University of Tennessee Law
Legal Scholarship Repository: A Service of the Joel A. Katz Library

Tennessee Law | Historic Collections

Fall 2014

Tennessee Law Fall 2014

University of Tennessee College of Law

Follow this and additional works at: https://ir.law.utk.edu/utk_tnlaw

University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

Tennessee Law (2008 - 2013) College of Law Communications and Publications

Fall 2014

Tennessee Law Fall 2014

University of Tennessee College of Law

Follow this and additional works at: http://trace.tennessee.edu/utk_tnlaw

Part of the Law Commons

Recommended Citation
University of Tennessee College of Law, "Tennessee Law Fall 2014" (2014). *Tennessee Law (2008 - 2013)*.
http://trace.tennessee.edu/utk_tnlaw/13

This Magazine is brought to you for free and open access by the College of Law Communications and Publications at Trace: Tennessee Research and Creative Exchange. It has been accepted for inclusion in Tennessee Law (2008 - 2013) by an authorized administrator of Trace: Tennessee Research and Creative Exchange. For more information, please contact trace@utk.edu.

Tennessee Law

University of Tennessee
College of Law
Fall 14

EQUALITY

50 YEARS OF THE CIVIL RIGHTS ACT

How far we've come...
and how far we still have to go

3L Karissa Hazzard outside the Tennessee Supreme Court in downtown Knoxville, where she clerked over the summer

PHOTO BY PATRICK MURPHY-RACEY

Contents

FEATURES

14 Equality: 50 Years of the Civil Rights Act

The fiftieth anniversary of the Civil Rights Act of 1964 is a time to celebrate our successes—and acknowledge the challenges that still lie ahead. Members of the UT Law family discuss the issue.

BY ROBERT S. BENCHLEY

18 'Inevitable'

UT Law alumna Regina Lambert ('01) is representing two UT veterinary medicine professors—who happen to be her close friends—in their case for legalized same-sex marriage in Tennessee.

BY ROGER HAGY, JR.

23 Don't Touch that Dial

Cable and Internet companies: Can't live with them, can't live without them. And if Comcast's acquisition of Time Warner Cable is approved, most Americans will have a single choice for their telecomm services. Professor Maurice Stucke argues the merger will damage market competition and net neutrality—and he has joined the fight against it.

BY ROGER HAGY, JR.

DEPARTMENTS

2 From the Dean
3 Omnibus
8 Recess
10 Deliberation
26 Alumni
28 Colleague

Tennessee Law

EDITOR & DESIGNER
Roger Hagy, Jr. (CCI, '07)

CONTRIBUTING WRITERS
Robert S. Benchley
Alex Long
Ben M. Rose ('00)
Luis Ruuska
Willie Santana ('14)

CONTRIBUTING PHOTOGRAPHERS
Patrick Morrison
Patrick Murphy-Racey

PRINTER
University Printing & Mailing

COVER PHOTO
The 1963 March on Washington, DC (Photo by Marion S. Trikosko, courtesy Library of Congress)

CONTACT *TENNESSEE LAW* MAGAZINE
Tennessee Law Magazine
University of Tennessee, Knoxville
College of Law
Suite 248
1505 West Cumberland Avenue
Knoxville, Tennessee 37996-1810
E-mail: law@utk.edu
Phone: 865-974-6788
Web: law.utk.edu

Tennessee Law is published twice each year (spring and fall) by the University of Tennessee College of Law. REV 14-049. PAN R01-1601-013-010-15.

The University of Tennessee is an EEO/AA/Title VI/Title IX/Section 504/ADA/ADEA institution in the provision of its education and employment programs and services. All qualified applicants will receive equal consideration for employment without regard to race, color, national origin, religion, sex, pregnancy, marital status, sexual orientation, gender identity, age, physical or mental disability, or covered veteran status.

From the Dean

As you may already know (and can read on the opposite page), I have decided to step down as dean at the end of this academic year. When I became dean, plenty of people advised me: "Being dean is like running a marathon; you need to pace yourself." By my calculations, that means I'm in mile 24 of the 26.2. It sure doesn't feel like it, though. I have run a couple of marathons, and at mile 24, I was not having fun. As dean I'm still having *lots* of fun.

Early in my deanship, I learned this particular running metaphor didn't ring true. For me, being dean is like interval training: a series of sprints interspaced with a few jogs and, on rare occasions, a brief walk. Our innovative faculty, energetic students, and engaged alumni collectively create a multitude of exciting programs, collaborations, and initiatives that have definitely kept me going.

The past few years have also presented a number of challenges. As the purported Chinese curse goes, "May you live in interesting times," and the recent past has certainly been interesting. My first three years as dean involved budget cuts and belt tightening in higher education. Then the legal job market tightened, and tightened…and tightened. And law school applications nationwide have decreased nearly 50 percent over the past five years. Fewer students applied to law schools in 2014 than were admitted in 2009.

