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 have just published the last issue of Volume 69—a symposium on “The Disclosure Function of the Patent System,” which includes twelve articles and is a fitting conclusion to an incredibly ambitious volume. Building on the work of our past editors and our VLR alumni, we look forward to the first issue of Volume 70, which will come out this January.

This year, the Law Review has also hosted and participated in several exciting events, which you can read about in the newsletter. Other notable events include a collaborative symposium at Emory exploring state court decisionmaking, which will have a corollary event here at Vanderbilt this March. Though we have had much excitement this year, the Law Review also suffered a tragic loss with the passing of our 2L staff editor Elizabeth Chitwood. In this newsletter you will see a short tribute written by her friend and classmate, which was published as a foreword to our October issue.

We would like to thank you all for your interest in and support of the continued success of the Law Review. We hope to continue building our alumni network and work 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 our next newsletter. Also, we hope that you will stop by if you are ever in Nashville—we would love to see you!

Sincerely,

Susanna M. Rychlak (J.D. ‘17), Editor in Chief & Stanley Onyeador (J.D./M.B.A. ‘17), Executive Editor

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Photo Courtesy of Hannah Frank
TRIBUTE

Elizabth “Beth” Chitwood was one of the newest members of the Vanderbilt Law Review. Our community mourns her unexpected loss and is grateful for the time we were able to share with her. The following Tribute briefly highlights Beth’s contributions to the Vanderbilt Law community and the Vanderbilt Law Review.

Elizabeth Chitwood

On the first day of law school, Dean Pavlick informed us that we had fewer than one thousand days until our law school graduation. This number simultaneously seemed both big and small. What we did not know on that first day was that we would only have 377 days with one of our fellow students, Elizabeth “Beth” Chitwood.

Beth came to school that day with a bright orange flower accessory in her hair. I do not know what everyone thought about her flower on that first day, but I am certain that everyone remembered it. We would quickly learn that Beth wore a flower in her hair every day; it was her “brand.” As a music major in undergrad, Beth aspired to practice music and copyright law, so having a brand suited her. Before long, however, we learned so much more about the girl behind the flower.

Beth was extremely intelligent, always having a quick answer when cold-called in class. She was one of the fastest readers I have ever encountered. She was also incredibly generous, never failing to point a classmate struggling with a legal concept in the right direction. Beth’s law school talents were recognized with her selection to the Vanderbilt Law Review, a great honor that I know she cherished.

Beyond her intelligence, Beth was a thoughtful colleague and a fierce friend. If you passed her in the hallway she would ask about your day, genuinely wanting an answer. One of her favorite days in Civil Procedure was when Professor Wuerth asked the class to bring in baked goods to share—Beth always wanted to treat others to her baking talents. Her kindness towards friends truly knew no bounds. My 1L year, I walked to school from my apartment, but after a purse-snatching took place right outside my building Beth insisted on picking me up and taking me home every single day.

Those 377 days went by in the blink of an eye, but they are 377 days that everyone at Vanderbilt Law School and all of those on the Vanderbilt Law Review are better for. The Law Review will miss the inevitable spark Beth would have brought to the group. Her Note, which undoubtedly would have involved music copyright law, will now go unwritten. Most of all, her absence in the law school building and from all of our lives will be deeply felt.

Beth taught us many things about law and about life, not the least being that sometimes the most fearless thing you can do is proudly wear a bright orange flower in your hair. As we finish our less-than-one-thousand-day journey, we will carry Beth’s spirit with us. She will forever be our fellow Class of 2018 member, Vanderbilt Law Review colleague, and, most importantly, our friend.

Jessica L. Haushalter
Dean Chemerinsky and Vanderbilt Law Review

In March, the Vanderbilt Law Review—along with the Branstetter Litigation and Dispute Resolution Program and the Program on Law and Government—welcomed Dean Erwin Chemerinsky to the law school to discuss his latest book, *The Case Against the Supreme Court*. Engaging in a candid discussion, Dean Chemerinsky was joined by Professor Corinna Lain of the University of Richmond School of Law, with Vanderbilt's own Professor Suzanna Sherry moderating. Taking as their starting point Dean Chemerinsky's argument that the judiciary has failed to protect the essential rights of minorities, the three discussed where the Supreme Court has failed, where it has succeeded, and what it can do in the future.

