in law librarianship in the last 50 years,” said Michael Chiorazzi, associate dean for information services at the University of Arizona James E. Rogers College of Law and a reference librarian at Duke Law from 1981 to 1989. “When you go to law library meetings ... Dick was the smartest guy in the room.”

At Duke, Danner has taught Legislation as well as courses on legal research and writing. He has also taught Introduction to American Law at Duke’s summer institutes in Geneva and Hong Kong.

He is the author of two books, *Strategic Planning: A Law Library Management Tool for the '90s and Beyond* (2d ed. 1997) and *Legal Research in Wisconsin* (1980), and the co-editor of three others, including the *IALL International Handbook of Legal Information Management* (2011) (with Jules Winterton), which received the 2012 Joseph L. Andrews Legal Literature Award. He has also published countless articles, papers, and book chapters on such subjects as open access, technology, legislation, and law librarianship.

In addition to being one of the leading thinkers in law librarianship, Danner has encouraged the development of more robust scholarship in and about the field and its overall professionalization, said Barbara A. Bintliff, director of the Tarlton Law Library/Jamail Center for Legal Research at the University of Texas School of Law.

“He’s been so instrumental for legal information professionals, for law librarians, helping us define who we are, and then redefine who we are, and understand really the more intellectual side of what we do,” she said. “Dick has been the explorer, the translator.”

“The space just works, and it’s really a monument to his understanding of the role of the law library in the Law School community.”

— Professor Thomas B. Metzloff

Cox praised Danner for his consistent support of faculty and commitment to students during his tenure at Duke and through the ongoing evolution of law libraries, legal research, and legal education. “None of us feel that we lack the resources we need, because Dick’s been able to balance so well the competing acquisition needs for the library over the years,” he said. “It sadly is the case that with Dick’s retirement we are at the end of an important era, losing somebody who’s that skillful a librarian who’s been such a significant player in building the institution over the last four decades.”

Said Danner: “I am fortunate to have spent my career at Duke Law, which is the ideal place for me to pursue my professional goals as a librarian as well as my interests in research and writing. Importantly, I have been able to work closely with deans who understood the impacts that technology would have on legal education. (Former Dean) Pamela Gann, especially, saw how advancing technology would change not only the library, but how law is taught and learned, and how these changes could be leveraged to Duke Law’s benefit.

“In 2017, the ways of teaching and learning and the pursuit of knowledge continue to evolve, sometimes rapidly, changing how libraries and librarians support the core activities of the law school. I am confident that law librarians’ roles will continue to be essential to legal education, but this will require greater collaboration between librarians and faculty and stronger efforts by librarians to make known their extensive knowledge of research methods, technology, and law, as well as how their range of skills adds value to legal scholarship and teaching.”

Following Danner’s retirement, Assistant Dean for Academic Technologies Wayne Miller will manage Duke Law technologies as an associate dean, and Assistant Dean for Library Services Melanie Dunshee will serve as interim library director. ♡

# Nota Bene

Selected scholarship from Duke Law faculty | Summer 2017



**T**HE EXCERPTS COLLECTED in the following pages from recently published articles reflect the diverse research interests and depth of expertise of Duke Law faculty scholars. »

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Joseph Blocher and Mitu Gulati
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# Keeping a critical eye on enforcement

Margaret H. Lemos

**D**ECISIONS REGARDING THE ENFORCEMENT OF LAWS are highly discretionary. The choice of a federal or state agency or attorney general to investigate, charge, litigate, or resolve a specific infraction of a statute or regulation or not gets little public, judicial, or scholarly scrutiny.

Yet enforcement is critical to establishing what a law actually means, according to Professor Margaret Lemos. In a forthcoming article, one of several that examine enforcement as a form of political representation, Lemos, the Robert G. Seaks LL.B. '34 Professor of Law, calls it "the government function that lies at the intersection of law-making and law application." She argues, in "Democratic Enforcement? Accountability and Independence for the Litigation State," (102 *Cornell Law Review* 929-1002 (2017)), that it operates as a form of discretionary policymaking, "necessitating the same sorts of policy judgments that characterize law-making," such as whether and when to investigate and proceed with an action (since many possible violations are likely to go consciously unchallenged by authorities). Additionally, in such matters as settlement, enforcers are making legal determinations that are quasi-judicial in nature, she writes.

"These sorts of decisions are made across the spectrum in enforcement," says Lemos. "In part it's out of necessity — these are policy decisions about priorities and allocation of resources. It's also a way of allowing the legislature to act in more general terms, because we expect that where the rubber meets the road, there's going to be a second set of review and decision-making taking place."

"Democratic Enforcement?" is the latest of several articles in which Lemos asks whether enforcement should trigger the sorts of demands for accountability and transparency that are applied to other forms of governance and focuses on public or governmental law enforcement and its relationship to private litigation.

For Lemos, whose ambitious and influential body of public law scholarship addresses the interrelated fields of federalism, admin-



**Margaret H. Lemos**, Robert G. Seaks LL.B. '34 Professor of Law  
Faculty co-director, Duke Law Center for Judicial Studies

- » Teaches in Duke Law Master of Judicial Studies program
- » Received Duke Bar Association's 2013 Distinguished Teaching Award and was twice voted "best first-year teacher" at Cardozo Law School
- » Former Bristow Fellow, Office of the U.S. Solicitor General and Furman Fellow at NYU Law School
- » Clerked for Judge Kermit V. Lipetz of the U.S. Court of Appeals for the First Circuit, and for U.S. Supreme Court Justice John Paul Stevens



*“Enforcement is a category of government action worthy of attention in its own right, in the same way that we would study the legislative process or the regulatory process or the judicial process.”*

— Professor Margaret Lemos

istrative law, civil procedure, and statutory interpretation, enforcement as a topic of inquiry was a “short step” from her early scholarship on judicial interpretation of law. “From the beginning, I’ve been interested in what happens to law after it’s enacted,” she says. “How do we translate it from the words on the page to what actually is used to affect people’s lives?”

Focused primarily on civil matters, Lemos’ work on statutory interpretation sparked her interest in the role of state attorneys general in enforcing federal law. “I had been using antitrust as an example of an area of law where we depend very heavily on judicial interpretation,” she says. “Reading the relevant federal statute, it’s hard to miss the provision that says the law can be enforced by state attorneys general.” Writing “State Enforcement of Federal Law,” (86 *New York University Law Review* 698-765 (2011)) at a time when state attorneys general were emerging as “particularly active litigants” in federal courts, often in cases with national implications, Lemos characterized state enforcement as “both a unique model of public enforcement and a unique form of state power.” With attorneys general often elected independently from their governors and representing different parties and constituencies, enforcement authority “opens up new outlets for state-centered policy, empowering actors whose interests and incentives distinguish them from the state and institutions that dominate other channels of federal-state dialogue,” she writes.

“In the course of writing that article, I started thinking about the conventional wisdom on the difference between public and private enforcement, and how state attorneys general seem to fall between those boxes,” Lemos says. “There are conventional arguments about the qualities that we would expect from public enforcement and there are conventional arguments about the qualities we would expect from private enforcement, and state AGs had a little bit of both.” Lemos followed up with a comparative analysis of private class action lawsuits and aggregate litigation brought by state attorneys general. While both collect claims into a single suit in the pursuit of monetary or injunctive remedy, they are treated differently legally, she found.

Among other differences Lemos charts in “Aggregate Litigation Goes Public: Representative Suits by State Attorneys General,” (126 *Harvard Law Review* 486-549 (2012)) is the fact that these actions brought by state attorneys general are not subject to

the rules protecting absent class members in private class actions. She also notes the general lack of scrutiny regarding states’ motives and interest in bringing aggregate lawsuits, and finds the principal critiques of class actions “translate readily to the public realm:” Public attorneys, like class counsel, have incentives to accept “quick and easy” settlements that exclude the largest possible sanctions, resolutions that might not achieve the objectives of compensation and deterrence that are in their clients’ best interest. Lemos recommends that the resolution of state suits should not preclude subsequent private actions.

Lemos next delved into the choices government actors make regarding the types of litigation to pursue. In “For-Profit Public Enforcement,” (127 *Harvard Law Review* 853-913 (2014)), Lemos and co-author Max Minzner countered the prevailing assumption that public enforcement is tied to deterrence as opposed to self-interest, pointing out that successfully pursuing large monetary awards can burnish an agency’s reputation as well as fill up its coffers. They call for “careful thinking” about the circumstances under which financial incentives can add value to public enforcement.

In “Privatizing Public Litigation” (104 *Georgetown Law Journal* 515-582 (2016)), which is excerpted on page 32, Lemos analyzes what it means for the government to be a party to litigation, asking “what might be special” about government and government attorneys. Warning that relying on private attorneys or taking private financing to pursue or defend a government claim threatens “to skew government litigation away from the public interest and toward the more narrow interest of donors,” she flags the potential differences in culture and norms between government agencies and large private law firms that could affect an attorney’s strategy and approach to a public action. This is somewhat mitigated, she acknowledges, by the trend for many lawyers to move back and forth between the private and public sectors in their careers.

A key question for Lemos concerns the extent to which the use of private attorneys in public litigation amounts to the transfer of sovereign power. “In debates about privatization, one often struggles with the question of how do we know if the government is acting,” she says. “If you have a circumstance where the action is effectively funded by private dollars and prosecuted by private lawyers but is nominally

still done in the name of the state, that strikes me as worrisome. If an action is captioned, *North Carolina v. Smith*, the state of North Carolina, acting as *parens patriae*, can do something that is effectively equivalent to a private class action in many ways, but doesn't have to jump through the procedural hoops that a private class action has to jump through. You don't want to be taking advantage of the legal doctrines that apply to the state as plaintiff when it is just a private action in disguise.

"The harder questions for me have to do with the expressive value of saying that the State of North Carolina is doing this, as opposed to some private group," she says. "My sense is that given how discretionary enforcement actions are, saying 'North Carolina thought it was important to go after this particular offense,' carries some weight. And that makes it important, I think, that the decision actually is the decision of the state and that it has run through the same sort of democratic processes that we'd expect for other decisions that are supposed to speak for the people in some way."

In another new article, "Three Models of Adjudicative Representation," (165 *University of Pennsylvania Law Review* (forthcoming)), Lemos applies the lens of political theory to different types of representation and actions — individual suits, civil suits by government, and private class actions in primarily public law litigation — and demonstrates how "different types of representation include and exclude, empower and disempower, in different ways." And with "Democratic Enforcement?" she teases out underlying theoretical questions arising from her larger body of work on enforcement, essentially asking what citizens should expect from their government when they are taking enforcement action.

Lemos anticipates continuing with her study of the similarities between enforcement and interpretive decision-making. "There is something kind of quasi-judicial about a decision that *this* wrongdoer violated *this* statute. But then there is some added decision that it's worth it to go after them. That overlap — that imperfect overlap — between enforcement and interpretation, or something more judicial, is something I'm still trying to make sense of. The more we think of it as quasi-judicial, the more we might want independence and some kind of separation between enforcement decisions and public pressures or public opinion, lobbying. And the more we think of it as just a policy act, the more we might think public opinion matters. I think we have skipped over some foundational questions.

"Enforcement is a category of government action worthy of attention in its own right," Lemos says, "in the same way that we would study the legislative process or the regulatory process or the judicial process." »

EXCERPT:

# Privatizing Public Litigation

Margaret H. Lemos

104 *Georgetown Law Journal* 515-582 (2016)

## Introduction

Public litigation is being privatized as public entities turn to private actors to perform, and sometimes to pay for, litigation on behalf of the state and federal governments. Consider the following examples:

- » The U.S. Department of Justice hires David Boies to lead antitrust litigation against the Microsoft Corporation.
- » The National Credit Union Administration (NCUA) hires two private law firms to represent it in litigation against large banks concerning toxic mortgage securities. One of those firms boasts "long-standing and continuous representation of the NCUA in various matters."
- » Multiple states hire private attorneys to represent them in litigation against tobacco companies in exchange for a portion of the proceeds.
- » After the state attorney general refuses to sue, the Nevada governor creates a "Constitution Defense Fund," supported by private donations, to pay for costs associated with prosecuting the state's challenge to the Affordable Care Act (ACA). Other states' challenges to the ACA are handled, in part, by a private firm and financed by a private lobbying group.
- » Private citizens, many from out of state, bankroll a special prosecutor's efforts to target topless bars in Memphis.
- » Ben & Jerry's ice cream company contributes \$1 from every purchase at certain locations to support the defense of Vermont's law requiring special labels for food containing genetically modified organisms. Ben & Jerry's recently committed to using non-GMO ingredients in its own products.

Though these examples are all of recent vintage, the privatization of government litigation is not new. Indeed, much of what appears as privatization today would have been taken for granted as a historical matter. Before we had a United States Department of Justice (DOJ), it was commonplace for private lawyers to handle the federal government's work. And private prosecutions were once the norm in many jurisdictions. Over time, however, our system "publicized" most litigation in the name of the government, shifting control from private actors to salaried public servants.

We are now witnessing at least a partial shift back as privatization becomes more prevalent, particularly at the state and local levels. The trend coincides with a marked rise in the visibility and ambition of state attorneys general. As government litigators aspire to do more, they are increasingly turning to private resources — both human and financial — to support their efforts.

Privatization in the litigation context also coincides with broader trends toward privatization more generally. At least since the 1980s, state and federal policymakers have embraced privatization as a way to cut costs and reduce the size of government. In the United States, privatization typically involves enlisting private actors to perform, on the government's behalf, functions that otherwise would be carried out by government employees. Less intuitively, privatization also may entail a move from public to private financing for public goods and services. Both types of privatization have been the subjects of extensive debate. On the performance side, advocates argue that outsourcing work to private firms is more efficient than relying on bloated government bureaucracies staffed by overpaid and unmotivated civil servants.

Critics question whether privatization is cheaper in practice, and contend that any efficiency gains come at an intolerable cost to democratic and programmatic accountability. As for financing, privatization's proponents argue that many government services can and should be funded individually rather than collectively — that is, via user fees and the like rather than general taxes. User fees allow governments to generate revenue while reducing taxes, and can send useful signals about the value of the services in question while ensuring that those who reap the benefits also absorb the costs. Critics worry that citizens will be unwilling or unable to bear the expense of valuable government services, particularly when nonpayers can still enjoy many of the benefits. Opponents also insist that some government goods and services are simply too fundamental to ration according to citizens' willingness and ability to pay.

The privatization of public litigation warrants a place in these debates. Privatizing government litigation promises many of the same benefits, and threatens many of the same costs, as privatization in other contexts. In a sense, the question whether to rely on private attorneys to perform the government's legal work presents the same "make or buy" dilemma that governments — and private firms — regularly face. And the question whether private actors should be permitted or required to finance government litigation presents the same tradeoffs between allocative efficiency and distributive fairness that have been aired in the commentary on user fees. Understanding these questions, not as discrete policy dilemmas but as part of the broader privatization phenomenon, helps clarify the interests at stake and suggests useful avenues for normative assessment.

As is true of privatization elsewhere, outsourcing the government's legal work may or may not be cost-effective, depending on the work in question and how the government selects and supervises private attorneys. Contracting out is easiest to defend on efficiency grounds when the government needs to expand its capacity in the short-term — to handle a temporary spike in litigation, for example, or for cases that require special expertise. Although private attorneys often have higher effective hourly rates than government attorneys, it may still be cheaper for the government to "buy" the necessary manpower on an as-needed basis than to "make" it in the form of a long-term, full-time employee. Matters are more complicated for work that recurs regularly. Here, competition is critical. In the absence of meaningful competition for government legal work, replacing government employees with private contractors may well increase the costs of public litigation.

Even if we could be sure that privatizing the performance of government litigation would be cheaper, important questions would remain. Generally speaking, outsourcing is most appealing in areas where ends matter more than means: "The more precisely a task can be specified in advance and its performance evaluated after the fact, the more certainly contractors can be made to compete. ..." Relying on private actors to perform public work becomes more problematic when objective truth is elusive, or where value judgments and discretion reign. Government litigation is nothing if not

*Privatization empowers private attorneys to exercise discretion on the public's behalf. But private attorneys may bring different incentives, and different habits of practice, to their work for the government.*

discretionary. Particularly in a system dominated by settlements and plea bargains, the choices government litigators make about what claims to pursue and what remedies to seek carry profound consequences for the "law in action." Privatization empowers private attorneys to exercise discretion on the public's behalf. But private attorneys may bring different incentives, and different habits of practice, to their work for the government. For example, private attorneys may be more likely than salaried government employees to focus on maximizing financial penalties, or on winning cases at all costs. Competition for government contracts — while critical to cost-savings — may exacerbate those incentives by encouraging private attorneys to emphasize easily quantifiable indicia of effectiveness, such as win rates or dollars recovered. The consequence is that government litigation may be changed, not just cheaper, when private attorneys are involved.

On the question of financing, the privatization literature suggests the greatest need for caution in areas marked by substantial externalities and where distributive concerns are strongest. Both sets of considerations counsel against private funding in the litigation context. Private financing threatens to skew government litigation away from the public interest and toward the more narrow interests of donors. By treating public litigation as an item up for sale, moreover, private financing diminishes the expressive value of public litigation, sapping its civic and moral import.

More broadly, both approaches to privatizing public litigation allow private actors to stand in the shoes of government, to exercise aspects of sovereign power. As such, litigation privatization triggers concerns about democratic governance that are familiar to the broader debates over the private role in government. But this particular form of privatization also raises questions unique to litigation concerning the purposes of public litigation and its relationship to purely private suits. Decades of scholarship have mapped the differences between public and private enforcement of the law. Courts and policymakers likewise distinguish between public and private litigation in countless ways, treating them as distinct categories even in areas where they overlap. The core distinctions rest on the interests served and the incentives of those who serve them: Whereas private litigation typically seeks to vindicate the interests of the parties (and their attorneys), litigation by the government is supposed to promote the public interest. Privatization upsets those

distinctions, smuggling aspects of private litigation into litigation in the government's name. It therefore pushes us to think more carefully about what we expect from government litigation and how we ought to treat it.

This Article proceeds in four parts. Part I begins by sketching the characteristic attributes of public and private litigation, then introduces the possibility of merger — instances in which private actors participate in public litigation. The discussion focuses on two types of privatization. In one, private attorneys perform legal work on behalf of the government; in the other, private actors finance government litigation. Parts II (private performance) and III (private financing) examine the benefits and risks of each approach to privatization.

The particulars vary, but the net effect of both types of privatization is the same. Privatization makes public litigation more, well, private. Private attorneys and financiers imbue public litigation with private norms and direct it toward private goals. Though that consequence is important in its own right, it also suggests some of the longer term costs of privatizing public litigation. As Part IV explains, government litigation currently offers a path around the many — and mounting — obstacles that stand in the way of private litigation. Privatization gives private interests access to that route, allowing them to make their way to court in the shoes of the government. The path may not stay open indefinitely, however. Opponents of private litigation are already expanding their focus to take in government litigants, arguing that limitations on private suits should be applied to government actions as well. To the extent that privatization blurs the lines between public and private litigation, it may also spell the end of legal rules and practices that treat government differently, cutting off access to courts for public and private interests alike. ♡

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## A variant on shareholder primacy

Steven L. Schwarcz,  
Stanley A. Star Professor of Law & Business

**S**INCE THE BEGINNING OF THE FINANCIAL CRISIS, Professor Steven Schwarcz has offered multiple legal and policy proposals aimed at solving a bedeviling problem: how to protect the public from the drastic economic harms that can be triggered by the collapse of systemically important firms, in part by curbing excessive risk-taking by managers of these companies.

In a new article, “Rethinking Corporate Governance for a Bondholder Financed, Systemically Risky World,” (58 *William & Mary Law Review* 1345-1374 (2017)), Schwarcz, the Stanley A. Star Professor of Law & Business, poses an alternative to the shareholder-primacy model of corporate governance, arguing that bondholders, who are more risk-averse, should be included in the management of businesses that are “too big to fail.” Their inclusion, in addition to reducing risk-taking that could cause systemic harm, would address two recent developments in the financial markets: Bonds have been dwarfing equity shares as the primary source of corporate financing, and bondholders increasingly trade their securities before maturity, giving them more of a vested interest in a firm’s performance.

