Message from the Editor in Chief and the Executive Editor

Dear Alumni,

We hope that you enjoy this latest edition of the VLR Alumni Newsletter! We are in the midst of another busy year here at the Vanderbilt Law Review. We are about to publish our first issue of Volume 71, which features articles on transparency in the legal system, contract theory, consumer credit litigation, and cross-border law enforcement access to electronically stored data. Additionally, the issue includes student-written notes on regulating gestational surrogacy and the relationship between correctional facility medical care and criminal incompetency.

In addition to publishing first-class scholarship, we are happy to report the Law Review’s involvement in several exciting events this year. We recently concluded a Fall Symposium, “The Future of Discovery,” which focused on advances and challenges related to e-discovery. In addition to bringing federal judges and scholars to campus to present cutting-edge work on discovery, the Law Review also secured CLE credit for the event so that practicing attorneys could attend and benefit from the symposium sessions. We are also looking forward to hosting Judge Christopher Cooper as part of the Law Review’s judicial speaker series, which is cosponsored by the Branstetter Judicial Speaker Series. Judge Cooper serves on the U.S. District Court for the District of Columbia and has presided over a number of high-profile, highly important trials, including most recently US v. Khatallah, the trial of the accused Benghazi terrorist.

We would like to thank you all for your continued interest in and support of the Law Review. We hope to continue building our alumni network and working to foster meaningful interaction between our current and former members. We love hearing from our alumni, and we hope that you will be in touch with any comments, updates, or ideas of what to feature in future newsletters. And as always, we hope that you will stop by if you are ever in Nashville—we would love to see you!

Sincerely,

Alex Carver (J.D. ’18), Editor in Chief & Margo Wilkinson Smith (J.D. ’18), Executive Editor
VLR Alumni Spotlight:

Dean Darby Dickerson (‘88)

Before becoming Dean of The John Marshall Law School in Chicago, former President of Scribes—The American Society of Legal Writers, and inaugural recipient of the Darby Dickerson Award for Revolutionary Change in Legal Writing, Darby Dickerson was hours away from committing to Emory Law School when she reached out to Anne Brandt, former Associate Dean for Admissions and Student Affairs at Vanderbilt Law, to reiterate her desire to attend law school in Nashville. Darby and Anne first met in an elevator at The College of William & Mary, where Darby, a senior working in the career center, had organized a panel of law school admissions directors that Anne attended to promote Vanderbilt Law School. When the two met, Darby told Anne that she was applying to law schools and applied to Vanderbilt because of Anne’s encouragement. When Anne later learned about Emory’s admission offer, she asked Darby to hold off, and Darby quickly received her admissions letter. When Darby then figured out she could not put together a financial package to attend Vanderbilt, Anne worked out a half grant, which made a Vanderbilt Law education possible. After Darby started her career in legal academia, she and Anne continued to work together—Darby has twice hired her as an admissions consultant.

While at Vanderbilt, Darby worked as Senior Managing Editor for the Vanderbilt Law Review, developing an eye for detail and a passion for footnotes that benefited her throughout her career. She credits this position with helping her obtain a clerkship with Judge Harry Wellford of the Sixth Circuit. Two years into practicing at Locke Purnell Rain Harrell (now Locke Lord) in Dallas, Darby was hired to teach legal writing as an adjunct professor at SMU Law—a job she directly credits to her work as Senior Managing Editor at Vanderbilt Law Review. She then went on to start her career as a professor of law and director of legal research and writing (and law review faculty advisor) at Stetson University College of Law in Tampa Bay, Florida. Because of her extensive work with citations, Darby was invited to author the ALWD Citation Manual, a legal citation guide competing with the Blue Book.

Darby’s career in legal writing and education continued to grow. Before starting at John Marshall Law School, Darby served as Dean at Stetson University College of Law in Florida from 2003-2011 before accepting a position as Dean of Texas Tech University School of Law, which she held from 2011-2016. She was integral to improving the legal writing programs at both schools, and helped put legal writing professors in tenure-track positions. She has also served as a managing editor for both Legal Writing: The Journal of the Legal Writing Institute, and the Scribes Journal.
In recognition of her contributions to legal writing and education, Darby received the Burton Foundation Award for Outstanding Contributions to Legal Writing Education in 2005. In 2012, the Association for Legal Writing Directors awarded Darby the first inaugural Darby Dickerson Award for Revolutionary Change in Legal Writing, *National Jurist* named her one of the most influential people in legal education in 2016, and on January 4, 2018, she received the AALS Lifetime Achievement Award for Legal Writing.