In a testament to the importance and controversy of Dean Chemerinsky's argument, the Law Review used the talk to kick off a paper symposium discussing the Court’s role. Introduced by an article by Professor Suzanna Sherry, the symposium encapsulated eight articles written by experienced and impassioned scholars. Dean Chemerinsky and Professor Lain reprised their arguments from the Vanderbilt-hosted discussion. Vanderbilt’s Professors Brian Fitzpatrick and Edward L. Rubin contributed papers, as did William & Mary’s Professor Neal Devins and the University of Chicago’s Professor Gerald N. Rosenberg. Professor Barry Friedman of the NYU School of Law also contributed, writing the spirited *Letter to the Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care)*.

The papers from the May 2016 symposium were published in the 69th volume of the *Vanderbilt Law Review* and can also be found online.

Will Marks, Former EIC, Speaks at Vanderbilt Law School

This fall, Will Marks, a 2014 graduate of Vanderbilt Law School and former Editor in Chief of the Law Review, returned to the law school to discuss a pending Supreme Court case for which he helped write an amicus brief. The case, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, centers on whether the exclusion of a church-run preschool and daycare center from a state program that provides grants for rubberized surface material for children’s playgrounds violates the Free Exercise Clause of the First Amendment. As he was preparing for the event, Will remarked that it felt surreal to be on the “other side” of the lectern in a classroom where he had often sat as a student.

In addition to strong student turnout, several professors and administrators also attended the event, a testament to the strong relationships Will built during his time at Vanderbilt. Professors Blumstein and Sherry, both scholars of constitutional law, attended the talk and fired off several lively questions for Will at the conclusion of his presentation. Will quipped afterwards: “It felt like being before a three-judge panel for oral argument.”

Will is currently an associate at Williams & Connolly in Washington, D.C., where his practice focuses on complex civil litigation in a wide variety of matters, such as antitrust, administrative law, constitutional law and products liability. His experience spans both the trial and appellate levels in federal and state court. Recently, Will has helped draft briefs in several matters before the U.S. Supreme Court and the U.S. Courts of Appeals. Will joined Williams & Connolly in 2015 after serving as a judicial clerk for Judge Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit.

Born and raised in North Carolina, Marks graduated magna cum laude from Georgetown University in 2009. He served for two years as a Teach for America Corps member in eastern Arkansas, where he directed a school district's band and choir programs. Will graduated from VLS in 2014 ranking first in his class and earning the Founders Medal.
VLR Alumni Spotlight:
Mr. Adolpho Birch III (‘91)

Mr. Adolpho Birch, who is currently working as the Senior Vice President of Labor Policy and League Affairs for the National Football League, knew from a young age that he wanted to attend law school. He settled on Vanderbilt pretty quickly, as Nashville had been his home growing up. After law school, Mr. Birch worked for the Antitrust and Complex Litigation Group at Fulbright & Jaworski in Houston, where he also cultivated an interest in public law. Eventually, Mr. Birch decided to move to a boutique firm and dedicate more time to public law practice. When litigation continued to take up the majority of his time, however, he began considering another move. After realizing that the Oilers were coming to Nashville, he reached out, hoping to help with the transition. His request was met with “thunderous silence,” but it got his name out there, and he ended up receiving a call about a different position with the NFL. This unique position, which happened to require experience with antitrust, worker’s compensation, public law, and arbitration, was a perfect fit for him. While he was hesitant about moving to New York, he ultimately decided that the job would make up for the location. Today, he says he would make that same choice again; his love for his job has helped him to tolerate “The City” for eighteen years.

What is a typical day of work like for you?

*It is typical in that not much is typical. It starts with getting a download of everything that happened the previous day and that morning. I deal with hot-button things that come up depending on what the media is writing about that day. There are also ongoing things that I deal with like drug policy. Then throughout the day, I will be taking calls, working on agreements, making sure everyone knows the things they need to know, and attending internal and external meetings. Then sometime during that we also watch highlights.*

What is your favorite part of your current job?

*Sunday from 1:00-11:30. Either I’m at a game or I’m using any and every device I can to follow the action. At the end of the day, the most important thing is what we see on the field. The reason it all comes together is what those twenty-two guys out there on the field are doing. I like to make sure we remember that, and I do it by watching.*

Do you have the opportunity to use skills you gained on the Law Review in your work with the NFL?