It may be trite, but it is true: challenges present opportunities. UT Law has taken advantage of these recent "opportunities," and we are stronger and better than ever. We have hired fabulous new faculty members who are productive scholars and terrific teachers who connect theory and practice in our classrooms and clinics. Faculty have expanded our strong clinical tradition to provide one of the very best legal educations in the country, with new practical and experiential courses and clinics added every semester. We have, with the support of the university, kept the cost of our education affordable, and the financial support

of our alumni is at an all-time high.

Returning to the running metaphor, I've realized that being dean is also like a relay. You run your leg of the race to the best of your ability and hand off the baton to the next runner. It's almost time for me to hand off the baton. It's time for new energy, new leadership, and new ideas.

However, I'm not going anywhere. We have established a new Institute for Professional Leadership. And I joke (truthfully) that I started a new program (with significant help from Buck Lewis, Brad Morgan, and several others) and appointed myself director. The institute will build on some of our existing programs to help our students better develop professionally as lawyers and leaders, both during and after law school. I am excited about this new opportunity to teach and stay engaged with our students and alumni.

I know I'm not finished yet, and I plan to run hard through the rest of my leg of the relay. But I do look forward to handing off the baton to the next dean, who I know will make the law school we all love even better.

It's been a great run, friends!

DOUG BLAZE, DEAN

Omnibus

Blaze to step down as college's dean

Dean Doug Blaze says he's eager to return to teaching and working with students full-time, something he has always loved and has missed for a long time. Blaze has decided to step down, after seven years of service, as dean of UT Law in early summer 2015.

Blaze, the Art Stolnitz and Elvin E. Overton Distinguished Professor, has had an administrative role at UT Law since his arrival twenty-two years ago as director of clinical programs. He served in that role until 2006 and also served as director of the college's Center for Advocacy and Dispute Resolution from 2004 to 2006. He then served as interim associate dean for academic affairs until being named dean in 2008.

"These have been some of the most rewarding years of my professional life," he says. "But I love being a teacher and lawyer, too."

Blaze won't step too far away from the college's leadership. Fittingly, he will serve as director of the college's new Institute for Professional Leadership (see next story). He will also continue to chair the Tennessee Supreme Court's Access to Justice Commission.

"Doug truly exhibits the Volunteer spirit, thanks to his commitment to community service, equal access to justice, and students' development as future leaders," says Susan D. Martin, the university's provost and senior vice chancellor. "UT Law has benefited greatly from Doug's leadership, and I'm so pleased he'll remain an active member of the university family."

Despite beginning his deanship facing uphill challenges—the nationwide economic crisis, the employment and enrollment challenges faced by all US law schools and their graduates, and budget cuts at the university—Blaze has seen UT Law prosper and grow during his time at the helm. The college has developed its identity as Tennessee's flagship law school, boasting an affordable legal education; a nationally recognized focus on experiential learning, pro bono, and clinical education; and a tightly knit community of students, faculty, staff, and alumni.

"This is a remarkable law school that not enough people know about," Blaze says. "But we're positioned well for the future. UT Law was good when I got here, and it has only become better."

Blaze credits the people in the UT Law family as being the primary contributors to the college's success and future.

"This faculty is so cohesive and absolutely committed to giving our students the best education possible," he says. "Our faculty, staff—and our fabulous alumni—they've all made my job easier."

A search for Blaze's replacement is under way. As of press time, a hiring decision has not been made.

Buck Lewis ('80), Dean Doug Blaze, and Brad Morgan ('05)

LEWIS/BLAZE/MORGAN PHOTO BY PATRICK MORRISON

College starts Institute for Prof. Leadership

He may be stepping down as dean in the summer of 2015, but Doug Blaze will be no less busy or committed to the College of Law.

Blaze is currently developing the Institute for Professional Leadership, which finds its home in the UT College of Law. The institute was founded by Buck Lewis ('80), who co-teaches the college's Lawyers as Leaders course with Blaze. Lewis has committed $1 million in support of the institute and has been instrumental in the development of the institute and its initial design.

The institute will focus on preparing students and recent graduates for leadership roles in their careers by developing their leadership skills and professional values.

In addition to a return to teaching, Blaze will become director of the new institute when his tenure as dean ends next summer.

"I miss working with students full-time and finding new ways to help them develop as future lawyers," Blaze says.

Joining Blaze in leading the new institute will be Brad Morgan ('05), currently the coordinator for access to justice and mentoring programs at the college. Morgan will serve as the associate director of the institute.

"I'm thrilled to join Doug and Buck in this new initiative," says Morgan. "The institute will not only impact the community and the profession in many positive ways through service and leadership programming for the public, but will also benefit students of UT Law and students of other disciplines."

The institute will promote interdisciplinary programming to develop students' leadership skills and experience beyond a strictly legal context. Also, the institute will expand UT Law's pro bono and mentoring programming and will host courses and practicums in public service and leadership.