In addition, she’s an elected member of the American Law Institute, just finished a term on the Executive Committee of the Association of American Law Schools, and just started a term as Chair of the AALS Deans Forum Steering Committee.

Darby is also a prolific academic, publishing a variety of works on legal writing and legal education. One of her most notable pieces is *Professor Dumbledore’s Advice for Law Deans*. When asked if she thought Professor Dumbledore had any advice to current students and recent graduates of Vanderbilt, she said, in part quoting Dumbledore:

“It is our choices . . . that show what we truly are, far more than our abilities.” Students on the Vanderbilt Law Review obviously have tremendous talent and abilities. My advice is to focus on how you choose to use those abilities. Be true to yourself, follow your passion, and understand the tremendous power that lawyers have to both literally change the world, and to change the world of individuals and other clients they are able to help. Lawyers wield power in this world. Use your power wisely.

Darby credits her time and training at Vanderbilt Law School for opening opportunities that led to a successful career in law and academia. To give back to the school that she feels gave her so much, she established an endowed scholarship at Vanderbilt to help students planning a career in law teaching.
VLR Alumni Spotlight:
Rick McMurtry (‘94)

As a Nashville native, Rick McMurtry recognized Vanderbilt as being at the pinnacle of schools one could attend. McMurtry graduated magna cum laude from Belmont University and was the Student Government Association President. Naturally, he was accepted to numerous elite law schools, and was ultimately drawn to the community environment at Vanderbilt Law. From the beginning, McMurtry established a closely-knit group of friends, and found himself having more fun than he did in college. Upon becoming a member of the Law Review, he met some of his dearest, life-long friends. Although McMurtry can only remember being consumed with writing his note during his 2L year, he has vivid memories from his role as the Senior Notes Editor. Many a night he would be working late alongside his fellow senior editorial board members. Despite never procrastinating, the team continually found itself scrambling to finalize edits and get the newest edition out the door.

McMurtry went on to clerk for Judge Robert L. Echols for the U.S. District Court for the Middle District of Tennessee. There, he found himself writing a number of draft opinions and felt that the Law Review prepared him well for the immense meticulousness required. Subsequently, he began work as an IP litigator in Washington, D.C., but soon discovered that patent cases were not for him. McMurtry quickly transitioned to become a trademark attorney where he has found a home and remained ever since. McMurtry believes that the Law Review sharpened his writing skills and provided an absolutely essential and practical foundation for his day-to-day work.

After moving to Atlanta, Georgia with his partner, McMurtry spent less than two years at a firm before interviewing at Turner Broadcasting System, Inc. Turner runs channels like CNN, TBS, TNT, and Cartoon Network. McMurtry began as Senior Counsel in 2000, and by 2006 was the Assistant General Counsel at Turner. This required him to oversee all of Turner’s worldwide IP assets—including trademarks, patents, domain names, and copyrights—as well as issues relating to music, licensing, compliance standards, and advertising. By 2016, he became the Vice President and Associate General Counsel at Turner. McMurtry is fascinated by the incredibly dynamic entertainment industry, and finds that he is able to grow and build his practice in genuinely enjoyable ways.

When asked to reflect on his proudest accomplishment during his time at Turner, McMurtry promptly responded, “my two boys!” In addition to being a devoted father, McMurtry is very proud of his gratifying and rewarding work with the Pro Bono Partnership of Atlanta. He previously served as Chair of the Board, and has been honored as Volunteer of the Year as well. Moreover, McMurtry was the recipient of the 2017 Intellectual Property Community Service Award by the IP Law Section of the State Bar of Georgia.

*Modern Counsel* referred to McMurtry as “A Quiet Example” for the LGBTQ movement. McMurtry feels that in addition to the marches and parades, society also needs quiet examples. Although he would not call himself a quiet person, he’s not the one “hanging the drums.” Three years ago, he legally married his partner after two children and nineteen years of being together. His family resides in an area where many of the neighbors are not accustomed to a family life that does not resemble their own. Yet, McMurtry has noticed that by simply living his life—caring for his family and being involved in the community—his neighbors are embracing that his family is equally deserving of every freedom and benefit that they themselves enjoy. Most recently, he hosted a caroling party for his neighbors where they sang together, ate cookies, and sipped on hot chocolate in union. Without a doubt, McMurtry is continuing the Law Review spirit of collegiality and kindness.
VLR Alumni Spotlight:
Samiyyah Ali (‘16)

Samiyyah Ali knew she wanted to attend law school beginning in elementary school (that is, after her mother talked her out of her original plan—clown school). She was inspired by the idea of advocacy. “Lawyers have the privilege of helping others resolve huge and complex problems so that they may achieve their goals and go on with their lives,” she states. “I just knew I wanted to be a part of that.”