Schwarcz, a founding director of the Duke Law Global Financial Markets Center (formerly the Global Capital Markets Center) and senior fellow of the Centre for International Governance Innovation, offers two ways of integrating bondholders into corporate governance that shouldn’t impede legitimate profit-making: a direct approach in which bondholders and shareholders share governance and an indirect approach in which managers have a duty to both bondholders and shareholders. “Both approaches should not only have lower costs but also more effectively reduce systemic risk than post-crisis regulatory experiments to try to harness bondholder risk aversion through the forced issuance of contingent capital,” he writes in the following excerpt. »

EXCERPT:

# Rethinking Corporate Governance for a Bondholder Financed, Systemically Risky World

Steven L. Schwarcz

58 *William & Mary Law Review* 1345-1374 (2017)

## A. The Sharing-Governance Approach

The precedents for sharing governance focus on allowing different constituencies — which in this article would be bondholders and shareholders — to elect management representatives. The constituencies would thus share governance by communicating their interests to their representatives.

In the United States, the most applicable precedent for minority sharing of governance is the preferred shareholder model, discussed below in Part II.A. Preferred shareholders who are not paid scheduled dividends have the right to elect one or more directors to the board. Outside the United States, the most applicable precedent appears to be the German co-determination model, discussed in Part II.A, in which employees have the right to elect certain directors to the supervisory board.

### 1. The Preferred Shareholder Model

Preferred shares, sometimes called “compromise securities” because they have both equity and debt characteristics, are contractually based shares that usually have specified rates of return and, in a liquidation of the firm, have priority of payment over common shares of stock. If expressed in their contract with the firm, preferred shareholders enjoy contingent voting rights to elect a minority of directors if the firm fails to pay dividends that achieve the specified rate of return.

Because of that minority representation, preferred shareholders “rarely prevail over common shareholders” in a dispute. Nonetheless, the diversity provided by preferred shareholder representation on the board, just like that which could be provided by bondholder representation on the board, can provide perspectives that the board will find valuable. In a deliberative governance process, minority representatives may persuade others to change their minds, thus resulting in better long-term decision making.

### 2. The German Co-Determination Model

Employees in all large German firms have the right to elect half of the members of their respective supervisory board of directors. Shareholders maintain a voting majority, however, because the

chairman of the supervisory board, who is elected by and accountable to shareholders, has the decisive vote in the case of a deadlock.

... [T]he actual impact of employee representation on corporate decision-making is unclear. Many have criticized employee representation as being inefficient, potentially paralyzing the board’s decision-making. A leading comparative law scholar counters, however, that although co-determination “may delay such decisions, it does not prevent them.” Moreover, co-determination is believed to help curb corporate risk-taking because, in contrast to shareholder focus on dividends and profit, employees are concerned with their firm’s survival in order to protect their employment.

### 3. Assessment of the Models for Sharing Governance

The preferred shareholder model and the German co-determination model face two main criticisms. First, minority voting power may constrain the minority representatives to merely consultative roles. Second, the misaligned interests of heterogeneous management representation creates inefficiencies. The sharing-governance approach could be designed to avoid both these criticisms.

Although bondholders in the sharing-governance approach would elect only a minority of management, the bondholders’ representatives need not, and in the circumstances explained below, should not, be constrained to a merely consultative role. Instead, management decisions that could significantly harm bondholders — a determination that could be made on a case-by-case basis by the bondholders’ representatives — should require some form of supermajority voting. For example, consent of at least one or more of the bondholders’ representatives should be needed to approve a transaction that, if unsuccessful, would be likely to cause the firm’s bond rating to be downgraded. Absent this requirement for supermajority voting, the shareholders’ majority representatives should be able to outvote the bondholders’ minority representatives, thereby avoiding a paralysis of board decision-making.

## B. The Dual-Duty Approach

Next I will examine whether managers should have a duty to both bondholders and shareholders. Because that duty would be filtered

through managerial discretion, it would be less direct than if bondholders actually communicated their interests to representatives.

The most applicable precedent for a dual-duty approach is the insolvency model, discussed below in Part II.B. Managers of insolvent, and possibly also of contingently insolvent, firms owe a duty not merely to shareholders but also to creditors. A related precedent, discussed in Part II.B, is the “public governance” dual duty to both shareholders and the public, which I have separately argued should apply to managers of systemically important firms.

### **1. The Insolvency Model**

Managers of a solvent firm owe a fiduciary duty primarily to shareholders, as the firm’s residual claimants. When a firm becomes insolvent, managers switch their primary duty to creditors, who become the firm’s senior residual claimants. The insolvency model becomes more relevant to analyzing this Article’s dual-duty approach, however, when a firm is not actually insolvent but merely in the so-called “vicinity of insolvency.” The firm’s managers are arguably then required to consider a “community of interests,” which includes both the shareholders and creditors. Managers are not required to prioritize one group over the other; instead, they must maximize value for the entire corporate enterprise. That approach to balancing potentially conflicting shareholder and creditor interests parallels this Article’s balancing of potentially conflicting shareholder and bondholder interests.

In that context, the insolvency model reveals that a dual duty poses two critical questions: When does the duty arise? How do managers balance the duty in their decision-making? In the insolvency context, the duty would arise when a firm enters the vicinity of insolvency because that is when creditors could be impacted. In the context of this Article’s dual-duty approach, the duty should arise, by analogy, when a management decision could significantly harm bondholders — the same test that would trigger a supermajority voting requirement under the sharing-governance approach. In the context of the sharing-governance approach, this Article has proposed that the bondholders’ representatives would determine, on a case-by-case basis, when that test is triggered. Because the dual-duty approach does not contemplate bondholders’ representatives per se, any manager subject to the dual duty should have the right to determine (again, on a case-by-case basis) when the test is triggered.

The question of how managers should balance a dual duty in their decision-making remains unsettled in the insolvency context. Normatively, however, I have argued that managers of a firm in the vicinity of insolvency should protect creditors from harm unless the overall benefit to shareholders is expected to considerably outweigh the harm (or there is some other compelling reason to favor shareholders). This balancing also follows a weak form of the precautionary principle, which requires “a margin of safety” to demonstrate that a potentially systemically risky activity is justified. ...

### **2. The “Public Governance” Dual Duty**

As mentioned, managers of systemically important firms ideally should have a dual duty: to shareholders to maximize profits, and to the public to control systemic externalities. This public governance dual duty (hereinafter, “public governance” duty) is less specifically applicable to this Article than the insolvency model

because bondholders, like creditors in the insolvency model, are identifiable stakeholders, whereas the public is a more diffuse concept of a stakeholder. Nonetheless, certain practical questions that are engaged in discussing the public governance duty can inform this Article’s dual-duty approach.

For example, how should a dual duty be created? In the public governance duty context, courts could judicially create such a duty or legislatures could amend corporation laws to require such a duty. To the extent the dual-duty approach is legislated, that could (in the United States) be done “either by state legislatures (especially the Delaware legislature, because most domestic firms are incorporated under Delaware law) or by the U.S. Congress.” ... [T]o the extent that dual duty is imposed to reduce systemic risk, it addresses a national problem. The “internalization principle” recognizes that regulatory responsibilities should generally be assigned to the unit of government that best internalizes the full costs of the underlying regulated activity. That would be Congress.

Another relevant question ... is the extent to which managers performing that duty should have the protection of the business judgment rule as a defense to liability. Under the business judgment rule, managers making business decisions, including risk-taking decisions, are protected from personal liability for negligent decisions made in good faith and without conflicts of interest — and in some articulations of the business judgment rule, also without gross negligence. Even in a public governance duty context, I concluded that managers should be protected by the business judgment rule, so as not to discourage the best people from serving as managers and to avoid requiring courts to exercise inappropriate discretion, among other reasons. I nonetheless questioned whether that protection should be modestly weakened because the interest of a manager who holds significant shares or interests in shares, or whose compensation or retention is dependent on share price, has a conflict of interest in favor of the firm’s shareholders. ...

These answers — that the dual-duty approach might need to be created on a federal level and that managers performing that duty should have the protection of the (theoretically but not practically modified) business judgment rule — should also inform the sharing-governance approach.

### **C. Comparing the Approaches**

Finally, compare the sharing-governance approach with the dual-duty approach. The sharing-governance approach would offer bondholders a more direct voice in management than the dual-duty approach. Although that voice would usually be a minority representation capable of being outvoted, it would have veto power when a management decision could significantly harm bondholders. Under the dual-duty approach, all managers would have a duty to consider bondholder interests. Although the primary duty of managers would usually be to shareholders, that duty would shift (as in the voting-power shift under the sharing-governance approach) when a management decision could significantly harm bondholders.

Both approaches thus face the same practical threshold question: When could a management decision significantly harm bondholders? Under the sharing-governance approach, the bondholders’ representatives would make that determination. Under the dual-duty approach, any manager could make that determination. In making

their determination, the relevant managers might consider, for example, whether management is contemplating a transaction that could be profitable but, if unsuccessful, would be likely to cause the firm's bond rating to be downgraded. In analyzing that, those managers would presumably take into account rating-agency criteria for downgrading bond ratings. So long as they use at least slight care in this process, the managers should be protected by the business judgment rule.

Once it is determined that a management decision could significantly harm bondholders, the sharing-governance approach would require supermajority voting in which the bondholder minority representatives could exercise veto power. For those same management decisions, the dual-duty approach would require managers to favor bondholders unless the overall benefit to shareholders is expected to considerably outweigh the harm to bondholders (or there is some other compelling reason to favor shareholders over bondholders). That balancing under the dual-duty approach would require managers to exercise discretion, which can create uncertainty. In exercising that discretion, however, managers would again be protected by the business judgment rule so long as they use at least slight care.

Both the sharing-governance approach and the dual-duty approach should therefore be feasible. Because the sharing-governance approach would be simpler and involve less managerial discretion, it would appear to be procedurally preferable. On the other hand, the dual-duty approach might provide more flexibility for profit-making because, as articulated, it would allow a firm to engage in a project that could significantly harm bondholders so long as the overall benefit to shareholders is expected to considerably outweigh the harm to bondholders. ♡

Reprinted with permission from: Steven L. Schwarcz, Rethinking Corporate Governance for a Bondholder Financed, Systemically Risky World, 58 WILLIAM & MARY LAW REVIEW 1345-1374 (2017) (Footnotes have been removed.) The full article is available at [scholarship.law.wm.edu/wmlr/vol58/iss4/5/](http://scholarship.law.wm.edu/wmlr/vol58/iss4/5/).



## Reevaluating thresholds for reversal

Lisa Kern Griffin, Carroll-Simon Professor of Law

**A**LTHOUGH ERROR IN CRIMINAL ADJUDICATION is now understood to be often rooted in cognitive failings, Professor Lisa Kern Griffin posits in a new article that some mechanisms available to appellate courts for error correction impede effective scrutiny of convictions.

"Standards that require a retrospective showing of materiality, prejudice, or harm turn on what a judge imagines would have happened at trial under different circumstances," she writes in "Criminal Adjudication, Error Correction, and Hindsight Blind Spots," (73 *Washington & Lee Law Review* 165-215 (2016)). "The interactive nature of the fact-finding process, however, means that the effect of error can rarely be assessed with confidence."

A former federal prosecutor who joined the Duke faculty in 2008, Griffin is a scholar of evidence, constitutional criminal procedure, and federal criminal justice policy. Her recent work concerns the status and significance of silence in criminal investigations, the relationship between constructing narratives and achieving factual accuracy in the courtroom, the criminalization of dishonesty in legal institutions and the political process, and the impact of popular culture about the criminal justice system.

In her article, Griffin argues that the problems with hindsight standards are particularly evident in the rules concerning the discovery of exculpatory evidence, the adequacy of defense counsel, and the harmfulness of erroneous rulings at trial, because they present "a barrier between the mechanism for evaluation and the source of the error." She concludes that "reviewing courts should consider the trial that actually occurred rather than what 'might have been.'" »

EXCERPT:

# Criminal Adjudication, Error Correction, and Hindsight Blind Spots

Lisa Kern Griffin

73 *Washington & Lee Law Review* 165-215 (2016)

## II. Finding the Blind Spot in Hindsight

Even as the incarceration rate attracts bipartisan attention, and scrutiny of investigative practices has given rise to conviction integrity units in prosecutors' offices, the role of judges considering trial errors continues to contract because of habeas barriers and hindsight standards. Two developments in the scholarship on criminal trials have brought into sharp relief the problems with hindsight and this missed opportunity for more rigorous review: insights from cognitive psychology about the way in which evidence is received, and new data on wrongful convictions. Jurors reach verdicts according to a complex process, and they respond to evidence in part through unconscious biases that elide analysis. Moreover, the strength of any piece of evidence cannot be evaluated in isolation because its weight and meaning arise from its relationship to other evidence. A clearer understanding of the way in which fact-finders make decisions reveals the impossibility of correctly evaluating a completed trial in hindsight. At the same time, greater awareness of the distribution of error at trial underscores the need for a tighter safety net to catch prosecutors' discovery violations, ineffective assistance of counsel, and wrongfully admitted evidence.

### A. Unpredictable Evidentiary Interactions

Experimental psychology has established that fact-finders do not engage in an atomistic weighing of probabilities at trial; they react to the evidence as a whole, in an integrated and non-linear process. Trials involve partial stories, intricate constellations of facts dim and bright, complex decision-making by counsel about strategy and presentation, and testimony that flows into other pieces of evidence the moment it emerges. Preexisting narrative constructs further affect how fact-finders receive and process information. Verdicts are thus an interactive process, in which pieces of evidence alter each other when they come together, and fact-finders themselves can change course through deliberation with other jurors.

As the Supreme Court has recognized, the sum of all of the evidence and argument at trial creates a new whole. In *Old Chief v. United States*, the Court reasoned that the government could present a narrative case "to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." And in *Bruton v. United States*, the Court stated that jurors cannot "segregate evidence into separate intellectual boxes."

Given the interdependence of evidence, it is both difficult to understand what actually happened at a trial and all but impossible to envision what *might* have happened at some slightly different trial. The "legal truth" might not have been a guilty verdict with

*... [H]indsight blindness should not preclude courts from engaging in guided speculation about the impact of errors. ... As applied, the current standards are afflicted by hindsight blindness that can preclude the necessary holistic inquiry.*

additional impeachment material on key prosecution witnesses, a superior defense lawyer, or the exclusion of unconstitutionally obtained evidence like a coerced confession. It is hard to say. One cannot step in the same river twice. And courts cannot accurately reconstruct or redirect the ebb and flow of a completed trial.

Yet that reconstruction is precisely what hindsight standards demand: a clear vision of an error-free trial that did not occur. On direct appeal, or on state or federal habeas, judges are asked to imagine a different trial than the one that took place. They must then characterize the effect that the other, fictional trial would have had on the initial fact-finders. The difficulty — if not impossibility — of this task is compounded by the simple fact that trials tend to occur in close cases with complex fact-finding. When reviewing courts apply standards to those trials that require hindsight, many errors evade scrutiny.

### B. Bias v. Blindness

This blind spot presents different issues than the well-documented problem of "hindsight bias." Hindsight bias makes past events seem inevitable and clearly predictable after they have actually unfolded. Decision-makers cannot suppress the influence of known results on judgments but remain largely unaware that outcome knowledge has altered their perception. Memory is a dynamic process, and awareness of a result highlights evidence and information consistent with that result, which makes the outcome appear much more likely at the earlier point in time. Belief perseverance can then make judges doubt the significance of facts that conflict



with the status quo of a conviction. This bias in favor of the known outcome partially explains the durability of wrongful convictions, sometimes even after new evidence like DNA exonerates a defendant. In a broader sense, the confirmatory impulse known as hindsight bias “leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.”

Some legal judgments already recognize this hindsight danger and reflect adjustments for the potential bias. This explains why, for example, after-acquired information is generally barred from liability determinations. And it also figures in the assessment of whether an unnecessarily suggestive identification process infected an eyewitness’s testimony. The phenomenon of 20/20 hindsight of course relates as well to failures to overturn error. But even though confirmatory bias obstructs meaningful review of inadequacies in the criminal justice process, it is not the primary obstacle.

Blindness rather than bias may be the most significant impediment to review. When courts must determine whether a decision-making process was sound despite an exposed error, the hindsight they employ appears to offer a clear view but too often is clouded. Courts can only speculate about the effect of error, and it turns out that many errors they have deemed trivial may be contributing to wrongful convictions.

### C. The Error-Correction Imperative

Empirical evidence now reveals that hindsight standards jeopardize not just the legitimacy of the finding of legal truth but the accuracy of the “factual truth” as well. Until recently, the Supreme Court only rarely expressed any doubt “that a person awarded the constitutional protections and found guilty by a jury of peers might be anything but factually guilty.” But in recent scholarship made possible by DNA exonerations, the analysis of wrongful convictions has established a significant population of “known innocents” in the criminal justice system. That development has shifted the criminal procedure paradigm in terms of the primacy of accuracy. Error leading to wrongful convictions is now real rather than theoretical, and the debate no longer involves speculation about the tolerable ratio of guilty acquittals to unjust convictions.

Moreover, accounts of wrongful convictions increasingly reach popular culture, and the criminal justice system’s “potential to convict and punish innocent people” has entered the broader public consciousness. The recent phenomenon of the “Serial” podcast, for example, alerted millions of listeners to the sometimes murky narrative that emerges in a criminal trial and the difficult process of pairing factual and legal truth.

Though reliability has been called the “largely forgotten purpose of the rules,” the confirmed incidence of “actual innocence” demands consideration of how particular practices might relate to correct outcomes. The actual rate of false convictions remains unknowable. DNA identification is not available in every case, and many serious crimes do not involve the collection of DNA evidence. But it is now apparent that more (and more egregious)

errors occur in the criminal justice system than previously thought. The National Registry of Exonerations documents 1,733 wrongful convictions that have been exposed to date. There have been 330 exonerations obtained through post-conviction DNA testing, including twenty defendants who had been sentenced to death. Further, despite rhetoric about the potential costs of wrongful acquittals stemming from more rigorous procedures, there is no identifiable population of “known guiltyies” who are wrongly acquitted to compare to the growing dataset containing known innocents. As Brandon Garrett has explained, “[C]onstitutional error no longer appears as a procedural technicality asserted by a probably guilty defendant.”

Accuracy, of course, is not the sole purpose or single-minded focus of criminal adjudication. It serves other goals and aspirations, including procedural fairness, individual autonomy, privacy and privileged relationships, and even the correction of some power disparities between the state and citizens. The “new reliability” scholarship, however, has brought correct outcomes to the forefront. It inspires discussion of best practices for investigators, underscores the scientific shortcomings of some common forensic analyses, and exposes the informational and resource asymmetries that can preclude true adversarial testing.

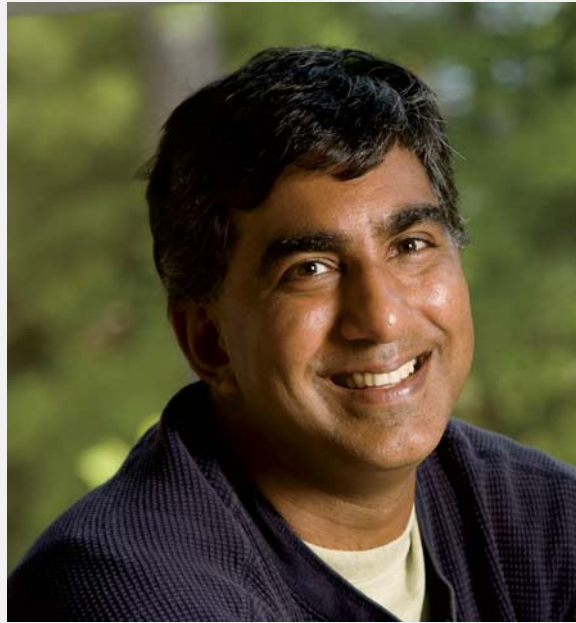
Yet the renewed imperative to achieve accurate results seems at odds with the limited avenues for error correction at later stages of criminal adjudication. Although *Brady* and *Strickland* claims of error were designed to trigger reversal only in a narrow band of cases, they were not intended to prevent any review at all. To be sure, there is a “strong aversion of appellate and post-conviction courts to intervene in factual determinations made at the trial level,” but the rules have no force if frontline institutional actors know that conduct is *completely* insulated from review. The understanding that once error occurs, it will rarely be rectified, has led to the recent establishment of conviction integrity units to review potential errors, and those reviews have in turn informed investigative and prosecutorial tactics in ongoing investigations.