*I have told more people than I can count that one of the most important things I ever did was be an editor on the Law Review. I learned how to edit my own work as well as the work of others and spent hours arguing over the placement of commas. Now, I write every day in a variety of contexts, and I also have to review work that is written by others. I am quite proud of the fact that I am considered one of the eagle eyes here in the league that can spot the things that need to be corrected, grammatically or otherwise. Editing, the selection of articles, and working with professors really helped me understand the nuances of language and how precisely to convey meaning and tone.*
Suzanna Sherry, *Normalizing Erie*
In this article, Sherry identifies an unnoticed discrepancy between the *Erie* doctrine—the “most studied principle in American law”—and ordinary federalism. Under ordinary federalism doctrines, strong unarticulated federal interests may overcome a presumption for state law, whereas under *Erie*, the opposite conclusion is reached—federal judges must revert to state law unless federal interests are codified. Arguing the *Erie* doctrine was a fluke of history decided during a period of heightened concern of judicial overreaching, Sherry suggests normalizing *Erie* and replacing it with the ordinary federalism framework.

Aaron Saiger, *Agencies’ Obligation to Interpret Statute*
In this article, Saiger rebuts the conventional notion that a court’s deference to agency interpretations of a statute implies that agencies may adopt any reasonable interpretation. Instead, Saiger suggests that the judicial deference granted to agencies places on them the law-declaration function of courts, and makes the agency itself the authoritative and final declarant on the law. Therefore, responsible agencies are legally and ethically responsible for selecting the best interpretation of the statute, not just a reasonable interpretation.

Christine P. Barthomolew, *The Failed Superiority Experiment*
The superiority requirement in Federal Rule of Civil Procedure 23(b)(3)—which requires a judge determine a class action is superior to alternative forms of adjudication—was intended to ensure controlled growth of class actions. Recently, however, class actions have come under attack. Bartholomew explores how these attacks have led to unprincipled interpretations of the superiority requirement. Given the irreconcilable interpretations of superiority based on conflicting factors and the foreclosure of class actions for small sum cases, Bartholomew concludes that the superiority requirement should be eliminated.

Jason Iuliano & Ya Sheng Lin, *Supreme Court Repeaters*
In recent years, the Supreme Court has granted certiorari to fewer and fewer cases, making it an exceptional feat to receive cert even once. In the first study of its kind, Iuliano and Lin identify eighty-four cases that have received cert twice or more in the last ninety years. The authors then explore how these cases are used by the Supreme Court to set up important substantive questions that could not be addressed during the first review, supervise lower courts, and address different substantive issues arising at distinct points in litigation.

**November Symposium**
In November 2015, the *Vanderbilt Law Review* hosted a Symposium entitled “The Disclosure Function of the Patent System.” This event brought together distinguished patent and intellectual property scholars to explore the ways that the patent system encourages the dissemination of technical knowledge. The twelve articles authored from this Symposium provide thoughtful reflections on this important function of the patent system and are published on the *Vanderbilt Law Review* website as the November 2016 issue of the *Vanderbilt Law Review.*
Elizabeth Burch, *Monopolies in Multidistrict Litigation*
Under basic economic principles, noncompetitive markets may result in higher prices, lower outputs, and self-interest. Empirical evidence demonstrates that the lawyers representing plaintiffs and defendants are “repeat players.” By analyzing lead lawyers’ common benefits, fees, non-class deals, and client results, Burch provides new empirical evidence suggesting that multidistrict litigation is not immune to these market or agency principles, all of which may result in lower plaintiff payouts, stricter evidentiary burdens, and more coercive plaintiff participation measures. Therefore, Burch suggests more judicial regulation to invigorate competition.

Nicole Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*
In recent years, education reform has attempted to increase the number of high-quality educational options outside of the traditional public school sector. Garnett characterizes this shift as “sector agnosticism,” which embraces a child-focused reform agenda by increasing the number of options across education sectors, including charter, private, and public. This shift, and the focus on charter schools as private entities, has significant implications for education law, including the potential for religious charter schools and the preclusion of charter schools from constitutional norms that govern public schools.

Maria Glover, *A Regulatory Theory of Legal Claims*
In trying to achieve the goals of procedural law, scholars have debated the appropriate conceptualization of legal claims as either individual property or as collective goods. While this debate has often occurred within the context of class actions, Glover broadens the debate by looking at legal claims outside of class actions. In doing so, Glover provides significant insights into the implications of this issue for normative questions in our litigation system and proposes a new theory for regulating litigant autonomy that aligns with the goals of our litigation system.

Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*
In this article, Parkin provides new insight into the unchartered territory of how institutional reform injunctions end. In particular, Parkin identifies three ways in which injunctions are terminated—by dissolution, by design, or by disuse—and the implications of each form for institutional reform litigation, including unaddressed rights violations, upset expectations of parties, and increase uncertainty and cost. Arguing that we must rethink the current approach to the end of institutional reform injunctions, Parkin then provides strategies to ensure current and future injunctions are not terminated prematurely.