Ms. Ali grew up in Atlanta and completed her undergraduate degree at Duke, the first in her immediate family to graduate from college. Subsequently, she received a Master's Degree in Higher Education and Student Affairs from Ohio State. When it came time to choose a law school, Ms. Ali was drawn to Vanderbilt's collegial environment. “Vanderbilt is a special place,” she asserts, acknowledging that other attorneys are often amazed when she recounts how supportive her peers were and the dedication of Vanderbilt professors. Ms. Ali credits the mentorship of her professors, such as Tracey George, Michael Bressman, and Lisa Bressman, with helping shape her career by encouraging her to pursue a summer associate position in Washington, D.C. and judicial clerkships.

After graduating from law school in 2015, Ms. Ali clerked for Judge Amul Thapar in the U.S. District Court for the Eastern District of Kentucky. In 2016, she began clerking for Judge Sri Srinivasan in the U.S. Court of Appeals for the D.C. Circuit. Beginning in October 2018, she will cap off her clerkships as a clerk to Justice Sonia Sotomayor.

Ms. Ali is grateful for her time on Vanderbilt Law Review, which she acknowledges helped prepare her for her clerkships. As a clerk, she explains, attention to detail and efficiency are extremely important. Law Review allowed her to hone skills like proof-reading and citation corrections and to become comfortable editing her own work and that of others. She reflects fondly on her time on Law Review. As a 2L, she enjoyed reading the scholarship submitted for publication; and, she concedes, she liked hanging out in the Law Review suite where she could work with friends and drink discounted La Croix. Her favorite memories are these times spent in the suite, conversing with her fellow Law Review members. Ms. Ali spent many such hours with the senior board her second year. She was so impressed by the board and prior Executive Editor, Mary Nicoletta, that she was inspired to serve as Executive Editor herself. Executing this role was a test in time management, another skill at a premium as a clerk.

When asked whether a Supreme Court Clerkship had always been a goal of hers, Ms. Ali confesses that when she began law school, she did not even know what a clerkship was. A former Executive Editor of Vanderbilt Law Review, Matt Downer, first introduced her to the idea after Ms. Ali sent him a thank you for the use of his Con Law outline. He also connected Ms. Ali with Judge Thapar, who he clerked for as well. Both Mr. Downer and then Judge Thapar mentioned the idea of a Supreme Court Clerkship. Ms. Ali was initially skeptical but warmed to the idea. She explains: “Although it still seemed like an impossibility to me, I quickly learned to embrace the ideas proposed by people I trusted. It was more of a longshot possibility, more than a goal. But I knew if I worked towards it, I would be able to access a lot of opportunities in the future, even if it wasn't clerking at the Supreme Court. So, I followed the guidance of Judge Thapar, Professor George, and both Professor Bressmans, and it worked out in the best way possible.”

She looks forward to reading incoming cert petitions, discussing issues with her co-clerks and Justice Sotomayor, and witnessing some of the nation’s best legal advocates in action. She admits she is anxious to ensure her work product is helpful to the Justice, but her current biggest concern is more practical—“I can’t remember where her chambers are. I just hope I don’t get lost on the first day!”

After her clerkship for Justice Sotomayor, Ms. Ali anticipates that she will initially work for a law firm. But after that, she says, “who knows? I would love to work in the Department of Justice or the Solicitor General’s office one day.”
Articles: October—November

Reverse Political Process Theory

Professor Tang challenges the traditional notion that the Supreme Court has rejected political process theory, which states that powerless minority groups alone are entitled to heightened judicial solicitude, by observing that the Court gives greater constitutional protections to politically powerful groups while withholding those protections from similarly situated, less powerful groups. Tang argues that attention to the political process will force judges to think twice before granting special constitutional treatment to politically powerful entities.