Nonetheless, executive self-correction still happens infrequently, and hindsight blindness should not preclude courts from engaging in guided speculation about the impact of errors. Reforms to date have focused largely on investigators and prosecutors rather than reviewing courts. Yet there are now hundreds of cases that reveal the relationship between errors that were not fully assessed and persistent false convictions. As applied, the current standards are afflicted by hindsight blindness that can preclude the necessary holistic inquiry. And this is especially concerning when the errors that appellate courts are weighing involve practices that have long been understood as related to accurate adjudication, such as the discovery of exculpatory material or the adequacy of defense counsel. ♣

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Joseph Blocher



Mitu Gulati

## Can financial incentives help stem the tide of refugees?

Joseph Blocher, Professor of Law  
Mitu Gulati, Professor of Law

**R**ECENT YEARS HAVE SEEN HUMAN MIGRATIONS almost unprecedented in scale as millions have sought refuge from seemingly intractable conflicts in such places as Syria, Sudan, and Somalia, and ethnic persecution like that faced by the Muslim Rohingya minority of Myanmar. With refugees now facing intense backlash against resettlement in many countries, Professors Joseph Blocher and Mitu Gulati suggest that international law and economics could be harnessed both to deter countries from creating migrants and encourage others to provide sanctuary on a temporary or permanent basis.

In "Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis" (48.1 *Columbia Human Rights Law Review* (2016)), Blocher and Gulati propose the establishment and international recognition of financial claims on behalf of persecuted and displaced groups that would be enforceable against their countries of origin and transferable to host nations to help offset the costs of offering refuge. "The new host nations could then seek to enforce the claims directly, use them to offset any debts that they have against the refugee-creating nation, or sell the debt to a third party such as a hedge fund specializing in the enforcement of sov-

ereign debts," they write. "This mechanism would give bad countries another reason not to create refugees, and good countries another reason to accept them." Giving refugees an asset they can trade to potential host countries creates a link between them, write Blocher and Gulati.

Blocher's principal academic interests include federal and state constitutional law, the First and Second Amendments, capital punishment, and property. He is the co-author of *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (NYU Press, 2017, with Mark V. Tushnet and Alan K. Chen), and in 2016 he co-led the interdisciplinary Duke Project on Law and Markets. Gulati's wide-ranging scholarship addresses matters of sovereign and international debt financing, odious debt, contract design, and critical race theory, among others. He is a member of the editorial board of the *Capital Markets Law Journal*.

"Competing for Refugees," which concludes with the outline of a proposal based on the specific plight of the Rohingya, is one of several articles in which Blocher and Gulati propose applying market-based strategies to persistent international problems stemming from misplaced borders and poor governance. »

EXCERPT:

# Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis

Joseph Blocher and Mitu Gulati

48.1 *Columbia Human Rights Law Review* (2016)

## B. The Remedy

Where a violation of international law has been established, the next question is whether that violation can be translated into a legal right to compensation for refugees.

### 1. The Legality of Compensation

Under the current system, even to the degree that a breach of international law is recognized, it is host nations — not the country of origin — that end up providing a remedy, in the form of protection for refugees. Morally and politically, this is backwards. While nations sometimes have a moral or legal duty to remedy harms they did not cause, that should not absolve the initial wrongdoer. Of course, the opposite is also true: the inability or unwillingness of a persecuting nation to make things right does not absolve other nations of their duty to help. The question for our purposes is who has the primary duty to *pay*. And as a legal matter, a wide range of international sources (again, more than enough to satisfy a finding of [customary international law]) suggest that states that create a refugee problem are responsible for the costs.

Such sources are at least as old as international refugee law itself. For example, the 1948 Progress Report of the United Nations Mediator on Palestine provided that “payment of adequate compensation for the property of those choosing not to return[] should be supervised and assisted by the United Nations conciliation commission,” a return-or-pay theme that would be echoed in later documents, including the Bosnian accords. In 1981, the General Assembly “[e]mphasize[d] the right of refugees to return to their homes in their homelands and reaffirm[ed] the right, as contained in its previous resolutions, of those who do not wish to return to receive adequate compensation.” In more general terms, Article 2(3) of the International Covenant on Civil and Political Rights guarantees a right to remedy, and Article 14(6) says that a person who has been the victim of a miscarriage of justice “shall be compensated according to law.”

A related line of argument under international law suggests that countries of origin owe compensation not only to the refugees they create, but to the nations that — because of practical necessity, as well as their own legal and moral obligations — must house them. By pushing refugees into other nations, the argument goes, countries of origins violate the sovereignty of those other nations by forcing them to accept people within their borders (and, consequently, to pay for them).

This theory of liability was articulated as early as 1891, when U.S. President Benjamin Harrison claimed:

The banishment, whether by direct decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an *order* to enter another — some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for the remonstrances which we have presented to Russia. ...

The logic behind such country-to-country claims for compensation has been accepted in other legal contexts. One example is the famous *Trail Smelter* arbitration, which involved pollution across borders but has been used (somewhat apologetically) to analyze the refugee problem as well. In *Trail Smelter*, the tribunal held that

under the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Damages were awarded as a result of the breach.

The complication is sovereign immunity — a state might be in breach of its obligations and yet immune to claims for money damages. As noted above, state sovereignty and related concepts like immunity have long been serious obstacles to the enforcement of international refugee law. This point was recently driven home by the ICJ’s decision in the *Jurisdictional Immunities* case, which held that Germany might have violated international law (even *jus cogens*) through the actions of its military during World War II, but that no remedy was available to the plaintiffs in the domestic courts of Italy or Greece. If the country being sued is one that has consented (via a treaty) to the jurisdiction of an international tribunal that has been set up to tackle these issues, sovereign immunity is not an issue since the country has waived it for conflicts within the treaty’s scope. But if not, or if no such tribunal exists, then suit is likely to be brought in a domestic court and the question of immunity will be central, as it was in the *Jurisdictional Immunities* litigation.

*Under the current system, even to the degree that a breach of international law is recognized, it is host nations — not the country of origin — that end up providing a remedy, in the form of protection for refugees. Morally and politically, this is backwards. ... [A]s a legal matter, a wide range of international sources ... suggest that states that create a refugee problem are responsible for the costs.*

The possible assertion of sovereign immunity presents an obstacle, but there is nothing essential or inevitable about it. After all, sovereignty and sovereign immunity are legal fictions that are given by the international legal community to groups of people with territory so as to enable the functioning of the international legal system. When a sovereign invoking the power of that legal fiction uses it in a way that undermines the system, the benefit of the fiction can (and perhaps should) be forfeited. In some ways, this seems to be happening already.

After the failure of the international community to prevent the horrors of World War II, and in light of the dramatic increase in cross-border commerce over the past few decades, sovereignty's grip has weakened in at least two ways. First, on the human rights front, international law now contains more significant prohibitions against countries committing human rights abuses against their citizens, including prohibitions on genocide and torture. There is also growing support for the position that countries cannot rely on sovereignty to shield themselves from remedies for these violations. Indeed, some of these basic human rights rules fall under the rubric of what are called *jus cogens* norms, which are treated as more fundamental than sovereignty itself.

Consider the growing support for two remedial principles that would alter the traditional conception of sovereignty in cases of serious human rights violations. First, under the principle of remedial secession, regions subject to widespread humanitarian abuse are entitled to secede from their nations. Second, and along the same lines, the "Responsibility to Protect" would *require* the international community to intervene in cases of severe oppression, despite the territorial integrity of the oppressive nation — one recent proposal extends the Responsibility to the refugee context. Acceptance of these principles is far from universal and their implementation is far from perfect. The point is simply that sovereignty is not absolute, and that abuse of one's own citizens can be a justification for removing the entitlements that sovereign status brings with it.

A case can be made that international law does not recognize sovereign immunity as a defense to claims of compensation for the kinds of violations described here. The Declaration of Human Rights, for example, states that every person has "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law." Scholars have noted that the principle of compensation has "developed and, arguably, [is] implicit in conventions such as the Hague Convention IV, Respecting the Laws and Customs of War on Land and Annexed Regulations, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War."

These are not simply abstract legal principles; nations have claimed (and occasionally succeeded in obtaining) such compensation in the past. The U.S. claimed compensation from Russia based on Russian persecution of Jews in the late 1800s; India did likewise with Pakistan and refugees from Bangladesh in the 1970s. Along these lines, the International Law Association's 1990 Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum notes multiple cases where nations paid compensation for creating refugees or their equivalent, the most prominent being the payments that were made by the German government to the state of Israel for the resettlement of refugees after World War II.

A critic could argue that many of these are instances where the country paying the reparations did so out of a sense of moral obligation rather than legal obligation. This is a fair point. The compensation scheme we have in mind would arguably require a change in international law by making such payments mandatory. Our point here is to show that it would not be a wholesale change. We envision developing the evidence of voluntary practice and of aspirational norms into a doctrine of CIL, as is the case in so many other areas of international law.

The second major set of changes in the traditional conception of sovereignty comes in the commercial arena. Countries engaging in cross-border commercial transactions are deemed to have waived their immunity to suit in foreign courts. When a sovereign uses the power of that legal fiction in a fashion that undermines the legal system, it should no longer be entitled to it. This was, after all, the basic logic behind the shift from absolute sovereign immunity to restrictive immunity in international law. Restrictive immunity came into being as a doctrine during the Cold War era because sovereigns were doing business as private actors (usually via state-owned firms from socialist nations) and then trying to claim sovereign immunity when some counterparty pursued a claim of damages against them. This is also what we see happening in sovereign veil-piercing cases where a sovereign in default might be trying to do business through a subsidiary so as to avoid exposing its assets.

Our goal is to take these two developments — the erosion of sovereignty in cases involving human rights violations, and waivers of sovereign immunity in international markets — and marry them in a way that would help refugees. ♣

Reprinted with permission from: Joseph Blocher and Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48.1 COLUMBIA HUMAN RIGHTS LAW REVIEW (2016) (Footnotes have been removed.)



## Should public companies spend more on counsel?

Elisabeth de Fontenay, Associate Professor of Law

**I**N THE WAKE OF THE GLOBAL FINANCIAL CRISIS, corporations took myriad cost-cutting measures, including ones designed to reduce their legal expenses. In many cases they demanded fee reductions from outside counsel or restructured their approaches to retaining firms.

Professor Elisabeth de Fontenay, a scholar of corporate law, finance, and financial institutions, has been investigating the underlying costs of some of these choices. In “Law Firm Selection and the Value of Transactional Lawyering,” (41 *Journal of Corporation Law* 393-430 (2015)), she argued that in major corporate transactions, higher-priced “elite” law firms often bring unique value and significant bargaining advantages to their clients through their repeated exposure to similar deals. And in a new article, “Agency Costs in Law-Firm Selection: Are Companies Under-Spending on Counsel?,” (11 *Capital Markets Law Journal*, 486-509 (2016)), she suggests that public companies’ tendency to be thrifty in choosing firms to retain for their financing transactions may result in less effective representation.

Parsing data derived from a large sample of U.S. syndicated loans, de Fontenay constructed two proxy metrics for analyzing law-firm quality: rankings based on market share, to capture law firms’ experience with the applicable types of transaction, and rankings based on reputation among market participants. She observes that U.S. public companies

routinely select lower-ranked firms to handle financing transactions than do private equity-owned companies that might be getting better terms on comparable deals. Illustrating her argument with case studies from four financings, the article offers a number of possible explanations for this trend.

“Due to agency and influence costs, the general counsel of large, public companies arguably internalize the costs of their companies’ choice of transactional counsel less than do private equity firms,” which can prompt them to underspend, she writes. “Public-company general counsels act within large, bureaucratic organizations, and have conflicting allegiances to shareholders, management, and their in-house staff. Large corporations are by all accounts intensely political environments, and we should not be surprised that, like all other corporate management positions, the general counsel role engenders agency and influence costs.”

de Fontenay, who specialized in mergers and acquisitions, debt financing, and private investment funds in practice prior to entering academia, suggests further empirical study of law-firm selection is warranted. But, she argues, public companies should consider using elite finance counsel on major loans: “While the recent focus on legal fees is both timely and advisable, it should not be understood to justify hiring lower-quality counsel as a rule.” »

EXCERPT:

# Agency Costs in Law-Firm Selection: Are Companies Under-Spending on Counsel?

Elisabeth de Fontenay

11 *Capital Markets Law Journal* 486-509 (2016)

## Introduction

Corporate clients select their law firms for myriad reasons, some of which are likely to be value-maximizing, and some of which are not. The economic stakes are high: to the extent that clients fail to make first-best decisions in hiring counsel, they may derive needlessly poor outcomes from the legal services that they purchase, while law firms earn large rents at their clients' expense. Yet because we lack straightforward measures of the quality of law firms' output, we are generally left either to assume that clients choose their counsel rationally or to suspect that they do not, depending solely on our priors about the efficiency of markets.

This article takes an indirect tack in broaching the problem. It begins with a more readily observable inquiry — whether different types of corporate clients select different quality counsel for the very same work. If so, we have evidence that, at the very least, law-firm selection is non-random. Further, we will be left with a far simpler task than assessing the efficiency of law firm selection in general. The set of plausible factors driving a discrepancy in choice of counsel between different types of clients is likely to be comparatively small. Once identified, these factors can be classified according to whether they are likely to be value-maximizing for the client, providing narrower testable hypotheses for future work.

This article focuses on two types of clients having very different goals and governance, but with the financial means to select among a wide range of law firms: i) large private equity firms and ii) major public companies. Given their prominence in large financings and acquisitions, private equity firms have increasingly captured the time and attention of elite law firms in the USA and abroad. Private equity firms tend to be leanly staffed and thus to rely heavily on outside counsel. Large public companies, by contrast, may have large teams of in-house lawyers and are therefore less reliant on outside counsel for certain types of work. These and other differences between the two may manifest in different preferences for the quality of outside counsel that they select.

Various theories have been advanced for the value added by lawyers in corporate transactions. Gilson (1984) describes transaction-

al lawyers as 'transaction-cost engineers' who, even in the absence of regulation, can increase the transaction value by structuring the transaction and crafting contract terms so as to minimize the parties' aggregate transaction costs (including in particular their information costs). Kraakman and others suggest that law firms act as *reputational intermediaries* in corporate transactions: their reputation plays a certification role that allows parties to reach an agreement at lower cost. Still others argue that transactional lawyers primarily serve as *regulatory experts*. When the focus narrows to law firms with high-market-share transactional practices, their knowledge of the current 'market' terms for a particular type of transaction can also create value. As *market information experts*, they should be able to negotiate transaction terms that yield more transaction surplus for their clients.

Using a large sample of syndicated loan transactions, I find that private equity-owned companies are substantially more likely to engage top-ranked borrower's counsel than are their public-company counterparts, controlling for various loan characteristics. Why might private equity sponsors be more willing to pay for elite law firms than much larger organizations such as Fortune 500 companies, for the very same types of transactions? Conversely, what explains the relative reticence of major corporations to engage top-tier law firms?

In considering these questions, we first observe that private equity firms are relatively well incentivized to select counsel for their portfolio companies that maximizes their expected value from the transaction. Private equity investments are typically highly leveraged, meaning that any improvement in transaction terms that counsel can obtain results in a relatively larger economic return. Further, private equity sponsors benefit more directly from such increased returns than do the public-company agents — typically, general counsels — responsible for selecting outside counsel. Private equity sponsors commonly receive 20 per cent of the profits from their portfolio-company transactions (the 'carry'), which is then shared among a relatively small number of individuals. Such high-powered incentives to maximize transaction value

... [T]here are reasons to doubt whether public-company general counsels optimally select among law firms in the first instance. Particularly for one-off transactions, general counsels may not be correctly incentivized to make value-maximizing choices. Information, agency, and influence costs within public companies may drive general counsels to steer transactional work to cheaper firms or to in-house counsel, even when doing so is not in shareholders' best interests.

contrast with the relatively low-powered incentives faced by public company general counsels.

Not only are private equity firms better incentivized to select counsel optimally, they are arguably better able to do so. As sophisticated, repeat players with respect to leveraged acquisitions, they can benchmark their outside counsel's performance across a sizeable volume of transactions. Thus, overall, private equity firms internalize both the costs (higher legal fees) and the benefits (the expectation of a better economic deal) of hiring top-tier law firms relatively well. From the outset, then, their revealed preference for elite counsel suggests that it is likely to be value-maximizing.

The picture for public companies is murkier. Major public companies face a classic 'make-or-buy' decision when it comes to transactional work: they can engage a law firm or rely on in-house counsel. Yet, framing the make-or-buy decision as a binary choice is misleading in this context. In practice, the difficulty lies in selecting from a wide range in quality of outside counsel, once the decision to 'buy' has been made. This article's empirical result raises the possibility that public companies are selecting an inefficiently low quality of legal work for their transactions. Stated differently, a general counsel's bias toward 'making' legal work in-house may manifest as a tendency not

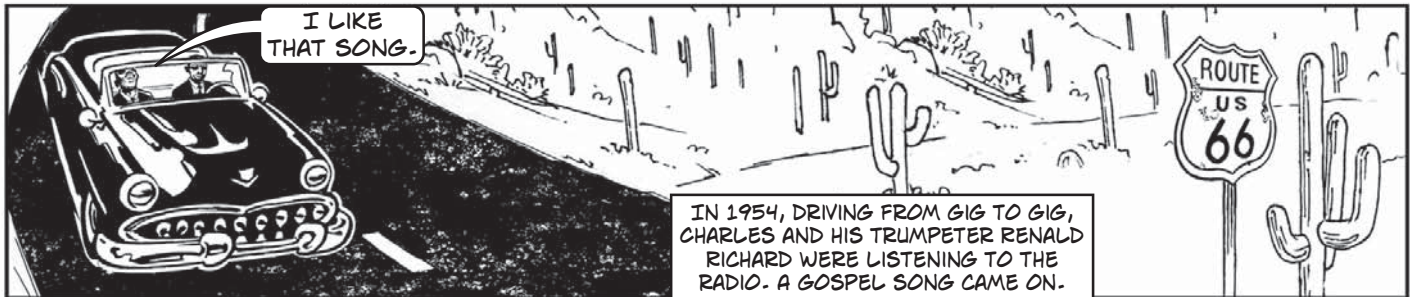
only to forgo (or under-utilize) outside counsel for certain work, but also to select lower-quality outside counsel than is optimal for the company.

To be sure, in-house counsel at public companies can help monitor outside law firms' work, thus potentially increasing the value that outside counsel provides *once a law firm has been engaged*. Yet there are reasons to doubt whether public-company general counsels optimally select among law firms in the first instance. Particularly for one-off transactions, general counsels may not be correctly incentivized to make value-maximizing choices. Information, agency, and influence costs within public companies may drive general counsels to steer transactional work to cheaper firms or to in-house counsel, even when doing so is not in shareholders' best interests. This raises the surprising possibility that, contrary to the prevailing view, major U.S. public companies may in fact be under-spending on legal services. ¶

Reprinted with permission from: Elisabeth de Fontenay, Agency Costs in Law-Firm Selection: Are Companies Under-Spending on Counsel? 11 CAPITAL MARKETS LAW JOURNAL 486-509 (2016) (Footnotes have been removed.)