Clayton Masterman, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*
In a recent decision, the Supreme Court stated that similar legal standards should apply to antitrust claims arising out of both buyer conduct and seller conduct. However, applying similar legal standards to anticompetitive conduct by buyers and sellers results in underenforcement against anticompetitive buyer conduct in labor markets. This Note analyzes how courts should balance the welfare of workers and customers under antitrust analysis to avoid this underenforcement. Masterman proposes that courts consider the welfare of workers first, then customers’ welfare only if workers experience a de minimis harm—appropriately weighing the interests of workers against customers who receive a price cut from monopsonistic conduct.

Susanna Rychlak, *I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials*
This Note examines the problems with the rising yet underexplored trend in state evidence law of “Living-Victim Photo Statutes.” Photographs of a victim while alive would be—and often have been—excluded from evidence during a trial as lacking relevance or being unfairly prejudicial. Tennessee’s 2015 statute—mandating the admissibility of such photographs during homicide trials—has eviscerated these balancing considerations, taking admissibility determinations out of the hands of judges. Though state statutes, like that in Tennessee, amended rules of evidence, they were passed under largely normative and emotional considerations based on concerns for victims’ families in the trial process, rather than on Due Process for defendants. Rychlak’s Note seeks to explore and demonstrate the evidentiary and constitutional problems with these living-victim photo statutes.
Brian Baxter, The Securities Black Market: Dark Pool Trading and the Need for an Independent Front-End Disclosure System

Baxter’s Note analyzes the effect certain Alternative Trading Systems known as "dark pools" have on the market, as well as how the current regulatory scheme falls short in protecting trade and execution quality. A number of regulatory loopholes have resulted in the creation of an off-exchange securities market, whereby investors can exchange large blocks of securities with delayed public disclosure, reduced market impact, and favorable pricing. While this “dark market” has a number of perceived benefits, its lack of transparency reduces investors’ ability to evaluate the effects of these available services on trade facilitation. As a result, this Note proposes that the recently-proposed Regulation ATS-N be expanded to require that the SEC regularly issue a "quality trade facilitation" rating that rates each pool's ability to provide quality execution.

Stanley Onyeador, The Chancery Bank of Delaware: Parasitic Appraisal Arbitrageurs Expose the Need to Reform Defective Appraisal Statute

Appraisal arbitrageurs—hedge funds who purchase target company stock after the announcement of a merger solely to pursue appraisal—test the bounds and aims of appraisal rights to protect dissenting shareholders from majority expropriation. The backlash against appraisal arbitrage has uncovered a need for additional legislative reform and unveiled Delaware judges’ shortcomings in engaging in highly technical corporate valuation. Onyeador’s Note proposes reforming Delaware’s appraisal statute beyond recent amendments to curb appraisal arbitrage and ensure certainty in appraisal proceedings. Specifically, the Note recommends that Delaware confine the market-out exception’s cash carve-out to interested transactions, limit appraisal rights to shareholders as of the record date, and delegate valuation in appraisal proceedings to a panel of independent finance professionals.


Who determines the “rules of the road” for once inaccessible Arctic shipping routes? This Note examines the implications for navigation and protection of the marine environment should current sea ice melting trends create a shortcut across the Arctic Ocean. The existing international legal framework arguably does not contemplate such a shortcut: ambiguous "due regard" language in Article 234 of the United Nations Convention on the Law of the Sea ("UNCLOS") leaves Arctic Coastal States with broad—perhaps excessive—latitude to restrict navigation through their waters. By analyzing inconsistencies between the Arctic navigation policies of three Arctic Coastal States (Russia, Canada, and the United States) and the existing international legal framework, Williams concludes that these inconsistencies can be easily resolved by understanding the “due regard” standard in UNCLOS Article 234 through the lens of the Polar Code, an internationally binding maritime safety code entering into force in January 2017. Such an understanding would help protect individuals navigating through the Arctic as well as the Arctic environment, while still allowing Arctic Coastal States to maintain some level of autonomy and sovereignty.