A Theory of Differential Punishment

In this article, Jack Boeglin and Zachary Shapiro address a long-standing puzzle in criminal law: Why do two offenders, guilty of the same act, receive different punishments simply because one offender causes more harm than the other due to circumstances beyond the offender’s control? The authors propose a solution to this puzzle after laying out groundwork for two categories of punishment: traditional rationales (deterrence, retribution, rehabilitation, and incapacitation) and victim-facing rationales, such as “expressive” theories of punishment for which people are punished out of respect for the victims or vengeance-based justifications. Boeglin and Shapiro show that victim-facing punishments, if valid, are sometimes theoretically capable of justifying differential punishments. For cases when they are invalid, the criminal should be punished as if she had not caused the harmful result that would have otherwise brought about increased punishment.

Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb

Professors Biber, Light, Ruhl, and Salzman note that many scholars have addressed how various types of business innovations, often called “disruptive innovation,” can dramatically impact a given market. One notable example is the recent advent of the “sharing” economy, which includes companies like Airbnb. But Biber et. al. note that Airbnb arose in an unregulated environment and competes with companies in a regulated environment, creating challenges for regulators and policymakers. The authors address this problem, which is termed a “policy disruption,” and provide an analytical framework to guide regulators in responding to policy disruptions.

Going Postal: Analyzing the Abuse of Mail Covers Under the Fourth Amendment

In this student note, Rooney examines government surveillance of private mail in the United States. The government now photographs and records the exterior of each of the 160 billion pieces of mail delivered by USPS each year with little judicial oversight. Rooney offers analysis of the Fourth Amendment jurisprudence on this issue and argues that we should apply a new theory—the mosaic theory—of privacy to this issue in order to better safeguard private citizens from government surveillance.

Do Your Job: Judicial Review of Occupational Licensing in the Face of Economic Protectionism

Some lawyers and legal scholars have challenged occupational licensing regimes as impermissibly driven by naked economic protectionism, but federal appellate courts have not yet reached a consensus on the legitimacy of the protectionist motivations behind these regimes. In her note, Weeks argues that courts should engage in rational-basis-with-judicial-engagement review to examine occupational licensing laws and strike down those schemes that are motivated by economic protectionism.

November Issue

The November 2017 Issue of the Vanderbilt Law Review focused on pieces presented during the March 2017 Symposium hosted at Vanderbilt Law School. The Symposium was titled, “The Least Understood Branch: The Demands and Challenges of the State Judiciary” and was held to better understand justice in state courts. State judiciaries are grossly understudied in legal academia largely because they are disaggregated and have evolved differently across states. This Symposium was designed to remedy that problem by building a more comprehensive understanding of justice in state courts. The Symposium issue has articles in three broad categories.

The first category addresses the effect of selection methods on public officials. These articles explore the various mechanisms for selecting public officials, including election, political appointment, or selection by a technocratic commission.

In Adjudicating Death: Professionals or Politicians?, Professors Stephen Choi and Mitu Gulati examine whether professional medical examiners or elected coroners deliver better autopsy services. Choi and Gulati find that professional medical examiners are sued less, perform more autopsies, and are more likely to be accredited than their elected counterparts.
Articles: October—November

November Issue Continued

In The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges, Vanderbilt Professor Brian Fitzpatrick investigates the effect of judicial selection methods on the ideological composition of the bench. If it holds that lawyers are more liberal than the general population, then it likely follows that selection by a commission of lawyers will result in a more liberal bench than selection by popular election. To test this theory, Fitzpatrick compares the ideological preferences of appellate judges to those of the public in each state. Fitzpatrick finds that states with technocratic commissions or nonpartisan elections have, in general, more liberal benches than states that use appointment or partisan elections.

In Judging Law in Election Cases, Professors Kang and Shepherd address an age old legal question: to what extent do ideological biases influence judicial decisions? While realist lawyers have convinced the academy and much of the public that ideology influences case outcomes, it is difficult to isolate the effect of ideological influences on case outcomes since it is hard to empirically identify cases where the law and a judge’s politics diverge. To overcome this hurdle, Kang and Shepherd focus on candidate litigation cases, which are particularly partisan in nature. Kang and Shepherd find that judges display significant loyalty to candidates from their own party.

In the final piece in this section, Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform, Professors Bonica and Sen investigate the political factors that lead states to adopt judicial reform. Using case studies from Florida, Kansas, and North Carolina, the authors find that political actors used judicial reform to shift the ideology of their state’s judiciary closer to that of the state’s politicians and away from the ideology of the state’s bar.