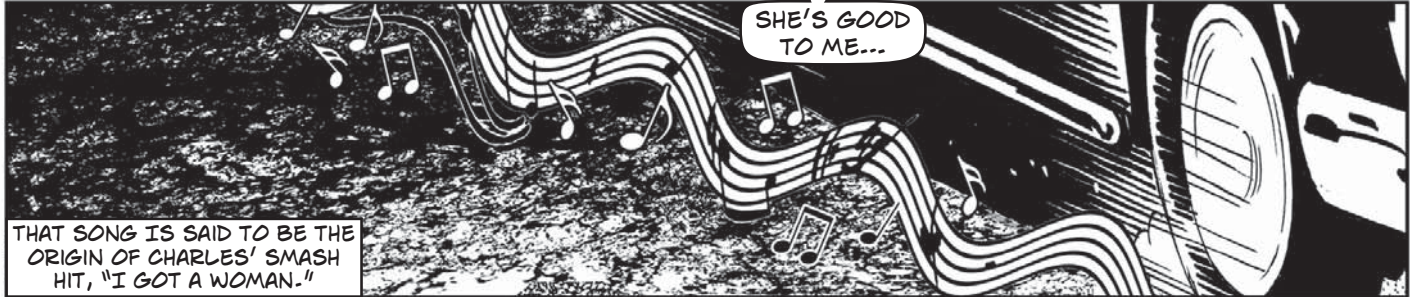


THE INFLUENCES THAT CHARLES DREW ON TO CREATE HIS MUSIC WEREN'T JUST GENERAL TRADITIONS. THEY WERE VERY, VERY SPECIFIC.

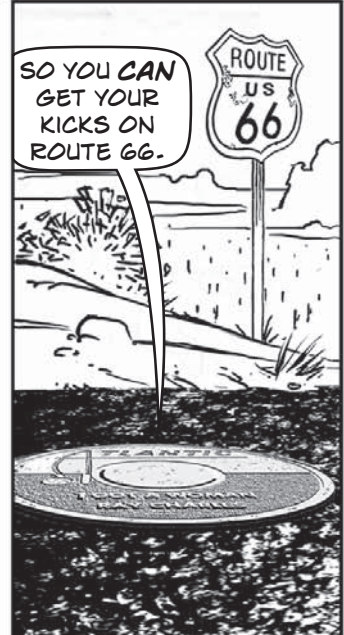


IN 1954, DRIVING FROM GIG TO GIG, CHARLES AND HIS TRUMPETER RENEAL RICHARD WERE LISTENING TO THE RADIO. A GOSPEL SONG CAME ON.

LIKING WHAT THEY HEARD, THEY BOTH STARTED TO SING ALONG, CHANGING THE WORDS TO SUIT THEIR MOOD.



THAT SONG IS SAID TO BE THE ORIGIN OF CHARLES' SMASH HIT, "I GOT A WOMAN."



SO YOU CAN GET YOUR KICKS ON ROUTE 66.



# REMIX OR ROBBERY?

TWO COPYRIGHT SCHOLARS  
PRESENT THE *HISTORY OF MUSIC*  
AS AN *EPIC BATTLE* BETWEEN  
*CREATIVITY* AND *CONTROL*

BY *FRANCES PRESMA*

ILLUSTRATIONS REPRINTED WITH PERMISSION FROM *THEFT! A HISTORY OF MUSIC* BY JAMES BOYLE, JENNIFER JENKINS, AND KEITH AOKI

**I**n 1954, while riding along Route 66 on the way to a gig, Ray Charles and his trumpeter, Renald Richard, started singing along with — then improvising words to — a gospel song playing on the radio. Later that year, Charles released a single that retained the central melody of that song, “I Got a Savior,” and another gospel tune, “It Must Be Jesus,” but infused them with a driving blues beat. “I Got a Woman” became one of the first hits of a new genre: soul. »



# REMIX OR ROBBERY?

Style setters: Joe Cocker (top), based elements of his style on that of Ray Charles who, in turn, borrowed from Nat King Cole.



**“YOU CAN’T TELL THE HISTORY OF MUSIC WITHOUT TELLING THE HISTORY OF MUSICAL BORROWING. AND YOU CAN’T TELL THE HISTORY OF MUSIC WITHOUT TELLING THE HISTORY OF ATTEMPTS TO *REGULATE* MUSICAL BORROWING.”**

— JAMES BOYLE

As Professors James Boyle and Jennifer Jenkins ’97 tell the story in their new comic book, *Theft! A History of Music*, Charles was unapologetic about borrowing recognizable elements of a song about sacred love to create one that was decidedly secular, even carnal, in its outlook. He was simply fusing two essential elements of his creative DNA: the ecstatic gospel music of the church and the rhythm and blues of the clubs where he performed at night. Charles, who admitted to modeling his early performance style on that of Nat King Cole, didn’t mind when younger musicians later borrowed aspects of his; he saw it as a sincere form of flattery.

Clara Ward, who composed “I Got a Savior” (as well as another classic, “This Little Light of Mine,” that served as the template for Charles’ 1957 hit, “This Little Girl of Mine”) saw it differently. She was not flattered by his sacrilegious adaptation of her work. In today’s world, the story would probably end in a copyright lawsuit. Not so back then. Charles’ appropriation of songs and styles that influenced him to create new ones followed a tradition as old as music itself: musical borrowing, a practice that is much more heavily regulated today.

“We don’t mean simple copying — the reproduction of an entire song,” Boyle and Jenkins write in their end notes to *Theft!*. “We mean the borrowing and cultural cross-fertilization that creates more music. Church musicians borrowing from troubadours. The Marseillaise quoted in the 1812 Overture. The African poly-rhythms that came to the United States during slavery. The fragments of another tune in a jazz solo. Whether it is the rhythm and blues and country music that built rock and roll, the fusion of blues and gospel that made soul music, or the wall of sound in early rap, the lines of borrowing and cross-fertilization go on and on.”

Boyle, the William Neal Reynolds Professor of Law, and Jenkins, the director of the Center for the Study the Public Domain, which published the comic, inhabit their book as cartoon avatars, passionate music lovers and intellectual property scholars “cursed to chart the line between freedom and control” in culture. Joined by a companion who is both a musician and musicologist, they traverse more than 2,000 years of sonic history, chronicling changes in culture, migration, religion, economics, and law that helped music flourish, as well as periodic efforts at curbing musical innovation. Boyle describes the comic, which reflects 10 years of research, as a story about access to the musical commons and attempts to restrict it.

“The process is as old as the quills,” he says. “You can’t tell the history of music without telling the history of musical borrowing. And you can’t tell the history of music without telling the history of attempts to *regulate* musical borrowing.”

## SQUEEZING THE MUSICAL COMMONS

While many past attempts to regulate musical borrowing were effectively efforts to prevent changes in social, religious, or racial order, today they are largely legal matters. Copyright law gives owners — the author of an artistic work, his or her heirs, or a purchaser of those rights — the right to control, for a limited time, who can use their works and how, as well as the right to be paid. In theory, it's a system designed to incentivize the creation of new works: Artists use royalties to support their ongoing creative efforts and get to preserve their artistic integrity by vetoing uses of their work they deem inappropriate. And at the end of the copyright term, creative works enter the public domain — the commons — and become available free for others to use at will.

In their scholarship, teaching, and advocacy through the Center for the Study of the Public Domain, Boyle and Jenkins have argued that the system in the United States isn't working as intended. Partly, that is due to a series of statutory extensions of the copyright term that have effectively locked works published since 1923 — books, films, and music — out of the public domain, even those whose author is unknown. Boyle examined the implications of ever-expanding intellectual property rights for innovation across disciplines in his award-winning book, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008), devoting a chapter to a 100-year-long chain of musical borrowing beginning with spirituals and ending with rap that puts "I Got a Woman" in the center (a story that is graphically reprised in *Theft!*). By then, he and Jenkins had already made their first foray into comic book scholarship, 2006's *Bound by Law?*, which examined issues of copyright, fair use, and the public domain in documentary film. Aiming for a broad audience, from professional filmmakers and academics to teenagers making movies on their laptops, they published it under

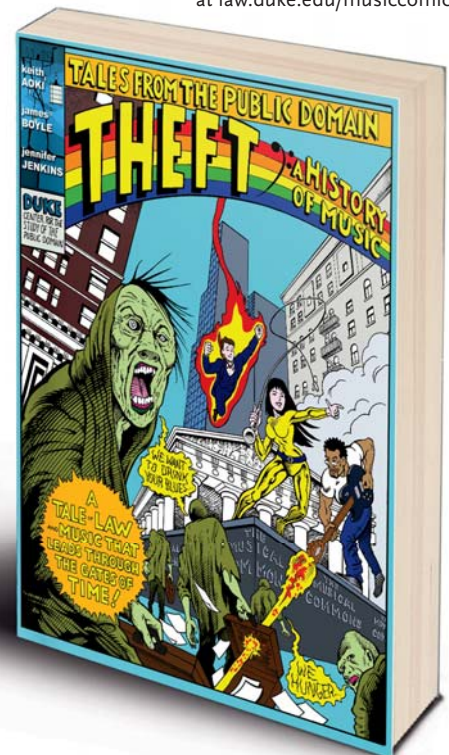
a Creative Commons license and made it available to download for free from the center's web site. The comic, which was drawn and co-authored by the late intellectual property scholar Keith Aoki (see page 55), confirmed the public appetite for broadly accessible and entertaining information on creativity in the digital age: It has been downloaded more than 1 million times.

In *Bound by Law?*, Boyle and Jenkins described a growing "permissions culture," in which business norms, not law, demand that filmmakers pay license fees for using even tiny snippets of copyrighted content. Then, as now, they caution that these practices, left unchecked, put art and culture under threat by continually raising the costs for creators. And the squeeze of the musical commons is particularly tight due, in part, to a number of recent court rulings which Boyle and Jenkins find questionable or downright wrong. In one, the U.S. Court of Appeals for the Sixth Circuit found a sampling by N.W.A. of two seconds of another recording to be a copyright violation. And in 2015, a jury in the Ninth Circuit found Pharrell Williams and Robin Thicke liable for just borrowing the feel and rhythm of Marvin Gaye's "Got to Give It Up" for their hit, "Blurred Lines."



Co-authors and spouses James Boyle and Jennifer Jenkins '97 at the March 29 launch party for *Theft!*

» Order *Theft!* in paperback or download at [law.duke.edu/musiccomic/](http://law.duke.edu/musiccomic/).



# REMIX OR ROBBERY?

“Pharrell Williams said he was just trying to channel ‘that late ‘70’s feeling,’ and how do you do that without evoking the funk or the groove or the style of disco and Motown and R&B music?” asks Jenkins. “And if you trace the evolution of music, certainly if copyright is seen to extend to those kinds of genre-building elements, then a lot of the music we love could be potentially illegal or subject to licensing and permission requirements.”

Boyle says music is now being regulated at the “atomic” level. “No one disputes that copyright should protect composers and artists. But today that ‘protection’ is interpreted to forbid even the most trivial borrowing. Our big question in the book is, would prior forms of music be possible under this? Would jazz be illegal? Would the blues be illegal? Would certain practices in classical music be illegal? And the answer, I think, is that if permission is always required, then, yes, they would be illegal unless permission was asked. And in many cases, asking permission would destroy the art form. You can’t have jazz if every time you solo you have to go and get a license.”

Boyle and Jenkins say they believe, firmly, that musicians deserve payment for their work. “There are definitely cases where permissions are required and fees should be paid,” says Boyle, noting that Kanye West was right to pay license fees for his liberal sampling of “I Got a Woman” in his 2005 release, “Gold Digger.” “We are not saying illicit downloading is okay or that you can wholesale appropriate from other songs. And we wish musicians were better paid. But we don’t think this permissions culture will achieve that. An artist might say, ‘I can’t make that song. It’s just not worth it to me.’ So we think if we continue down that path and actually regulate the process of creativity at the atomic level, we lose genres that we don’t miss because we never knew they were possible.

“Copyright’s goal is to promote cultural progress,” he says. “But more rights do not always produce more culture.”

In music, striking the right balance between incentives and constraints is particularly challenging, says Jenkins, who teaches a course on music copyright.

“Every musician is simultaneously a creator who benefits from copyright protection and a re-user who benefits from the freedoms that copyright affords them to build upon previous works. Every artist is on both sides of the divide, so getting the line in the right place benefits anyone who is making music. Allowing enough control for copyright to provide incentives is important, but there also has to be enough freedom to create in the first place. It’s not just binary.”

One of Jenkins’ former students, Peter Berris ’17, says he has encountered the freedom and control divide firsthand as a songwriter. “Every listenable song is derivative of something, but the trick is to make sure it isn’t too derivative,” he says. “I have sometimes scrapped or reworked compositions partway through the songwriting process after realizing that they were too similar to an existing work. Thus, in a sense control makes it harder to write new songs, but it can also force innovation by requiring a songwriter to depart from what would otherwise be a similar preexisting work.” Weakening control also has downsides, he says: “Even if songwriting were made easier by diminishing control, it would also undermine the degree of protection that a songwriter’s own compositions would have and the income he could earn.”

Boyle adds that as an art form, music poses inherent regulatory challenges; whereas literature relies on a virtually infinite supply of words and possible word combinations, the possibilities in music are more constrained. “There are a limited number of notes, and only a subset of those are pleasing to the human ear, and



only a subset of those fit within a recognizable genre,” he says. “Your rock song is more likely to sound like my rock song than your novel is likely to read like mine.

“So already, instead of this vision of creativity as this expanding fountain which goes off in every direction, we’ve got this sort of bottleneck, where music is likely to sound like other music, even if the person *isn’t* borrowing. And often the person is *and should be* influenced by the groove. That’s how you work within a genre.”

Boyle and Jenkins agree that today’s musicians face an essential irony: At a time when, thanks to technology, it’s easier than ever to make and disseminate music, law and business have adopted ever-tighter restrictions. “Our point,” says Jenkins, “is that this is not a discrete thing. Aesthetics, economics, technology, and changes in law are all linked.”



## THE TRAIL OF MUSICAL INNOVATION

That's been true throughout history, as they demonstrate by their comic avatars' gleeful time-travel through *Theft!*, in period costumes via TARDIS, DeLorean, Nemo's Nautilus, and other vehicles mined from pop culture. "Our book is about musical remix," says Jenkins, "and it uses *visual* remix to make its points." On an early stop, they explain that Plato wanted the state to ban the "mixing of the musical modes" — for reasons of order and morality. Moving along their time line, they find that the church of the Holy Roman Empire required that all religious music be monophonic and purely vocal, imposing strict stylistic rules on liturgical singing. One impulse for the religious rebirth of the lost technology of notation, in fact, was to "make sure people were literally all singing the same tune" at mass. "One pope, one church, one song," Boyle and Jenkins write.

But notation allowed musicians to innovate and to score polyphonic and instrumental compositions, an unintended effect of a musical "technology." ("Only the first of many"

**"EVERY MUSICIAN IS SIMULTANEOUSLY A CREATOR WHO BENEFITS FROM COPYRIGHT PROTECTION AND A RE-USER WHO BENEFITS FROM THE FREEDOMS THAT COPYRIGHT AFFORDS THEM TO BUILD UPON PREVIOUS WORKS. ... [G]ETTING THE LINE IN THE RIGHT PLACE BENEFITS ANYONE WHO IS MAKING MUSIC."**

— JENNIFER JENKINS

Boyle notes.) And a few centuries later, in the era of courtly love, the church engaged in its own musical theft, reshaping troubadours' songs of romantic love and lust as worshipful paeans to the Lord and the Virgin Mary.

The advent of printing and, in 1498, the invention, in Venice, of a specific method for printing musical scores led to an explosion of polyphonic and complex composition, because those compositions could now be shared with the world. But if musicians and composers were thriving, they were still being paid by patrons, while the inventor of the new printing technology received a property right over his method: a 20-year monopoly over all music printing in Venice. Subsequent legal innovations covered printing and re-printing — such as a composer's right (rarely bestowed) to determine whether his work was printed and by whom — not performance. It actually wasn't clear whether composers were even covered by the first copyright law, the Statute of Anne, passed in 1710, until 1777, when a court, ruling in favor of composer J.C. Bach, held that musical compositions were, indeed, "writings." That cleared the way for composers to claim a share

# REMIX OR ROBBERY?



**" 'BORROWING IS PERMISSIBLE, BUT ONE MUST RETURN THE OBJECT BORROWED WITH INTEREST.' "**

**IN OTHER WORDS, BORROWING IS ALL RIGHT, AS LONG AS YOU IMPROVE UPON THE ORIGINAL AND TRANSFORM IT OR MAKE SOMETHING BETTER WITH IT."**

— JENNIFER JENKINS, QUOTING JOHANN MATTHESON'S 1739 WORK, *THE PERFECT CHAPELMASTER*

## MIND THE CHAPEL MASTER

Rampant borrowing among baroque and classical composers can still be heard in any symphony hall. "Not only was borrowing not illegal, but as an aesthetic matter it was accepted in classical music," says Jenkins. She and Boyle make that point by charting borrowing across the work of six composers, illustrated as a game of "Chutes and Ladders," moving from Handel to Beethoven to Brahms (whose First Symphony sounded so similar to Beethoven that it was nicknamed "Beethoven's Tenth") to Mahler, Berio, and Stravinsky. Another illustration charts a taxonomy of different kinds of accepted borrowing, for example, the use of an existing melody as the basis for a new composition, or the appropriation of another composer's work by way of a quotation or for purposes of parody.

"The study of musical borrowing is familiar to anyone who studies classical music," says Jenkins. "It was an accepted method of building upon prior works." The standard, she says, is reflected in a quote from Johann Mattheson's 1739 work, *The Perfect Chapelmaster*, which appears more than once in *Theft!*: "Borrowing is permissible, but one must return the object borrowed with interest." In other words, borrowing is all right, as long as you improve upon the original and transform it or make something better with it." And that guidance still resonates with musicians, she says.

"Putting copyright aside, if you ask artists what they think should be ethically allowed or prohibited, the line they draw is using their song in a commercial or

wholesale borrowing. But if you take a few measures of their song and do something interesting with it, something transformative, many composers and songwriters think that's great."

Still, creative norms evolved through the classical and romantic periods and art, Boyle and Jenkins write, came to be defined as original genius. Composers began to consider their works sacrosanct. The comic quotes the eminent musicologist J.P. Burkholder, who wrote that Handel was later accused of plagiarism "for practices that seem today like particularly excellent examples of what had been a long and distinguished tradition of creatively reshaping borrowed material." And in matters of technology and law, the music marketplace changed rapidly: The concept of the original author became the organizing principle of copyright; lithography reduced the cost of printing music and facilitated its sale directly to the public; and, for the first time in the U.K., playwrights and operatic composers gained property rights relating to the performance of their works.

## AMERICA'S BORROWED SONGBOOK

Landing their Nautilus on the shores of Maryland in 1814, the comic's protagonists observe Francis Scott Key watching the British attack on Fort McHenry. His poem about the bombardment languished until he set it to the tune of an old British drinking song and retitled it the "Star-Spangled Banner." Boyle and Jenkins point out the origins of other patriotic standards: "My Country 'Tis of Thee" transformed the British national anthem; and "The Battle Hymn of the Republic" and the "Marine Hymn" reflect longer derivative chains.

"America, as we say in the comic, is remix nation," says Boyle. It went beyond the direct appropriation of melody. In popular music, Stephen Foster's compositions borrowed from multiple sources, including African musical traditions brought (involuntarily) by slaves. Ragtime blended European marches with African polyrhythms. The cross-cultural borrowing that imbues American music became its hallmark, Boyle says. "America

takes the music that citizens from each culture and country brought to this country and blends it. That's what makes George Gershwin's 'Rhapsody in Blue' so fascinating — it has components of jazz, classical, and ragtime. That's what takes the progression of blues and country and rockabilly and fuses it to make rock and roll. That's how soul is gospel plus the blues."