Photo Courtesy of Vanderbilt University Law School

VLR alums Lionel Barrett and Rob Ledyard with Bob Brandt, Gene Gaerig, and Randall Wyatt at the Class of 1966 Party.
On Friday, October 21, 2016, I was sitting in the VANDERBILT LAW REVIEW (VLR) suite. That weekend, Vanderbilt Law School held a reunion for some of the graduating classes between 1966 and 2011. A number of returning alumni found their way to the law review suite to take a look at how things had changed. Interestingly, almost every person who stopped by the suite asked if we still played Backgammon. The other students and I looked at each other, and one answered “Backgammon? No, but we do have an Xbox now!”

Backgammon is one of the oldest known board games where two players move pieces according to the roll of dice and a player wins by removing all of one’s pieces from the board before one’s opponent. Xbox is a video game brand introduced in 2001. When I heard about this Backgammon tradition of days-gone-by, I knew I had to investigate. Susanna Rychlak, current Editor in Chief of VLR, pointed me in the direction of Professor Robert Reder who graduated from Vanderbilt Law School in 1978 and was a member of our beloved VLR. Fortune would have it that Professor Reder was actually the one who brought the Backgammon board into the VLR suite in the first place during his second year of law school in 1977.

I met with Professor Reder to learn more about the VLR Backgammon legend. It turns out that he was an avid Backgammon enthusiast in college and ended up receiving a Backgammon board for a birthday gift during those years. It would be this very board that would make its way into the VLR suite and VLR members’ hearts. Professor Reder taught everyone how to play, and Backgammon thus became an unstoppable force within VLR.

Alas, the Backgammon board has been lost to time and VLR’s members have turned to a new gaming tradition: Xbox. Though the Backgammon board no longer graces the VLR suite with its presence, Professor Reder did not have long to despair as current VLR member, Soraya Ghebleh, Class of 2017, showed him the ropes on the Xbox. Professor Reder’s only complaint was that we had no Xbox game relating to golf. Even though the game of choice for VLR members has changed, the spirit of competition and desire for camaraderie through rivalry has not.
Delaware Corporate Law Bulletins

Recently, Vanderbilt Law Review En Banc has begun publishing short essays discussing material developments in the area of Corporate Law, available here.

Robert S. Reder & Tiffany M. Burba, Delaware Court Dismisses Duty of Loyalty Claim Against Disinterested, Independent Directors (September 16, 2016)
In In Re Chelsea, the Delaware Court of Chancery highlighted the difficulty in bringing a claim for breach of the duty of loyalty merely on the basis of bad faith. In that case, the court held that an informed Board’s decision to disregard a set of valuation methods when recommending a company sale, without more, was not so egregious as to constitute bad faith. That is, mere disagreement with corporate decisions does not *per se* violate the duty of loyalty.

In Pell v. Kill, the Delaware Court of Chancery issued a preliminary injunction against incumbent directors’ plan to eliminate board seats held by dissenting directors in order to thwart a proxy contest. The decision provided insight on the relationship between Blasius and Unocal review, clarifying that Blasius’ compelling justification standard ought to be applied within the Unocal framework. Thus, directors who interfere with the shareholder franchise must prove their actions were unselfish, non-preclusive, non-coercive, and proportional to the ends sought.

Robert S. Reder & Stanley Onyeador, Delaware Chancery Disqualifies Lead Petitioners in Dell Appraisal Who Inadvertently Voted “FOR” Management Buyout (November 11, 2016)
In Dell, the Delaware Chancery Court clarified that shares voted in favor of a merger inadvertently nonetheless fail to meet the Dissenter Requirement under DGCL § 262. Thus, stockholders who wish to exercise appraisal rights must ensure that their shares are voted correctly, even where, as in this case, a glitch in the voting software caused the default votes to be counted “for” rather than “against” the merger.

En Banc Student Notes

Tiffany Burba, “To “B” or not to “B”: Duties of Directors and Rights of Shareholders in Benefit Corporations (forthcoming)
This Note analyzes the purpose and motivations behind benefit corporation legislation, evaluates recent proposals for the enforcement of fiduciary duties, and advocates for a solution as a hybrid as the new corporate form itself. Burba argues that shareholders, as well as some external stakeholders, should receive greater enforcement rights than the Model Legislation envisions.

Kasey Youngentob, Criminalizing Refusal (forthcoming)
This Note discusses Birchfield v. North Dakota, in which the Supreme Court upheld—against a Fourth Amendment challenge—a statute imposing criminal penalties on those who refuse to submit to a breathalyzer test. Youngentob argues that the Fifth Amendment’s bar on self-incrimination provides an alternative ground for striking down these statutes as unconstitutional.
Meet VLR’s Newest Cite Checkers, Lucy and Rocky!

Happy Holidays from Bailey and friends!

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