The second set of articles addresses the perceived legitimacy of state judiciaries. The public entrusts the judiciary with the power to say what the law means and what it demands. To that end, each of the four articles in this section addresses the fact that judicial authority is directly connected to the public’s perception of judicial legitimacy. Even when judges make mistakes or rule ideologically, so long as the public believes that the judicial system is fair overall, it will accept the judge’s verdict. But what principles determine whether the public perceives the judiciary as legitimate? Many accept that independence, competence, and probity are undiscussed factors that help the perception of legitimacy. But, as the following articles demonstrate, other factors are at play, including who serves as judge, how case outcomes differ for men and women, and the judge’s preference for working in the federal over the state judiciary.

First, in Measuring Justice in State Courts: The Demographics of the State Judiciary, Professors George and Yoon recognizing that who serves on the bench influences the perceived legitimacy of the court and therefore examine the demographics of the judiciary. George and Yoon find that state judiciaries often differ greatly from the demographics of their constituent populations.

Two articles in this section address gender issues within state judiciaries. In The Effects of Trial Judge Gender and Public Opinion on Criminal Sentencing Decisions, Professors Boyd and Nelson use empirical methodologies to find that female defendants, relative to their male counterparts, are sentenced significantly more leniently by female judges, but female defendants receive harsher sentences than males when a male judge sees their case. In Public Perceptions of Gender Bias in the Decisions of Female State Court Judges, Fix and Johnson find that, while gender stereotypes regarding state judges may be declining over time, the gender of the party affected by a judge’s decision influences public perceptions of judicial legitimacy.

The last article in this section, Judicial Lateral, Professor Nash examines the phenomenon of judicial laterals. He finds that most laterals involve judges moving from the state judiciary to their federal counterpart, largely because the federal system is seen as more prestigious than the state system. Given this perception, one wonders if the fact that judges readily move from the state to the federal level undermines the legitimacy of state courts.

The final set of articles in this issue addresses the influence of technology on state judiciaries. Technology affects how individuals and lawyers interact with the legal system by making it easier for laypeople to learn what the law is and for lawyers to conduct legal research. But, as the following four articles demonstrate, technology has also helped scholars study the legal system.

Using newly released data from the 2010 Survey of Criminal Appeals in State Courts dataset in State Criminal Appeals Revealed, Heise, King, and Heise empirically investigate which factors are associated with favorable outcomes for defendants who seek relief in appeals courts. In this article, the authors focus on two subgroups of appeals: a defendant’s first appeal of right and appeals to courts of last resort where the court can decide whether to accept the appeal. In appeals of right, some factors that help defendants’ success are having legal representation, filing a reply brief, or securing an oral argument. In high courts of last resort, appeals from sex offenses and appellants represented by publically-funded attorneys fare better.

In Contingent Fee Litigation in New York City, Helland, Klerman, Dowling, and Kappner analyze closing statements filed by contingent fee lawyers in New York, which includes information on settlement amounts, lawyer’s fees, and accounting expenses. Analyzing this data, Helland et al. reach a number of conclusions, including that settlement rates in New York are very high (84%), that claims are disproportionality from poor neighborhoods, and that attorney’s fees are almost always one-third of net recovery, the maximum allowed by law.

The third piece in this section, Improving Access to Justice in State Courts with Platform Technology by Professor Prescott, explores the introduction of online platform technology to improve individuals’ access to justice in state courts. Prescott presents evidence that introducing this sort of technology reduces the amount of time it takes for citizens to resolve disputes and satisfy any fines or fees owed. Default rates also plummet.

In Judicial Politics and Decisionmaking: A New Approach, Rachlinski, Wistrich, and Guthrie use data collected from over 25 experiments on 2,200 judges to assess whether a judge’s political ideology influences decisionmaking in hypothetical cases. Across a range of bankruptcy, civil, and criminal cases, the authors found that political ideology matters, but only very little.
VLR EVENTS: FALL 2017

First Annual Senior Board Selfie

The Future of Discovery Symposium Dinner

Bake-Off Judges Deliberating

Footnotes Walking Club

Book Club

October Book Publication Celebration @ Mellow Mushroom
Send us ideas for our next newsletter: VLR.Alumni@vanderbilt.edu
Instagram: @vanderbilt.law.review Twitter: @VandLRev