The Constitution gave Congress power to create patents and copyrights as a way to encourage American innovation. Music was not explicitly included until 1831, when copyright terms lasted for 28 years and could be renewed for another 14, and early copyright applied only to publication, not the performance of musical works. Boyle and Jenkins explain that Foster, "the father of American popular music" eked out a modest living as a songwriter based on royalties on the publication and sale of music to his songs, with the lion's share of the profits going to those who printed his songs, often without his permission. And they point to the conflict brewing between the idea of using property rights to pay composers and the time-honored (and apparently



# REMIX OR ROBBERY?

**"IN THE 20<sup>TH</sup> CENTURY, IN PARTICULAR...  
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ATTEMPTS TO POLICE THAT LINE."**

— JAMES BOYLE

unstoppable) tradition of musicians borrowing and recrafting earlier works to make new songs.

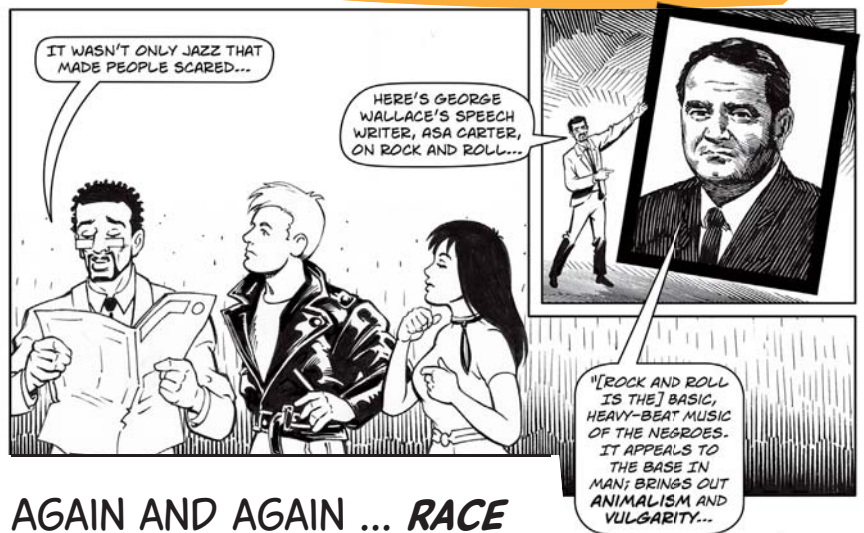
Such explosive technical innovations of the late 19th and early 20th centuries as the player piano, the phonograph, and the radio expanded music's reach and led to profound developments in business and law, further changing the way musicians were paid. When player pianos and the gramophone created a market for recorded music, the 1909 Copyright Act struck a compromise between the interests of composers and the nascent recording industry, Boyle and Jenkins explain. Composers, for the first time, got paid for recordings of their songs. But a compulsory license allowed anyone to record a composition as long as they paid a standard fee.

Copyright terms also changed, continually, through the 20th century. A term that in 1909 was 28 years and renewable for another 28, is now the author's life plus 70 years for new songs. Tracing the impact on the classic "Rhapsody in Blue" in the comic, Boyle and Jenkins observe that while many of George Gershwin's songs written prior to 1923 have been in the public domain for years, his best-loved work, written in 1924, remains controlled by his heirs and will not enter the public domain until Jan. 1, 2020, thanks to statutory extensions of the copyright renewal term in 1976 and 1998.

In a country where "composers had treated their musical heritage as a commons, borrowing and remixing to make new styles and songs," continual copyright extensions lock up the store of creative raw materials.

"Extending the term certainly benefitted a few people," they write, "but the price the public paid was higher. We locked up most of 20th century culture to benefit a very small proportion of works that were still commercially viable after 28 or 56 years or even life plus 50.

"The past gave us works to use, but we don't seem to be doing the same for the future."



## AGAIN AND AGAIN ... RACE

In remix nation, as recording and radio expanded music's reach, social anxiety soared. Listeners were getting exposed to — and enjoying! — new cultures in their own homes, and that was seen, by some, as a threat to societal segregation, even to bans on miscegenation.

"In the 20th century, in particular, again and again, African or African American-inspired music was seen by some as threatening a color line," says Boyle. "And many attempts to police the music were attempts to police that line. The fear was that if people listened to each other's music and idolized each other's artists, musical styles will mix and the races will mix. And that fear was very consciously put forward." Jazz was denounced (by the founder of the Julliard School, no less), as the self-expression of a primitive culture that could lead to the degeneration of "highly civilized" white culture. Segregationists even tried to ban rock and roll in Alabama.

Black musicians were denied access or, eventually, only grudgingly admitted to such professional organizations as the American Society of Composers, Authors and Publishers, and repeatedly found themselves denied credit and market access in other ways.

"Part of it was a process of frankly racist resistance, a fear of other cultures," says Boyle. "Part of it was a process of appropriation, where white musicians appropriated from black musicians and didn't give them credit or payment. Black musicians often didn't get their due." In other cases, black artists actually hailed the work of white musicians whose music crossed the color line and gave attention to black artists in the process. Al Green said that Elvis Presley "broke the ice



for all of us.” Boyle and Jenkins devote several pages to blues master Robert Johnson’s influence on rock and roll, and the way Chuck Berry transformed the genre by mixing blues and country. “Songs jump back and forth across a segregated color line. The story of remix is complicated,” says Boyle, “but in the end it gives us a more vibrant, and tolerant, culture.”

## FOR THE LOVE OF MUSIC

Boyle and Jenkins end their story where they began, at a time when controlling access to the commons is no longer motivated by race, morals, religion, or philosophy, and is now primarily a legal matter. But having built a case that musical influence and borrowing are essential to creativity, where do they see hope in today’s permissions culture?

“I think we have a lot of the tools in existing law,” Boyle says, “if we actually applied them, if judges applied them, and if juries understood them. The law allows the use of stock elements of a genre. We have a rule that says *‘de minimis non curat lex,’* — the law does not concern itself with trifles, and a certain amount of copying is so trivial that we don’t even count it as copying. We have fair use, which says you can take a copyrighted work without permission and use it, so long as you are transforming it, so long as you’re making something new, so long as you aren’t using it as a substitute for the original.”

But apart from parody, musicians rarely assert fair use, Jenkins points out. “In music-to-music borrowing, there are no non-parody cases finding fair use, which is remarkable,” she says. “There are all sorts of re-uses of music that would seem to qualify as fair use.” When industry practice is to license material even when a good, fair-use argument exists, musicians seem reluctant to make the claim, she says.

“With fair use you are saying, ‘I copied, but it’s okay because it was in service of a worthy purpose, it was transformative, and I didn’t use too much or



A panel from *Theft!* pays tribute to collaborator Keith Aoki, imagining him strolling on the surface of the moon with the late David Bowie.

## REMEMBERING KEITH AOKI

PROFESSORS JAMES BOYLE AND JENNIFER JENKINS dedicate *Theft!* to Keith Aoki, who is credited as a co-author. A noted scholar of intellectual property, civil rights, critical race theory, and local government law, Aoki was a professor of law at the University of California, Davis at the time of his death on April 26, 2011. Also a talented artist and cartoonist, he served as both co-author, with Boyle and Jenkins, and artist on their first comic, *Bound by Law?*, and had been working with them on *Theft!* until shortly before he died.

Two pages in *Theft!* reprint a 2011 graphic commentary the trio wrote and Aoki illustrated on the need to balance freedom and control in the digital world. It originally appeared in the *San Francisco Chronicle*.

“In the last conversation we had with him, he said, ‘You have to finish the book,’” Boyle recalls. “We were only halfway done. We had to start again with new artists and draw every page from scratch.” That entailed finding a team of artists who could realize their vision. Ian Akin and Brian Garvey, who have illustrated comics for Marvel, DC, and Disney, among others, drew and inked panels mapped out in minute detail by Boyle and Jenkins, while Balfour Smith, program coordinator for the Center for the Study of the Public Domain, handled lettering, coloring, and the digital publishing of *Theft!*

“We think the final product is a fitting tribute to Keith,” Boyle says. ♡

# REMIX OR ROBBERY?

Chuck Berry, right, died on March 18, 2017.

interfere with the market.' But in order to make that claim, you have to admit copying. It can be risky." And new genres, like rap, where sampling can be transformative, lack a body of case law to support fair use claims, she says.

As scholars of and advocates for awareness and protection of the public domain, Boyle and Jenkins say they are committed to both making law and policy accessible to creators and consumers, and to promoting balanced intellectual property law and policy. They want to engage musicians in addressing the optimal balance of rights and freedoms that feeds creativity and protects the economic interests of artists. They hope that a wide range of artists, teachers, and scholars will take them up on their invitation to download the comic for free. "We certainly think a lot of musicians might be fascinated by this history," says Boyle. "We think students of music and music history might find it useful. We've benefitted a lot from the work of music historians and we hope that we, in turn, offer them something."

They have, says Anthony Kelley, an associate professor of the practice of music at Duke University, on whom the musicologist character in the comic is modeled. He calls *Theft!* "a treasure trove of observation and facts regarding the intertwined condition of music and law," adding that while many songwriters and composers may know that borrowing is a long-standing tradition in music, they are unlikely to know the breadth and depth of its history.

"New composers, new songwriters, new DJs, new music critics, new improvisational musicians, students of vernacular music, arts/music scholars/



musicologists, ethnomusicologists, and generally new arts enthusiasts should read the book," he says.

Boyle says he and Jenkins kept those ordinary music lovers in mind as they worked on the comic. "The more we got into our research, we realized it's also for fans, people who grew up loving a particular



“[W]E’RE PASSIONATE ABOUT THE MESSAGE IN THE BOOK, WHICH IS ABOUT BREAKING DOWN WALLS. **MUSIC DOESN’T LIKE WALLS.** MUSIC HELPS US RECOGNIZE OUR COMMON HUMANITY.”  
 — JAMES BOYLE

band, a particular style, a particular movement, fans of blues, soul, Robert Johnson, rap. We thought these people would care pretty passionately about this story.”

It was their own love of music that propelled their work on *Theft!* for 10 years, Boyle says.

“We’re experts in law, so obviously that was our entry point. And there are a lot of challenges to music’s future, including, unfortunately, legal ones. But we’re

passionate about music and want musical creativity to succeed. And we’re passionate about the message in the book, which is about breaking down walls. Music doesn’t like walls. Music helps us recognize our common humanity.” ♪



John Fallone LLML '17 and Jeff Ward welcome attendees to the Duke Law Tech Lab's inaugural Demo Day on April 7.

# Innovation incubator:

Duke Law stakes out a leadership role in law and technology

by **Forrest Norman**

**O**N A FRIDAY afternoon in April, about 150 people crowded into the Bullpen, Duke's Innovation and Entrepreneurship hub in downtown Durham, filling the high-ceilinged spaces of the former tobacco warehouse alongside walls of whiteboards and flatscreens. They were there to listen as seven entrepreneurs pitched them their ideas for applying technology to a profession that has historically been resistant to such overtures: the law.

Photos pages 58–59: Kevin Seifert Photography



Associate Clinical Professor Jeff Ward '09 directs the newly established Duke Law Center on Law & Technology.

**“The law, from the way that large firms do business, to the way that courts operate, to the basic knowledge needed to aid certain clients, is increasingly tech-driven. So, from an educational perspective and a career-preparation perspective, we are positioning Duke Law to be a leader at the intersection of technology and the law.”**

**— Jeff Ward '09**

The teams had spent 12 weeks in the Duke Law Tech Lab, a new incubator for startup companies that leverages the Law School’s and Duke University’s community of faculty, students, and alumni to support cutting-edge innovations in the delivery of legal and regulatory services. They were now competing for cash prizes, an ongoing affiliation with the Tech Lab, and a chance to capture the interest of the venture-capital investors, law firm chief information officers, and members of the Triangle’s burgeoning entrepreneurial community in the audience. One team, TrustBooks, pitched software to help lawyers manage client funds held in trust, using cartoons and a stripped-down PowerPoint presentation to emphasize the system’s user-friendliness and reliability. Another, Skopos Labs, offered a program using complex linguistic algorithms and artificial intelligence (AI) to make real-time predictions of a bill’s chance of passage through Congress.

That spectrum of ideas — simple tools to streamline processes or reconcile incompatible systems at one end, AI-driven high-stakes prognostication at the other — provided a snapshot of the field of legal technology, a field that has already reshaped some facets of the profession and is in the process of radically changing others. The establishment of a new Duke Law Center on Law & Technology and the launch of the Tech Lab, along with the development of the LLM and JD/LLM in Law and Entrepreneurship degree programs and the Start-Up Ventures Clinic, and the engagement of the Center for Judicial Studies with the profession on e-discovery and other legal technologies, reflect the Law School’s drive to stake out a leadership position in this field.

“We are embracing the moment, we’re not fighting it,” Dean David F. Levi says. “And we’re well-positioned to do so because of the nature of our university, which is entrepreneurial and innovative, and because we are here in the Research Triangle, where there is such excitement and such rich soil for innovation and advancement.”

For students preparing for the shifts and opportunities spurred by technological change, there are new classes on technology in finance and banking — “fintech” — writing for e-discovery, and “smart” contracts, as well as clinical initiatives, workshops, practicums, and externships.

“These initiatives benefit the students we teach and the clients we serve, but there is a bigger picture as well,” says Associate Clinical Professor Jeff Ward '09, Director of the Duke Law Center on Law & Technology. “The law, from the way that large firms do business, to the way that courts operate, to the basic knowledge needed to aid certain clients, is increasingly tech-driven. So, from an educational perspective and a career-preparation perspective, we are positioning Duke Law to be a leader at the intersection of technology and the law.”

John Fallone LLMLL '17, whose startup company SendHub was backed by the prestigious Y Combinator incubator and who has worked as a legal consultant for entrepreneurial clients in Silicon Valley, says the law and technology endeavors coupled with the intensifying engagement with the Research Triangle have the potential to profoundly impact Duke Law, its students, and the legal profession. “We’re just starting to scratch the surface of what we can do,” says Fallone, who served as manag-

ing director of the Tech Lab during his law and entrepreneurship practicum. “People could start looking at Duke to see what’s next.”

## A changing profession

Familiarity with technological innovation is a given for students who know they will be advising startups or following an entrepreneurial path themselves. The extent to which that innovation has begun to permeate every aspect of the legal profession is a newer phenomenon. Many students, regardless of their practice areas, will go to work at firms where a chief information officer oversees such matters as e-discovery, compliance reporting, and conflicts. Conversance in technical terminology as it affects the discovery process, cybersecurity, contractual agreements, among many other facets of a legal practice, is becoming essential.

“It’s no longer good enough to be able to say, ‘Well, the tech guys are going to take care of it,’” says

**Lawrence Baxter**, the William B. McGuire Professor of the Practice of Law. Baxter, a former banking executive who founded Wachovia’s eBusiness group and went on to build and manage all of Wachovia’s eCommer-

ce operations, teaches how emerging technology has transformed finance in his Fintech and the Law class. “You have to understand what it is they’re going to take care of, because there may be policy issues implicated and there are likely even to be impacts to the legal rights of your clients. What employers expect from associates is shifting.”

Technological advances have been reshaping the litigation process for more than a decade — the first e-discovery-related amendments to the Federal Rules of Civil Procedure went into effect in 2006. Those advances continue to transform the litigation process (and litigators’ professional lives) in ways both large and small, from exponentially increasing the amounts of information processed and driving the development of tools needed to efficiently process that information, to vastly improving options for courtroom presentation and introducing social media into the jury selection process, says **David Lender '93**, co-chair of the global Litigation Department at Weil, Gotshal, & Manges and a member of the Law School’s Board of Visitors.

“Electronic communications platforms have changed our professional lives inasmuch as we use them, but they’ve also introduced a host of issues to the litigation landscape,” he says. “You have to understand your clients’ communications systems, you have to understand what cloud storage means in terms of possible issues in a case. You have to, when doing dis-



**“You have to understand your clients’ communications systems, you have to understand what cloud storage means in terms of possible issues in a case. You have to, when doing discovery, understand metadata, embedded data, how text messaging works, where it is stored, how it is stored.”**

– David Lender '93

covery, understand metadata, embedded data, how text messaging works, where it is stored, how it is stored.”

The explosion of mass electronic communication into multiple formats — Lender cites one client whose employees use email and four different instant messaging platforms — has companies and law firms investing heavily in ediscovery and Technology Assisted Review (TAR), which adds the self-learning capabilities of artificial intelligence to e-discovery’s high-powered search-and-sift capabilities.

TAR, the process by which software winnows down reams of digital documents to those applicable to a given case, has been honed to an ever-finer point since first entering the legal lexicon around 2009. Because courts are interested in making the litigation process as efficient as possible, Lender expects TAR to become standard protocol within the next five years. “Courts still haven’t ordered it over objections,” he says. “But we are on the precipice.”

Beyond that precipice is artificial intelligence. AI innovators such as ROSS Intelligence offer platforms that turbocharge document review and perform tasks such as searching out similar fact patterns and relevant legal decisions. Such firms as Latham and Watkins, Sidley Austin, and Simpson Thacher are now working with the company. ROSS CEO and co-founder Andrew Arruda spoke to Duke Law faculty last fall at a retreat that Levi calls “eye-opening.” Since then, ROSS has partnered with Duke to

provide mentorship to the Tech Lab teams and create a summer internship program for interested Duke Law students.

Next up: distributed ledger technologies such as blockchain, which are seeping into the practice of law, says Clinical Professor **Erika Buell**, who advised start-ups and technology companies before coming to Duke Law. Blockchain, the technology underlying cryptocurrencies such as bitcoin and ether, relies on a synced, shared database system, where multiple parties can access automatically updated records simultaneously, without accessing the same centralized network. Considered highly secure and resistant to retroactive tampering, blockchain has the potential to upend many aspects of transactional law.

Blockchain and some related platforms also allow for the construction and execution of smart contracts, where the contractual provisions are built into the computer code. Buell says endeavors like the Delaware Blockchain Initiative, introduced in 2016, point to the staying power of the technology; among the initiative's provisions are the amendment of Delaware law to expressly allow corporations to track shares issuances and transfers using blockchain-based technology.

"The fact that Delaware is moving in this direction makes me think that in the near future, many corporate associates will have to deal with share ledgers on blockchain." (Ward will teach Law & Policy Lab: Blockchain Law in the fall.)

## Duke Law responds

Buell's Contract Drafting: The Next Generation course, which she developed and taught for the first time last fall, delved into smart contracts and blockchain technology. She was initially interested in giving students a different lens through which to view contract drafting, but she also exposed them to graduates practicing in the blockchain space with such guest lecturers as Ian Darrow '15, general counsel and chief compliance officer of LedgerX. The New York-based company is awaiting regulatory approval to become the first federally regulated bitcoin options exchange and clearinghouse.



"Most of the firms I surveyed in formulating the course don't have blockchain experts yet, but I give that maybe a year," she says. "They're likely going to end up having some portion of their deals be blockchain-related and then they're going to need attorneys with that knowledge."

The Law School is striving to ensure curricular innovation keeps pace with technological innovation, not just in traditional skills courses like Buell's but also in new offerings such as Law of Robotics and Exponential Technologies. Like Buell, Baxter and co-teacher **Lee Reiners** relied on practicing professionals and other guest lecturers when they taught Fintech and the Law. Among them were Douglas Arner, the Ken Yun Visiting Professor of Law, who addressed the global spread of fintech, and Lin Chua LL.M. '00, co-founder and COO of digital lending company InterNex Capital.

"There's not really an established academic expertise in fintech," Reiners says. "The experts are the people who are out in the field doing it. We can add our perspective on the legal and policy angles, but we also have to expose students to people who are in the field, and to the latest developments in the marketplace. It's a real-time course."

Outside the classroom, the Center for Judicial Studies has been working with judges, lawyers, and law faculty to create clear guidelines for e-discovery since its acquisition last year of information-governance and e-discovery resource center EDRM. The center had already worked to define the role of e-discovery in litigation by hosting conferences, covering the topic in its quarterly journal, *Judicature*, and publishing *Guidelines and Practices Implementing the Discovery Proportionality Amendments*. With the ABA Litigation Section, the center held roadshows in 17 cities in 2015 and 2016, engaging lawyers and judges in a national conversation about the amendments.

In May, the center hosted its first workshop with EDRM members, discussing potential projects and reviewing an ongoing effort to develop standardized guidelines for TAR.

"We're committed to one deliverable a year," says **John Rabiej**, the center's director. "The EDRM community will come up with guidelines explaining how

## Duke Law courses relating to law and technology:

- » Law of Robots and Exponential Technologies
- » Law & Policy Lab: Blockchain Law
- » Frontier Tech of Legal Practice
- » Contract Drafting: The Next Generation
- » FinTech and the Law
- » eDiscovery
- » Science Law & Policy
- » Amicus Lab (part of Science & Society)
- » Introduction to Technology in the Law Office
- » Information Privacy and Government Surveillance Law
- » Frontier Robots: Law & Ethics
- » The Law and Policy of Innovation: The Life Sciences
- » Patent Law and Policy
- » Wintersession: Data Breach Response and Cybersecurity Due Diligence
- » Trademark Protection & the Changing Landscape of the Internet



Clinical faculty and students discussed their ideas for technological tools to facilitate expansion of legal services to their clients at a workshop on Feb. 24.

a particular technology operates and what its limitations are. Once we've done that, the center will hold a conference where lawyers, judges, and law faculty work to develop best practices."

## Access to justice

At Levi's behest, Ward has also launched a targeted effort to develop legal tech that addresses access to justice challenges. In the fall, he spearheaded the Access Tech Tools initiative, a project in which clinical faculty and students developed ideas for tools that could help expand access for or otherwise empower their clients. Keith Porcaro '11, CTO and general counsel of SimLab, a nonprofit focused on helping people and organizations make systems more responsive and accessible through technology, is helping to lead the initiative.

"One of the reasons why emerging technology is exciting, why it shouldn't be seen as a difficulty to overcome, is the potential it has to make legal services available to so many people who need them," says Levi.

Among the projects the clinics have developed: A 501(c)(3) filing preparation tool for nonprofit organizations from the Community Enterprise and Start-Up Ventures Clinics; a document-automation tool to help social workers, AIDS case managers,

**"Legal technology offers an amazing opportunity to close [the access to civil justice] gap, but it won't happen unless we do so deliberately, unless we engage in the process and shape AI and other tools to address these needs." – Jeff Ward**

and health-care professionals provide efficient referral and intake summary documents to the Health Justice Clinic and other service providers; and from the Children's Law Clinic, a tool to speed up the process for parents applying to the Social Security Administration for disability benefits for their children. Porcaro says projects like these, largely aimed at increasing efficiency in service delivery, are in line with ones he designs for such clients as Bay Area Legal Aid, Mississippi Access to Justice Commission, and the American Red Cross.

"A lot of these access problems aren't tech problems in the sense of putting someone on the moon — we're not breaking ground in computer science," Porcaro says. "These are information architecture problems, they're organizational process problems."





Keith Porcaro '11, CTO and general counsel of SimLab, co-led the Access Tech Tools initiative and the Feb. 24th workshop.

Rose McKinley JD/LLMLE '17, who served as student supervisor for the Access Tech Tools project while enrolled in the Start-Up Ventures Clinic, says the initiative was an opportunity to get entrepreneurial experience while addressing real problems in access that technology could inadvertently be perpetuating. The Children's Law Clinic tool could improve quality of life for disabled children and their families, for example.

"It's not about flashy answers, it's about changing the small things that stall the necessary processes to help people," says McKinley, who will work with technology companies as an associate in Silicon Valley beginning this fall (see page 68). "What small time-savers could be mechanized in a way that, in the aggregate, would make for a more radical shift in providing services?"

At the April Tech Lab event Ward told the audience that about 80 percent of the civil legal needs of poor North Carolinians go unmet. "Legal technology offers an amazing opportunity to close that gap, but it won't happen unless we do so deliberately," he said, "unless we engage in the process and shape AI and other tools to address these needs. There is a lot of capacity to make the world a better place through technology. Some of it is market-driven, but some of it is not, and it's our responsibility to engage on both ends."

Lawyers need to stay equally engaged with technological change in other areas of practice, policymaking, and regulation, says Weil's Lender, noting that technology demands adept attorneys in order to function optimally. TAR, for instance, relies on input from lawyers to determine how best to search for relevant documents, he says.

"We're definitely not at the place where you press a button and the 1,000 most important documents come out. There's an art to the algorithms. There are a lot of linguistics PhDs who help develop this software, but you must have lawyers who are reviewing representative samples of the production, and making choices about what is important." ♡

**"A lot of these access problems aren't tech problems in the sense of putting someone on the moon — we're not breaking ground in computer science. These are information architecture problems, they're organizational process problems."**

**— Keith Porcaro '11, CTO and general counsel, SimLab**

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# Profiles



Neil Boyd Photography

## James Scott Farrin '90

**J**AMES SCOTT FARRIN'S NAME is familiar to many in Durham, thanks in large part to an aggressive ad campaign for his eponymous personal injury law firm and the sign that towers over the Durham Bulls' centerfield fence. But his representation of African-American farmers seeking redress for years of discriminatory loan practices by the U.S. Department of Agriculture has earned him national recognition as a formidable advocate for underdog clients.

"It was heart-wrenching to learn about our clients' suffering at the hands of government representatives," says Farrin of the six-year effort that ended in 2013 with a \$1.25 billion discrimination settlement paid to thousands of African Americans who had farmed or attempted to farm. "Being a part of their redress was deeply rewarding."

Farrin remains committed to providing access to justice, and now, along with his law firm and his wife, Robin, has made gifts totaling \$325,000 to the Duke Law Civil Justice Clinic. A partnership between the Law School and Legal Aid of North Carolina, the clinic allows students to directly represent low-income clients in a wide range of civil matters. Farrin's gift has been used to hire a new supervising attorney for the clinic; Jesse McCoy II, a former Legal Aid staff attorney and private practitioner, began a two-year position

as the clinic's inaugural James Scott Farrin Lecturing Fellow in April.

"The clinic offers students a valuable perspective on how law affects everyday people," says Farrin, who worked with Dean David F. Levi to identify a project that would directly benefit the citizens of Durham as well as law students. "I have seen the reports on some of the clinic's cases and talked with the Legal Aid lawyers who say the students have been a significant help to clients. An extra clinic faculty member will mean more students can be involved, and more low-income North Carolinians will receive assistance."

### Finding a niche in law and business

Farrin started his legal career in the Los Angeles area, where he spent five years doing business litigation at top firms. While he enjoyed the intellectual challenge, he says he felt emotionally disengaged from both his clients and his work. That changed when he moved back to Durham in 1995 and joined the practice of Finesse Couch '84 as a plaintiff's lawyer. He found the contingency-fee structure resonated with his fondness for efficiency and success-oriented compensation. And he enjoyed seeing the immediate effect of his work on his clients.

"The clients tended to be lower- and middle-income, so even smaller cases were huge for them," recalls Farrin. "It was really motivating to see my work make such a difference in someone's life."

He admits to being a little surprised at how much the work satisfied him. "I've always been interested in the combination of law and business," says Farrin, whose father was an international businessman, "but with plaintiffs' work I discovered I have some of my mother — a social worker — in me as well."

Knowing he had found his practice niche, Farrin opened a solo practice in 1997, calling on the business savvy he'd learned from his father and the marketing sense he'd picked up while working briefly in sales after college. The Law Firm of James Scott Farrin now has over 40 lawyers working in 14 offices around North Carolina. The firm has recovered over \$700 million for more than 30,000 North Carolinians since its inception.

"When I graduated it was rare for a Duke Law grad to embrace the commercial side of a law firm, but I think we've turned what some see as a distasteful function into a strength for our firm," he says. "Law firms are not always very well-run, and I believe it has been a competitive advantage for us to be focused on that, as well as on providing quality legal services."

## “An incredible cause”

It was the firm’s reputation for organization that landed Farrin the case known as *In Re Black Farmers Discrimination Litigation* (“*Farmers*”). It grew out of a class action suit, *Pigford v. Glickman* that was brought by African-American farmers alleging racial discrimination by the USDA in its allocation of farm loans between 1983 and 1997. Because more than 58,000 eligible farmers missed the filing deadline after the USDA settled the *Pigford* claims with a payout of more than \$1 billion in 1999, Congress included a provision in its 2008 Farm Bill giving the late filers a new right to sue for discrimination. A small firm heading up the *Farmers* case asked Farrin to help with organizing and administering the matter.

Farrin eventually took on a lead role in representing the farmers — “the case of a lifetime,” he says — investing six years and millions in out-of-pocket expenses. In addition to hiring the litigation team for the case and administering a nationwide action on behalf of tens of thousands of claimants, the firm became adept lobbyists.

Fair compensation for the discriminated victims was contingent on Congress allocating an additional \$1.15 billion to satisfy successful claims. “In order to convince Congress to appropriate more money, we had to do some intense lobbying, which we hadn’t done before,” he recalls. “We staged rallies, we called the press, we had the president of the National Black Farmers Association drive a tractor through the streets of D.C. — anything to keep the case in the media’s attention.” Congress eventually agreed to fund the settlement and Farrin attended the bill-signing ceremony at the White House. “It was just an incredible cause,” he says.

Since *Farmers* was resolved, Farrin’s role at his firm has continued to evolve from lead attorney to managing the law firm business, “so that the other lawyers don’t have to,” he says. While he has no plans to extend his firm’s practice beyond North Carolina he remains growth-oriented, and says he will continue expanding the firm’s services. In addition to increasing its practice areas, the firm now provides business and legal consulting to personal injury firms in other states, still opting for contingency-based pay instead of billing clients hourly. “We succeed when these firms meet their goals,” Farrin says. The firm has also developed software to improve law firm management, which it is in the process of licensing out.

He still handles cases of particular interest to him, such as a current mass action suit brought by students against the Charlotte School of Law, which is under probation with the American Bar Association (ABA) and has lost its authority to participate in the federal student

loan program. The complaint alleges that the private, for-profit school purposefully hid its troubles with the ABA from students in order to maintain enrollment and tuition. “In this case a for-profit law school is taking advantage of trusting students,” says Farrin. “It’s a different kind of case for us, like the *Farmers* case, and it really raises my ire.”

While Farrin is a gifted businessman and a persuasive advocate, he is not an actor. That well-groomed man with the grave baritone in Farrin’s ads is a paid spokesperson who replaced the actor Robert Vaughn in the role. Farrin is, in fact, soft-spoken and unpretentious. “I tried it,” says Farrin. “For half a day I tried to do a commercial and it was a humbling experience. I have the utmost respect for professional actors, and I’m happy to pay them so that I can keep my life normal and under the radar.”

That life includes time spent at his Hillsborough home with his wife Robin, who also works for the firm, his two teenage daughters, and his two adult step-children when they’re in town. Farrin has maintained ties with the Law School and hosts an annual summer reception at his office in the American Tobacco Complex for the Duke Law Club of the Triangle. He says that several professors, including Paul Haagan, Thomas Metzloff, and Donald Beskind, have provided advice over the years and were “integral” to Farrin’s success with the *Farmers* case.

Beskind, who practiced trial litigation in the Triangle for more than 30 years, believes Farrin’s work has had a significant effect on the legal industry. “Jim Farrin and his firm have reshaped the plaintiffs’ tort practice in much of North Carolina,” Beskind says. “Before, lawyers saw the existing model’s inefficiencies in providing services to those injured by negligence. Now, because of Jim, we know the great success possible by leveraging quality lawyering with great business acumen and savvy marketing. And beyond his firm, Jim has been a staunch supporter of legal services for the underserved. His generous gift to the Civil Justice Clinic continues those efforts.”

Clinic Director Charles Holton agrees, noting that the gifts from the Farrins and their firm directly support the low-income people of Durham by expanding the clinic’s capacity to handle cases with the addition of McCoy to the staff. McCoy also will play a substantial role in implementing a pilot program in Durham that Holton developed with a clinic student aimed at helping renters facing eviction find the necessary resources to stay in their homes and in that way avoid collateral effects ranging from permanent damage to credit to homelessness.

✍ — Caitlin Wheeler ’97



### Robin Harris '93

**I**N THE WORLD OF BIG-TIME COLLEGE SPORTS, the Ivy League might seem like an outsider. Its member teams do not offer athletic scholarships, and in the money-making sports of football and men's basketball, they aren't regular championship contenders. Yet as executive director of the Council of Ivy League Presidents and a member of multiple NCAA committees, Robin Harris '93, T'87 has been instrumental in increasing the Ivy League's media presence and creating an environment in which the league's teams have thrived. She has also engaged with every major issue facing intercollegiate athletics today, from the health effects of repeated concussions sustained during play to the question of whether student-athletes should be paid.

In April, Harris returned to Duke Law for a Reunion-weekend panel discussion about the increasing "professionalization" of college athletics as they have become a multi-billion dollar business fueled by television dollars. Joined on the panel by ESPN analyst Jay Bilas '92, T'86, who is a steadfast proponent of paying student athletes, and Riché McKnight T'94, global head of litigation at William Morris Endeavor | IMG, Harris argued firmly for the maintenance of amateurism and a college environment in which a student's academic experience both feeds and is improved by participation in sports.

"Sports should be co-curricular," she says in an interview, adding that athletics are a key part of the Ivy League experience. "Sports provide a tremendous opportunity for community on campus, for non-athletes and athletes alike. Some of

our most engaged alumni are former athletes and passionate fans, and a lot of post-grad connections are made through these networks. In the Ivy League, everyone from the coaches and athletic directors to the presidents, is absolutely committed to a balance between athletics and academics."

Harris also advocates supporting a wide-variety of non-revenue sports. She is concerned that some Division I schools (outside the Ivy League) are "headed towards a financial cliff" with their athletic programs and will soon have to choose between trying to compete with the "Power Five" conferences at a semi-professional level in football and basketball and trying to maintain a full offering of non-revenue sports.

Since taking the helm of the Ivy League in 2009, Harris has worked to reach consensus among its eight schools on rules and approaches to hot-button topics in college sports, and has brought those ideas to other conferences through her involvement on national boards and NCAA committees. For example, in 2016 the Ivy League announced that its football teams would eliminate "full-contact" practices during the season to reduce player concussions, and while other conferences have not yet followed suit, Harris says they've taken notice. The league also took the lead in proposing limits to recruiting athletes prior to their junior year in high school, a proposal the NCAA adopted in April for lacrosse. "I am excited to be pushing these conversations forward," Harris says.

Tasked with easing Ivy League schools into the sports-media fray where they have traditionally had limited presence, Harris has orchestrated deals with such networks as ESPN, CBS, FOX, and NBC to broadcast some football, basketball, and lacrosse games. She has overseen the creation of the Ivy League Digital Network, a subscription service featuring live and on-demand content from all member schools' sporting events. While it is not yet a net revenue generator, it has been very popular and "has exceeded our expectations," she says. Most recently, Harris supervised the implementation of the inaugural Ivy League men's and women's basketball tournaments in 2017, during which all games were shown on the ESPN family of networks, including ESPN2, ESPN3, and ESPNU.

Harris says she knew she had found her dream job when she was recruited by the Princeton, N.J.-based Ivy League in 2009, having been impressed by the conference commissioners she met during

her nine years at the NCAA. Yet as a political science major as an undergraduate at Duke, she saw herself headed into government work, not to a career at the highest level of sports administration. She recalls being amused when a career aptitude survey she took during her senior year indicated she was well suited to becoming an athletic director. Although she was a lifelong Yankees fan and a committed Blue Devil, she didn't play sports. "I'm more active now than I was then," says Harris, who has run several half-marathons.

It was during her undergraduate years, Harris says, that she came to appreciate Duke's emphasis on excellence in sports alongside academics, a value shared by the Ivy League. She was a Blue Devils superfan taking in all the home games and road games she could for basketball, football, soccer, and baseball, and often sat with and got to know players' parents and team officials, including former all-pro NFL running back Calvin Hill — Grant's father — and Joe Alleva, who later became Duke's athletic director. Although she didn't realize it at the time, she was building a valuable professional network.

After graduating, Harris spent three years in the Office of Government Services of PricewaterhouseCoopers in Washington, D.C., working with such clients as the U.S. State Department and the CIA, before deciding that a law degree would be the best path to the government jobs she admired. The daughter of two lawyers, she says it seemed an inevitable move: "Law was in my genes."

At Duke Law, Harris quickly found a mentor in her Contracts professor, John Weistart '68, who also taught Sports Law. He encouraged her to consider a career that meshed her interest in policy with her love for sports, and suggested she volunteer in Duke's athletic compliance office, which was arranged with the assistance of Alleva. The work inspired Harris, who became a notes editor on the *Duke Law Journal*, to write her student note on the procedural fairness of NCAA Enforcement Regulations, and to pursue other opportunities. Hill helped her meet women working with the Baltimore Orioles, where he was an executive, and she also spoke with others to learn more about professional sports. However, as a result of her experience at Duke and an internship at the ACC — thanks to an interview facilitated by then-Commissioner Gene Corrigan T'52, whom she met during a luncheon at the Fuqua School of Business — she opted to pursue a career in collegiate sports. "I preferred the



Harris, third from right, at the 2014 Harvard/Yale football game with Ivy League staff and ESPN Game Day on-air hosts, Desmond Howard, Chris Fowler, Lee Corso, and Kirk Herbstreit

student-athlete experience of college sports to the pure business of pro," she says. Her ACC internship led to a post-graduate job offer from the NCAA.

Harris held a variety of positions over nine years with the NCAA, entering as director of the Committee on Infractions and ending as the chief of staff for Division I sports. She left to join Ice Miller and soon became co-chair of the firm's collegiate sports practice, through which she developed management, marketing, and leadership skills, and furthered her relationships with university presidents and general counsels. Although the firm was based in Indianapolis, she was able to work from her home in Kansas, flexibility that she says she greatly appreciated as the mother of twin girls, who are now almost 12.

In 2016, the *Sports Business Journal* named Harris a "Game Changer," a national honor for women who have a major impact on sports business. She was "delighted" to see the crowd of women attending the Game Changers Conference.

"When I first became a conference commissioner in 2009, I'd avoid sitting at a table with one of the other two or three female commissioners at our meetings," she says. "We were all friends, but we didn't want to position ourselves as a separate contingent. Now, there are so many female commissioners in NCAA Division I, I can't avoid sitting at a table with another woman if I tried." Noting that she has never felt discrimination on the job in her traditionally male-dominated industry, Harris credits her husband's support and flexible work schedule as a database programmer as key to her success. They partner in juggling work and family duties, and she brings her daughters with her to sporting events whenever possible, happy to be modeling a rewarding career for them.

"I love it all," she says. "It's amazing to represent these schools, and to work with such a broad range of people who all get along with each other. I'm excited about where we're headed as a league."

She is also looking forward to attending her 25th Duke Law class reunion next year. "I've always really enjoyed my classmates," she says. And 1993 was a good year for Duke Law: Two of Harris' classmates, Mark Brandenburg and Kelly Capen-Douglas, are general counsels at Division I schools, The Citadel and the University of San Diego, respectively. ♣ — Caitlin Wheeler '97



## Rose McKinley JD/LLMLE '17

**A**S SENIOR CLASS PRESIDENT of her high school, Rose McKinley was required to attend school board meetings in her hometown of Danville, Penn. (pop. 4,699). One member of the board, a lawyer, seemed to command more respect than the others, she noticed. Later, when she began writing columns for her college newspaper about issues such as sexual assault, the death penalty, same-sex marriage, and voting rights, McKinley thought back to that man.

“Everybody seemed to listen to him a lot more than everybody else on the board,” says McKinley, who graduated in May with a JD/LLM in Law and Entrepreneurship. “I thought that if I could understand the law better, I could better articulate why those issues mattered. And so that just fit back into my experience growing up in a small town and how this guy who had been legally educated was able to be a better citizen.

“I think if there’s one thing about law school that really appealed to me, it was the ability it gives you to be a better citizen and a better community member.”

McKinley already has a head start. At Duke, she was a highly visible student leader, serving as president of the Duke Bar Association (DBA), attorney general of the Graduate and Professional Student Council, a member of the OutLaw board, and a staff editor of *Duke Journal of Gender Law & Policy*. Her enthusiasm for engaging with her fellow students won her both the Outstanding Contribution to the Duke Law Community Award from the DBA and the Law School Community Award from the faculty, and she shared the Justin Miller Award for Leadership with classmate Marcus Benning.

“Rose McKinley ... has distinguished herself in serving and strengthening the Law School community,” Clinical Professor Erika Buell said in presenting the faculty award on May 12. “Rose’s mom had a rule that you can’t complain about anything unless you’re taking action to change it. Rose is committed to making incredible positive change.”

McKinley’s hometown was a typical rural community except for the large health care system based there that frequently brought doctors to town. Her

father was a pediatrician who showed her how to stitch up the pigs, sheep, and horses on their property when they were hurt and took her along on house calls for neighbors who couldn't afford an office visit. All four of her siblings followed him into medicine, but she says, despite the prominence of the profession in her upbringing, she "never felt drawn to it."

After graduating from the University of Pittsburgh, she stayed at her alma mater to work as an admissions counselor, but eventually decided law school was the right path. As she considered where to apply, Duke's location was a draw; the McKinleys had vacationed at the Outer Banks and Rose even spent one college summer working at the Ocracoke Lighthouse. She also liked that Duke was small, like her hometown. "I got the sense that if I came here, I would get to know who my classmates were, and that's certainly held true, that's still my favorite thing about the Law School," she says.

Getting to know her professors has been equally valuable, she adds. Faculty were especially helpful when she took over as DBA president, advising her and serving as sounding boards for her ideas — and she had lots of ideas. Among the first, and perhaps most noticeable, was the purchase of a Ping-Pong table for the Blue Lounge, which students have put to nearly continuous use since its arrival.

"I think the Ping-Pong table has been a great example of Duke's culture at its best," says McKinley, who joked that it honored alumnus Richard M. Nixon '37 and his "Ping-Pong diplomacy" with China in the early 1970s. "You can walk past the Blue Lounge now at basically any time of day and there are people playing Ping-Pong, and it's not from one social group. There are LLMs playing against 2Ls and 1Ls playing against 3Ls, and that's been a fun thing to see."

McKinley embraced the wide and varied roles the DBA plays as both a student bar association and the Law School's student government as well as the opportunity to connect more deeply with her fellow students. She studied in Star Commons rather than the library to ensure she was accessible and hosted regular get-togethers at the Durham bungalow she shared with classmates Paul Gray and Paul Ream. She revived the DBA's monthly Thursday afternoon gatherings, partnering with other student organizations to increase turnout and bring students together. And she successfully lobbied the university to let 3Ls keep their parking spots in the nearby Chemistry lot when a new garage opened farther away.

But her community-building skills faced their biggest test following the presidential election on Nov. 8. With the surprise outcome reverberating the next morning, McKinley invited students, no matter their political persuasion, to gather for donuts and coffee and talk about their reactions. The event

marked the beginning of constructive conversations that might not have happened after such a divisive campaign, Buell said: "Rose sought to unify the student body and encourage dialogue." And while McKinley makes no secret of her politics — she organized 100 students to travel to the Women's March on Washington the day after the inauguration of President Trump — she notes with pride that at the annual D.O.N.E. awards, which are given by the DBA, organizations from opposite ends of the political spectrum, the Federalist Society and the American Constitution Society, were honored for Outstanding Student Organization Leader and Outstanding Contribution to Civic Discourse, respectively.

"Even in stressful times, people still care about each other here because we are a community," she says. "Interacting with people when they were trying to accomplish something and hopefully being a resource to them gave value to my experience here but also reinforced this belief that getting to know who my classmates are has been the most valuable part of my experience. It's made me realize that very simply, people matter."

The recipient of the Caroline Gottschalk '90 Scholarship, McKinley has shown particular interest in the status of women during her time at Duke, whether at the Law School, in the legal profession, or in the technology industry she will be advising as an associate in the Palo Alto, Calif. office of Cooley LLP beginning this fall. In her second year, she and a group of other women leaders of student organizations began meeting every other week to talk about their roles and how they could support one another and mentor others. She has also been involved in an effort to build a women's network within the alumni community, and she's hoping to organize a group of her classmates who are staying in Durham to study for the bar to get together and discuss books on about gender topics.

"Her energy level is just amazing," says Lila Hope '02, a Cooley partner who met McKinley at the ESQ event during McKinley's first year at Duke and had a chance to see her in action as a 2L summer associate at the firm. "She's enthusiastic and passionate about the fundamentals of law practice, and she possesses a rare combination of work ethic and intellectual acuity."

Silicon Valley would seem to be an ideal landing spot for McKinley, a member of the second class of students to graduate with the dual JD/LLMLE. As a first-year student in the program, she got a taste of the entrepreneurial life through her work with a start-up incubator and an emerging health technology company in Durham. In her second year, she worked in the Start-Up Ventures Clinic, counseling early-stage companies on entity formation and other transactions, and as a 3L, she was student supervisor for the Access Tech Tools initiative, in which students developed apps to assist underserved clients in a variety of practice areas.

"Before I came to law school I knew I wanted a career that made me feel like I was advising people and helping people and I saw the law as something that put you in a position to do that," she says. "And I think in particular that's why transactional work has stood out to me, because it's sitting down with people and understanding what they're trying to do and where they're trying to get and then advising them on how to structure the deal to get there. I see that as something that's been consistent throughout my life."

McKinley says Cooley, which is known for its informal and collaborative culture and has been named to Fortune's 100 Best Companies to Work For list, reminds her of the collegial environment at Duke. She says she's excited for the challenge of being an associate there and working with companies at the forefront of technological change, and remains committed to the goal she has held since high school: to be an effective member of her community.

"And whether that means being on the school board or being on local city council or running for senator one day, I feel like Duke Law School has given me the sort of critical thinking abilities and the ability and desire to question things ... that will make me a good citizen," she says. "Or I could come back to work in student affairs and get more Ping-Pong tables." ♡ — *Andrew Park*

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DUKE LAW  
*Reunion*  
2017

*"It was a very good year..."*



**A**LUMNI FROM CLASSES ending in "2" and "7" and members of the Half-Century Club celebrated their reunions April 7–9. Dean David F. Levi and the Law Alumni Association honored Judge Mary Ellen Coster Williams '77, John R. Wester '72, Paul W. Hespel '95, and Linton Mann III '07 for their exceptional career achievements and service to Duke Law School. Richard A. Danner, the Archibald C. and Frances Fulke Rufty Research Professor of Law and senior associate dean for information services, received the A. Kenneth Pye Award for Professional Achievement. During Reunion, Levi also announced the establishment of an endowed clinical professorship at Duke Law in honor of John Adams '62, co-founder and longtime leader of the Natural Resources Defense Council. ♡





# Alumni Notes

This section reflects notifications received between Aug. 1, 2016 and Jan. 1, 2017.

**BOV** denotes membership on the Law School's Board of Visitors.

## 1972

**David O. Smith** has published his second book about the New Testament, *Unlocking the Puzzle: The Keys to the Christology and Structure of the Original Gospel of Mark* (Resource Publications, 2016). His previous book was *Matthew, Mark, Luke, and Paul: The Influence of the Epistles on the Synoptic Gospels* (Resource Publications, 2011).

**Joshua Treem**, a criminal defense attorney and partner at Brown, Goldstein & Levy in Baltimore, was the subject of a cover profile in the January issue of *Super Lawyers Magazine*. The article featured, among other matters, his penchant for taking on unpopular cases and his work on behalf of indigent defendants.



**John "Buddy" Wester**, who practices in the Charlotte office of Robinson, Bradshaw & Hinson, received

the 2016 Distinguished Pro Bono Service Award. Presented by the Council for Children's Rights, Legal

Services of Southern Piedmont and Legal Aid of North Carolina, the award recognizes John's decades of pro bono service to the citizens of Charlotte and North Carolina. **BOV**

## 1973

**Dan Blue**, a North Carolina state senator, is serving, for the second time, as president of the National Conference of State Legislatures (NCSL). Part of NCSL's mission is to ensure that state legislatures have a strong, cohesive voice within the federal system. Dan joined the N.C. Senate in 2009, having previously served in the N.C. House of Representatives for almost 25 years. **BOV**



**Donald Mayer**, chair of the Department of Business Ethics and Legal Studies and professor-in-residence at the University of Denver's Daniels College of Business, gave a lecture titled "International Finance Today" at UNC-Asheville on Oct. 4 as part of the World Affairs Council lecture series. In his research and

teaching, Donald addresses issues of corporate governance, criminal liability and corporate corruption, corporate social responsibility, ethics and global capitalism, military security, and private companies.

**Ron Hoevet** received the Federal Bar Association's Honorable James M. Burns Federal Practice Award for 2016. The award is made annually to a lawyer who has contributed to the practice of criminal law before the U.S. District Court of Oregon. Ron is a shareholder and founding member of Hoevet Olson Howes in Portland.

## 1975

**Jack Welch**, the Robert K. Thomas Professor of Law at the J. Reuben Clark Law School of Brigham Young University, has been named the Distinguished Scholar in Residence at the University of Southern California, sponsored by USC's Office of Religious Life and the John A. Widtsoe Foundation. In addition to research and teaching during his spring 2017 residency, he is directing foundation initiatives.

**Jim Lewis** retired, in December, as United States attorney for the Central District of Illinois. Appointed by President Obama to lead the 46-county district, he previously served as chief of the district's Civil Division.

## 1976

**David Adcock** has been elected an independent trustee of the Turner Funds' Board. David served for over two decades as general counsel of Duke University and Duke University Health System.

**Dean Cordiano** has been inducted as president of the Connecticut Chapter of the American Board of Trial Advocates for a two-year term ending in 2018. Dean is general counsel of Loureiro Engineering Associates.

**Eric Halvorson** became dean, in September, of Trinity Law School at Trinity International University in Santa Ana, Calif. Eric previously taught at Pepperdine University, and is of counsel for a California law firm.

**Robert Schuckman** has been promoted to vice president — legal counsel of the Jewish United Fund/Jewish Federation of Metropolitan Chicago. He continues to lead endowment efforts for JUF while also handling legal matters for the organization, which he joined in 2001.

» For *Super Lawyers* and other professional kudos, see page 74.

Let your  
classmates  
know how  
you've been!

New position?  
Promotion?  
Life changes?  
Awards?  
Adventures?

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



**Gray Wilson**, senior partner at Wilson & Helms in Winston-Salem, has been installed as vice president of the

North Carolina State Bar. He is a past president of the N.C. Bar Association, and chairman of the board of Lawyers Mutual Liability Insurance Company.

## 1977

**Scott Gayle** has been awarded the Jim Hart Governor's School Champion Award by the North Carolina Governor's School Foundation for his "extraordinary contributions" in supporting the school, a summer residency program for gifted and talented high school students. Scott is a director at Tuggle Duggins in Greensboro, where he focuses on commercial real estate and business law.

## 1978

**Arthur Miller**, a managing director at Goldman Sachs, was elected vice chair of the Municipal Securities Rulemaking Board, effective Oct. 1. He previously chaired MSRB's finance committee.



**Wendy Collins**

**Perdue**, dean of the University of Richmond School of Law, has been named

president-elect of the Association of American Law Schools (AALS). In addition to serving on the organization's executive committee from 2013 to 2015, she has held a number of leadership positions within AALS, and has chaired its membership review committee and the sections on civil procedure and conflict of laws. **BOV**

## 1979

**Val Broadie** joined the Brookings Institution in April 2016 as associate vice president for institutional advancement. She previously was vice president for development and public affairs for Planned Parenthood of Metropolitan Washington. In November, she was named the Fundraiser of the Year by the D.C. chapter of the Association of Fundraising Professionals. **BOV**

**Steven Polard** has moved his bankruptcy and restructuring practice to Eisner Jaffe in Beverly Hills, Calif., where he is a partner in the firm's litigation department. He previously practiced at Davis Wright Tremaine in Los Angeles.

## 1980

**Jack Hickey** has been elected to membership in the Miami chapter of the American Board of Trial Advocates (ABOTA). He is the lead trial attorney at the Hickey Law Firm.

## 1981



**Paul Arne**, co-chair of Morris, Manning & Martin's technology transactions practice, is serving as chair

of the State Bar of Georgia's Technology Section. The section focuses on the needs of lawyers who represent clients in technology-related matters, such as the challenges posed when technological innovation conflicts with long-established legal practices.

**Janet McHugh** has been selected as executive director of the Television Music License Committee, which negotiates music performing rights licenses. Janet joined the TMLC from Sinclair

Broadcast Group, Inc., where she had counseled stations and managed legal functions in key areas including music rights since 2009.

## 1982

**Daniel Jacobs**, visiting associate professor of management at the College of Business Administration at Loyola Marymount University in Los Angeles, has authored *BP Blowout: Inside the Gulf Oil Disaster* (Brookings Institution Press, 2016).

## 1983

**Kim Hoover** has been appointed by Washington, D.C. Mayor Muriel Bowser to the Mayor's Advisory Commission on LGBT Affairs. Kim is a real estate investor and developer in D.C.

## 1985

**Gill Beck**, an assistant United States attorney in Asheville, has been named the Lawyer of the Year by *North Carolina Lawyers' Weekly*. Gill is also a major general in the U.S. Army Reserves.

**Mark Costley** has been elected chairman of the board of trustees for the North Carolina Humanities Council, a statewide nonprofit and affiliate of the National Endowment for the Humanities. Mark is an estate planning partner at Walker Lambe Rhudy Costley & Gill with offices in Durham and Clayton.

**Neil McFeeley** was awarded the 2016 Idaho State Bar Professionalism Award, and also named a 2016 Leader in Law by the *Idaho Business Review*. Neil is senior litigation partner with Eberle Berlin Kading Turnbow & McKlveen in Boise, where he has practiced for over 30 years.

## 1986

**Brent Clinkscale** has been named to the board of directors and executive committee of the Atlanta International Arbitration Society. Brent is a partner at Womble Carlyle Sandridge & Rice, where he heads litigation in the firm's Greenville, S.C. office. **BOV**

**Robin Panovka** has co-edited and co-authored the U.S. chapter in *The Real Estate M&A and Private Equity Review* (Law Business Research, Ltd., London, 2016). Robin is a partner at Wachtell Lipton Rosen & Katz in New York. **BOV**

## 1987

**Lisa Kaplan** has joined Ogletree Deakins in Atlanta as marketing counsel in the client services department. She previously directed the LLM program at Atlanta's John Marshall Law School.

## 1988



**Kodwo Ghartey-Tagoe**

has been named South Carolina state president of Duke Energy. He

joined the company in 2002 and has held a number of positions — most recently vice president, legal for Duke Energy's commercial business organization. **BOV**

**Louis Lappen** was named acting United States attorney for the Eastern District of Pennsylvania in December. Prior to this appointment, he was the first assistant U.S. attorney. Louis has served in the U.S. Department of Justice since 1997.

## 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 *Thomson Reuters*. See details at [law.duke.edu/alumni/news/classnotes](http://law.duke.edu/alumni/news/classnotes). This list reflects notifications received by Jan. 1, 2017, and includes such designations as "Rising Stars."

**Joshua Treem '72**  
**John Wester '72**  
**Fred Fulton '74**  
**Ron Hoebet '75**  
**John Keller '75**  
**Gray Wilson '76**  
**Mark Prak '80**  
**Fred Ungerman '80**  
**Irene Keyse-Walker '81**  
**Sharon Fountain '82**  
**Forbes Sargent III '85**  
**Joseph Morris '88**  
**Bill Mureiko '89**  
**Matt Sawchak '89**  
**Cheryl Scarboro '89**  
**Scott Creasman '90**  
**Caryn Coppedge McNeill '91**  
**Amy Meyers Batten '92**  
**Subhash Viswanathan '95**  
**Geoff Adams '98**  
**Kimberly Schaefer '98**  
**Dustin Rawlin '00**  
**Erin Bradham '02**  
**Nicole Crawford '03**  
**Nicole Williams '03**  
**Kimberly Klimczuk '04**  
**Sarah Schlossberg '04**  
**Bo Ketner '06**  
**Matt Leerberg '06**  
**Kelli Ovies '06**  
**Heidi Malmberg '08**  
**Valecia McDowell '08**  
**Adam Doverspike '09**  
**Isaac Linnartz '09**  
**Toby Coleman '10**  
**Mike Dowling '10**

## 1989



**Matt Sawchak** has been appointed solicitor general in the North Carolina Department of Justice by

Attorney General Josh Stein. The solicitor general's office is responsible for handling civil appeals before state and federal appellate courts and coordinates the agency's participation in amicus briefs. Matt previously was a partner in the Raleigh office of Ellis & Winters focusing on appeals, business litigation, and anti-trust. He also is the former chair of the N.C. Bar Association's Appellate Rules Committee.

## 1991

**Gary Spitko**, Presidential Professor of Ethics and the Common Good, and professor of law at Santa Clara University, has authored *Antigay Bias in Role-Model Occupations* (University of Pennsylvania Press, 2016). He teaches courses in arbitration, mediation, employment discrimination and employment law, and wills and trusts, and has published extensively in the areas of arbitration, donative trusts, employment law, and law and sexuality.

## 1992

**Mark Patterson** has retired, as a colonel, from the U.S. Air Force and is pursuing an LLM in international dispute resolution at Fordham University in New York City.

**Paige Whitaker**, former deputy district attorney for Fulton County, Ga., has been appointed by Gov. Nathan Deal as a judge of the Fulton County Superior Court to replace a retiring jurist. She joined the DA's office in 2010.

## 1993

**David Elliott** has been appointed deputy chief of staff and special deputy attorney general in the North Carolina Department of Justice. He has served in the NCDOJ since 1997. As director of the Victims and Citizens Services Section for the past 10 years, he advocated against domestic violence, sexual assault, and human trafficking.

**Candice Savin** was appointed, in October, to the Westport (Conn.) Board of Education to fill a recently vacated seat for a term that ends in November. Candice, who practices real estate law in Westport, received unanimous board approval for her appointment.

## 1994



**David Kendall** founded Bold Legal, in September, with offices in Denver and Boulder, Colo. The firm, of which David is also CEO, is an entrepreneurial transactional and business law firm. David previously founded Kendall Koenig & Oelsner in 2002.



**Sterling Spainhour** has been named senior vice president and general counsel of Southern

Company Services in Atlanta. He previously was a partner at Jones Day in Atlanta.

**Caroline Verbruggen** was sworn in as a judge of the Brussels Court of Appeals in January. She also sits with the Market Court, a special division of the Brussels

Court of Appeals that handles various administrative matters. Caroline had previously served as a judge with the Tribunal of First Instance of Brussels.

## 1995



**Helen Dooley** is senior vice president, talent representation and general counsel of Tandem Sports

and Entertainment, a sports and entertainment agency in Washington, D.C. She previously practiced at Williams & Connelly.

## 1996



**Darren Jackson**, a five-term Democratic representative from District 39 (Eastern Wake County) to the

N.C. House of Representatives, has been elected minority leader for the 2017-18 legislative term. At Gay, Jackson & McNally in Zebulon, Darren maintains a general legal practice with emphasis on personal injury, wrongful death, worker's compensation, civil litigation, and residential real estate.

## 1997

**Matthew Kirtland** has been appointed partner-in-charge of the Washington, D.C., office of Norton Rose Fulbright, where he also leads the international arbitration and transnational litigation practices.

## 1998

**Bill Davis** was elected in November and began a four-year term in January as a district court judge in Guilford County, N.C. He served for the previous 18 years as an assistant public defender in Greensboro.

**Jessica Lange** joined Darden Restaurants, Inc., headquartered in Orlando, as vice president, and associate general counsel — securities and finance in March 2016. She previously was an attorney at DTE Energy in Detroit.



**Jason Miner** has been named Oregon's natural resources policy manager by Gov. Kate Brown.

Jason served as executive director of 1000 Friends of Oregon, a land use planning advocacy group, since 2010.

## 1999

**Brian Fowler** has been promoted to general counsel of Millennium Health in San Diego. He joined Millennium in 2012 as assistant general counsel.

**Barb Goffman** won the Agatha Award for the best mystery/crime short story published in 2015. Her story "A Year Without Santa Claus?" was the cover story of the January/February 2015 issue of *Alfred Hitchcock's Mystery Magazine* and was named a finalist for the Macavity Award for best mystery/crime short story of the year, given out by Mystery Readers International. Barb's story "The Wrong Girl" was named a finalist for the Short Mystery Fiction Society's Derringer Award for best flash fiction story of 2015 and appeared in the anthology *Flash and Bang* (Untreed Reads Publishing).

**Abigail Kahl** has been named co-chair of the family law practice at Denbeaux & Denbeaux in Westwood, N.J. Abby is senior counsel at the firm.



**Lisa Levin Reichmann** was inducted into the Greater Washington Jewish Sports Hall of Fame in November. An accomplished distance runner, Lisa has completed more than 20 marathons and is a 10-time Boston Marathon finisher. She won a gold medal in the half marathon competition at the 2003 Pan American Maccabi Games in Santiago, Chile, and is co-founder of Run Farther & Faster, LLC.

## 2000

**Juan Mackenna** has co-authored the Chilean chapter of the *Geothermal Transparency Guide: An Overview of Regulatory Frameworks for Geothermal Exploration and Exploitation* (BBA Legal, 2017 edition). Juan is a partner and head of the energy group at Carey law firm in Santiago, Chile.

**Nathan Sales** has been granted tenure as associate professor of law at Syracuse University College of Law, where he teaches and writes in the fields of national security law, counterterrorism law, administrative law, and constitutional law. He previously was assistant professor at George Mason University School of Law, and is of counsel in the Washington, D.C., office of Kirkland & Ellis.

## 2001

**Ayumu Iijima** has founded and is senior partner of Innoventier LPC, a boutique IP firm with offices in Tokyo and Osaka, Japan.

**Lisa Hall Johnson** has been named administrative judge for District 5, Prince George's County, Md. She was appointed to the district court in 2013. Prior to her appointment to the bench, Lisa was the director of litigation at Washington Gas Light Company.

**Desiree Sumilang Kwik** and her husband, Derek, welcomed twins, Dakota Olivia and Caroline Dylan, on Dec. 28, 2016. The family resides in Hong Kong.

**Chih-Chieh (Carol) Lin** LL.M. '01, SJD '05 has been promoted to full professor at the National Chiao Tung University Law School in Taiwan. Carol also serves as associate dean.

**Josh Malkin** has been named to the *Forbes Magazine* Top 200 Wealth Advisors in the U.S., as well as the *Barron's* Top 1,200 Financial Advisors in the U.S. Josh is managing director of the Malkin Group at Morgan Stanley.

**Antony Sanacory** has joined the Atlanta litigation firm HudsonParrottWalker, where he specializes in construction law. He previously practiced at Duane Morris, and serves on the board of directors of the Construction Financial Management Association of Georgia.



**Amy Scarton** has been named assistant secretary of the Washington State Ferries Division of the Washington Department of Transportation. She previously was the department's assistant secretary for community and economic development, and also served in senior transportation roles in the administrations of Presidents Barack Obama and George W. Bush.

## 2002



**Erin Bradham** has been elected partner at Steptoe & Johnson. Based in the firm's Phoenix office,

she focuses her practice on commercial litigation, with an emphasis on defending major insurance companies.

**Brendon Fowler** has been named partner at Perkins Coie. Based in Washington, D.C., Brendon focuses his practice primarily in the area of telecommunications and technology.

**Aaron Futch** married Sonia Winfield-Futch on July 23, 2016. Aaron is corporate counsel at LexisNexis Risk Solutions in Atlanta.



**Joanne Kwong** has joined Pearl River Mart, an Asian goods emporium in New York City,

as president. Joanne previously had served as vice president for communications and counsel to the president of Barnard College.

**Andrea Ghoorah Sieminski** and her husband, Paul, welcomed a son, Peter Vikram Sieminski, on Sept. 19, 2016. He joins big sister, Nora.

## 2003

**Frederick Isasi** has been named executive director of Families USA, a health care advocacy organization. He most recently served as the health division director with the National Governor's Association Center for Best Practices.

## 2004

**Tamala Boyd** was appointed, in August, as general counsel of the New York City Department of Consumer Affairs, where she had previously served as associate and deputy general counsel.



**Randy Cook** has joined Ankura Consulting Services as a senior managing director in the

firm's contractual compliance & risk, and resilience & geopolitical groups. Randy most recently worked for Sikorsky Aircraft Corp.

**Nicolas Diebold** has been appointed professor of public and economic law at the University of Lucerne, Switzerland. He has been a teaching fellow there since 2012. Prior to his professorial appointment, Nicolas was head of internal market affairs with the Swiss competition authorities in Berne and practiced at an international law firm in Zurich.

**Josephine Ko** has joined Vigilant, headquartered in Tigard, Ore., as an employment attorney. She frequently speaks and writes on employment law issues.

## 2005

**Chih-Chieh (Carol) Lin** SJD '05, LLM '01 has been promoted to full professor at the National Chiao Tung University Law School in Taiwan. Carol also serves as associate dean.

**Jennifer Harpole** has been promoted to shareholder in the Denver office of Littler, where she counsels employers on a wide variety of employment matters.

**Thomas Lenne** has joined Fieldfisher in Brussels as a partner in the corporate law/M&A department. He previously practiced at Baker & McKenzie.



**Robert Muth** was appointed academic director of the University of San Diego School of Law legal clinics

in July. As academic director, he oversees USD's 10 client-service legal clinics, while continuing to serve as managing attorney for the Veterans Legal Clinic, which he has overseen since its founding in 2012.

**Amy Mason Saharia** has been elected partner at Williams & Connolly in Washington, D.C., where she focuses her practice on complex commercial litigation and appellate litigation.

## 2006

**Garrett Levin** has joined the National Association of Broadcasters as deputy general counsel for intellectual property law and policy. Garrett served as senior counsel to Sen. Patrick Leahy (D-Vt.) since July 2015, after serving as counsel since 2014.



**Matt Leerberg** has been elected partner-in-charge of the Raleigh office of Smith Moore Leatherwood,

and has joined the firm's management committee. Matt's practice focuses on appellate and business litigation in North Carolina state and federal courts. He is vice-chair of the N.C. Bar Association's appellate practice section.

**Dana Pirvu** has joined Ag.com, Inc., a subsidiary of Amazon.com, Inc., as corporate counsel, based in Palo Alto, Calif. She previously was underwriting counsel at Ambridge Partners in New York City.

## 2007

**Tiaunia Bedell Henry** married David Henry on Nov. 4, 2016 in Santa Monica, Calif. Tiaunia is an associate in Gibson Dunn & Crutcher's Los Angeles office, where she is a member of the firm's litigation department with a primary focus on antitrust, breach of contract, and transnational cases.

**Ryan McLeod** has been elected partner in the litigation department of Wachtell, Lipton, Rosen & Katz in New York City. Ryan has taught seminars on corporate litigation at Duke Law's Wintersession and at Columbia Law School.

**Allison Jones Rushing** has been elected partner at Williams & Connolly in Washington D.C. She married Blake Rushing on Nov. 5, 2016 in Washington.

## 2008

**Michael Goodman** has joined the Office of Regulatory Policy, Center for Drug Evaluation and Development at the Food and Drug Administration as an attorney-advvisor. He previously was a trial attorney at the Department of Justice and a visiting assistant professor at George Washington University School of Law.

**Tomas Nassar** and his wife, Roxana Ortiz, welcomed a son, Felipe Nassar Ortiz, on Aug. 16, 2016.



**Justin Outling**, an associate in the Greensboro, N.C., office of Brooks Pierce, received the

"Outstanding Young Lawyer Award" from the Guilford County Black Lawyers Association in November. Justin's practice focuses on business litigation and white-collar criminal defense. He is also a member of the Greensboro City Council, representing District 3.

**Ana Santos Rutschman** LLM '08, SJD '16, the 2016-2017 Jaharis Faculty Fellow in Health Law and Intellectual Property at DePaul College of Law, has been named a Bio IP Scholar 2017 by the American Society of Medicine, Law and Ethics, based on her work-in-progress, "The IP of Ebola and Zika."



**Sarah Hawkins Warren** was named solicitor general for the State of Georgia effective Jan. 1.

As solicitor general, she oversees appellate litigation and collaborates on all phases of significant litigation with other attorneys at the Department of Law. Sarah previously served as Georgia's deputy solicitor general and special counsel for water litigation. Sarah and her husband, Blaise, welcomed a son, William Jr., on Sept. 21, 2016. **BOV**

**Bryce Yoder** has been elected partner at Keating Muething & Klekamp in Cincinnati, where he practices in the firm's litigation group, with a focus on complex commercial litigation.

## 2009



**Jeff Mason** has been elected partner in Stinson Leonard Street's Minneapolis office. He practices in the firm's financial services and class action litigation group.

## 2010

**Cesar Lanza Castelli** was married to Candelaria Escuti on Oct. 8, 2016, in Cordoba, Argentina. Cesar has founded the Lanza Castelli Law Firm.

**Junko Kawai** and **Adam Harris '11** welcomed a daughter, Rena Kawai Harris, on Aug. 1, 2016. Junko was recently a visiting scholar at Duke Law School, and is a partner with the Umegae Chuo law firm. She is based in New York City.

**Jonathan Porter** and **Sara Ruvic '11** were married on Sept. 6, 2015 in Dubrovnik, Croatia. They currently reside in Washington, D.C., where Jonathan is a litigation associate at Simpson Thacher & Bartlett.

## 2011

**Noah Browne** has joined the U.S. Department of State as an attorney adviser. He previously was an associate at Arnold & Porter.

**Andrea Dinamarco** has joined GM Financial in Charlotte, N.C., as legal counsel. She previously was an associate at Linklaters in Sao Paulo, Brazil, and consulted for a candidate in that city's mayoral race.

**Lauren Fine**, co-director of the Youth Sentencing and Reentry Project in Philadelphia, has been honored by the American Bar Association on its "On the Rise" list of top 40 young lawyers.

**Adam Harris** and **Junko Kawai '10** welcomed a daughter, Rena Kawai Harris, on Aug. 1, 2016. Adam is an associate at Sullivan & Cromwell in New York City.

**Sara Ruvic** and **Jonathan Porter '10** were married on Sept. 6, 2015 in Dubrovnik, Croatia. They currently reside in Washington, D.C., where Sara is a regulatory attorney at Buckley Sandler.

## 2012

**Yana Britan** is a commercial litigation associate at Gusrae Kaplan Nusbaum in New York City. She was previously an associate at Berwin Leighton Paisner in Moscow.

**Christina Brown** is an associate in the business finance and restructuring department at Weil Gotshal & Manges in New York City. She previously worked at GE Capital.

**Taylor Frankovitch** has been elected partner at Bowles Rice in Pittsburgh, where his practice focuses on the areas of energy, commercial law, real estate, and litigation.

**Kate Hunter** has joined Bass Berry & Sims as an associate in the firm's Nashville, Tenn., office. Previously, Kate was an associate in the Washington, D.C., office of Norton Rose Fulbright.

**Aditya Kurian** has joined O'Melveny's international arbitration practice in Hong Kong. He most recently served as counsel and a country head at the Hong Kong International Arbitration Centre.



**Steven Lee** has been named corporate counsel at Farmer's Business Network, Inc., an agricultural data analytics start-up based in Silicon Valley.

**Timothy Lee** has returned to the New York office of Cleary Gottlieb Steen & Hamilton after two years in the firm's Seoul office. His practice focuses on corporate and financial transactions, including the organization and operation of private investment funds.

**Xiao Recio-Blanco** LL.M.'12, S.J.D.'15, staff attorney at the Environmental Law Institute in Washington, D.C., has also been named director of the institute's Ocean Program.

**Hannah Woolf Vigoda** has opened an immigration practice, Vigoda Law Firm, in Raleigh, N.C. She previously worked at the Robertson Immigration Law Firm, also in Raleigh.

**Julia Wood** and her husband, Todd Leskanc, welcomed a daughter, Margaret Elizabeth Leskanc, on Dec. 16, 2015.

## 2013



**Tim Capria** has joined the Nashville, Tenn., office of Bradley Arant Boult Cummings as an associate on the intellectual property team. He previously was with Patterson Intellectual Property Law, also in Nashville.

**David Roche**, an attorney at the Environmental Law Institute in San Diego, was a guest on NPR's "Diane Rehm Show" on Aug. 8, speaking about the environmental implications of an increasing global demand for sand.

## 2014

**Christina Mullen Carroll** married Osman Carroll on June 26, 2016. Christina is an associate at Lynn Pinker Cox & Hurst in Dallas.

**Devon Damiano** joined the Department of Justice Legal Honors Program last fall, after completing a clerkship with Judge James A. Wynn Jr. on the U.S. Court of Appeals for the Fourth Circuit. Devon, who also holds a masters in environmental science and policy from Duke's Nicholas School of the Environment, is in the DOJ's Environment and Natural Resources Division.

**Adam Garmezy** has joined the mergers & acquisitions/private equity group at Debevoise & Plimpton in New York City. He previously practiced at Akin Gump in Houston.

**Natalie Laflamme** has joined Sulloway & Hollis in Concord, N.H., after completing a two-year clerkship with Justice Robert Lynn on the New Hampshire Supreme Court.

**Henry Phillips** has joined the Washington, D.C., office of Gibson Dunn & Crutcher after completing clerkships with Judge Gene Pratter on the U.S. District Court for the Eastern District of Pennsylvania and Judge Marjorie Rendell on the Third Circuit U.S. Court of Appeals.

**Sean Spence** has joined Proskauer Rose's New York office as an associate in the corporate department and a member of the private investment funds group. Sean previously practiced at White & Case.

**Donna Stroud**, a judge on the North Carolina Court of Appeals since 2006, received a Distinguished Alumni Award from Campbell University in October. She received her undergraduate and JD degrees from Campbell, and is an adjunct professor at its Norman Adrian Wiggins School of Law.

**Patricia Timmons-Goodson**, a former North Carolina Supreme Court associate justice and current vice chair of the U.S. Commission on Civil Rights, received the Elon Law School Leadership in Law Award in September.

**Josephine Woronoff** is a teaching assistant and PhD student studying oceans law at the Perelman Centre of Philosophy and Law at the Universite libre de Bruxelles.

## 2015

**Taylor Bartholomew** joined K&L Gates as an associate in the firm's office in Wilmington, Del., in November. He previously practiced at Morris, Nichols, Arsht & Tunnell. [Editor's note: A note in the fall 2016 issue of *Duke Law Magazine* incorrectly stated that Taylor had joined Morris Nichols. We apologize for the error.]



**Risnan Yosai '15** was married to Sierra Yuwono on Sept. 24, 2016 in Jakarta, Indonesia. Risnan is a senior associate at Zico Law in Jakarta.

**Mitch Blanchard** has joined Miller & Martin's Atlanta office, where he practices in the firm's corporate department. He previously was an associate with Smith Gambrell & Russell.

**Andrew Ligon** married **Nicole Blumenkehl Ligon '16** on Aug. 20, 2016 in New York City. Andrew is a corporate associate in the New York office of Baker Botts.

**Bryan McGann** has been named executive director of the Blackstone Entrepreneurs Network of North Carolina. Bryan also has been named interim director of the Start-Up Ventures Clinic and the Advanced Start-Up Ventures Clinic at the Law School, and is entrepreneur in residence at UNC Chapel Hill, a member of the founding team of the Carolina Angel Network, and of counsel to the Smith Anderson firm.

**Kara Nisbet** has joined Youngs Law Firm in Belize City, Belize, as an associate.

## 2016

**Anna Johns Hrom** was married to James Hrom Jr. on Jan. 14, 2017 at Duke Chapel. Anna is a PhD candidate in the history department at Duke.



**Nicole Blumenkehl Ligon** married **Andrew Ligon '15** on Aug. 20, 2016 in New York City. Nicole is a litigation associate at Cahill Gordon Reindel in New York.

**Ana Santos Rutschman** SJD '16, LLM '08, the 2016-2017 Jaharis faculty fellow in health law and intellectual property at DePaul College of Law, has been named a Bio IP Scholar 2017 by the American Society of Medicine, Law and Ethics, based on her work-in-progress, "The IP of Ebola and Zika."





# In Memoriam

(Received Nov. 15, 2016–June 10, 2017)

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## Class of '49

**Robert Franklin Clodfelter**

March 23, 2017

**Duncan Waldo Holt Jr.**

March 9, 2017

**Sidney W. Smith Jr.**

March 7, 2017

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## Class of '51

**Robert L. Clement Jr.**

June 9, 2017

**James Toombs Thomasson Jr.**

November 6, 2013

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## Class of '52

**Fred Folger Jr.**

December 13, 2016

**Hon. E. Lee Morgan Jr.**

March 13, 2017

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## Class of '53

**William Austin (Bill) Brackney**

July 16, 2016

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## Class of '59

**Cameron Harrison Allen**

January 23, 2017

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## Class of '60

**Richard E. Cooley**

December 14, 2016

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## Class of '64

**B. Frederick Buchan Jr.**

April 27, 2017

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## Class of '65

**William M. (Bill) Curtis**

March 27, 2017

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## Class of '68

**Henry E. Seibert IV**

July 5, 2015

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## Class of '73

**Richard Paul Rohrich**

March 26, 2017

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## Class of '83

**Patrice A. (Patty) Travers**

January 23, 2017

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## Class of '16

**Richard Lin**

May 9, 2017

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## Class of '18

**Chen Sheng**

February 13, 2017

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**Professor Richard C. Maxwell**

Taught 1980–1994

October 7, 2016

# Sua Sponte

## The J. Michael Goodson Law Library at twilight, Jan. 24, 2017

**M**EMBERS OF THE DUKE LAW COMMUNITY make good use of their 24-hour access to the law library, which was renovated in 2008 under the supervision of Archibald C. and Frances Fulk Ruffy Research Professor of Law Richard A. Danner, the library director. Danner, also senior associate dean for information services and a leader in the field of law librarianship, is retiring after 38 years at Duke Law. (Read more, page 27.) ♪

Photo: Megan Mendenhall/Duke Photography





# Duke Law in Your City

*Summer Event Series*

*This summer*, Duke Law Alumni Clubs are hosting events bringing together alumni, students, and friends in cities across the country. Join local alumni and students for barbecues, receptions, boat cruises, baseball games, panels with industry leaders, and much more!

Check out events in... **Miami, Dallas, Chicago, New York, Washington D.C., San Francisco**, and many more!



» Visit [law.duke.edu/alumni/connected/clubs](http://law.duke.edu/alumni/connected/clubs) to find an event near you!

Do you want to receive invitations to all local Duke Law alumni events? Be sure to update your contact information in the Alumni Directory at [alumni.duke.edu](http://alumni.duke.edu)!

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## Questions?

Please contact the Law Alumni Office at [alumni\\_office@law.duke.edu](mailto:alumni_office@law.duke.edu).

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# Innovation incubator:

Duke Law stakes out a leadership role in law and technology

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