Professor Ben Barton

Barton named Fulbright Scholar

Ben Barton, the Helen and Charles Lockett Distinguished Professor of Law, is one of four UT professors spanning the globe as Fulbright Scholars this year.

The Fulbright Program is a prestigious international exchange initiative that awards about 1,100 grants to American scholars each year. Funded by the US government, Fulbright Scholars are chosen based on their leadership and academic merits and their abilities to teach, conduct research, and contribute to solutions for shared international concerns.

Barton is teaching comparative law at the University of Ljubljana in Slovenia, with a focus on American civil, constitutional, and criminal law. He will also lead a seminar on comparative judicial behavior, highlighting the growing use of behavioral economics, psychology, and economic analysis to study judicial incentives and behavior in civil law and common law. The seminar will use Barton's 2011 book, *The Lawyer–Judge Bias in the American Courts.*

UT Law in 'National Jurist' Top 20 Best Value List

UT Law is one of the nation's top twenty best-value law schools, according to *The National Jurist* magazine.

The college received an A+ grade and ranked seventeenth in the best-value list. The magazine looks at a number of academic and financial variables, including a law school's tuition, student debt accumulation, employment success, bar passage rate, and cost of living. Employment is given the greatest weight, 35 percent, because of the recent woes in hiring.

Faculty, students recognized at Chancellor's Honors Banquet

A number of College of Law faculty and students received awards at the annual Chancellor's Honors Banquet in April.

Professor Karla McKanders received the Jefferson Prize, which honors a tenured or tenure-track faculty member for significant contributions through research and creative activity.

Professor Maurice Stucke received an award for Professional Promise in Research and Creative Achievement.

Student George Shields received an award for Extraordinary Campus Leadership and Service.

Student Michael Cottone was recognized as the Top Collegiate Scholar for the college.

Cottone and fellow students Jared Garceau, Lindsey Martin, and Charles Simmons received University Citations for Extraordinary Professional Promise.

College launches trademark clinic through US Dept. of Commerce program

UT Law students will soon be able to practice trademark law before the US Department of Commerce's US Patent and Trademark Office (USPTO).

UT is one of only forty-seven law schools chosen to participate in the USPTO Law School Clinic Certification Pilot Program. As part of the program, UT's Business Law Clinic will provide trademark legal services to independent inventors and small businesses on a pro bono basis. Students will represent clients before the USPTO under the guidance of a faculty clinic supervisor.

"Branding has become an increasingly important element of promoting a successful product or business," says Professor Brian Krumm, director of the Business Clinic and supervisor of the pilot program. "Providing our students the opportunity for hands-on experience with the trademark process will make them more effective counselors to businesses when they become practicing attorneys."

Clinic clients can expect to receive searches and opinions, advice from students regarding their IP needs, drafting and filing of applications, and representation before the USPTO.

UT Law has been named **one of the nation's best law schools** by The Princeton Review.

READ MORE TINY.UTK.EDU/TOP

Big ORANGE GIVE

Alumni give $59K to UT Law during Big Orange Give

UT has wrapped up its annual one-week Big Orange Give online giving campaign. UT Law started with a goal of $15,000, which was surpassed within the first two days. The college raised the goal to $50,000, broken by alumni and friends by the end of the week. Alumni Donna Davis ('79), Buck Lewis ('80), Al Separk ('69), and Rick Rose ('74) funded a $20,000 challenge gift during the week. In all, the college raised $59,122 during Big Orange Give. Alumni and friends helped the university overall by giving $766,330.

Thanks to everyone who supported the College of Law! For more information, visit bigorangegive.utk.edu.

FACULTY FORUM

DWIGHT AARONS was interviewed by WBIR, discussing the consequences attorneys face when convicted of crimes.

BRAD AREHEART'S article, "Accommodating Every Body" (with Michael Stein and others), has been published in the *University of Chicago Law Review.*

WENDY BACH gave a presentation at the Vulnerability, Resilience and Public Responsibility for Social and Economic Justice Conference held at SUNY Buffalo School of Law.

BEN BARTON spoke at the International Legal Ethics Conference in London on the subject "The Effect of Technology on the Regulation of Lawyers in the United States" and in a roundtable on "The Lawyers' Monopoly and Client/Consumer Protection."

ROBERT BLITT'S opinion essay, "Gaza Inquiry's Bias Against Israel is Already Clear," was published in the Israeli daily newspaper *Haaretz.* Blitt serves as co-chair of the Human Rights Interest Group of the American Society of International Law.

CATHY COCHRAN has been appointed vice chair of the Economic Status of Law Librarians Committee and participated in a pre-conference leadership workshop at the annual meeting of the American Association of Law Libraries (AALL) in San Antonio.

CAROL COLLINS is the new chair of the Awards Committee for the Technical Services Special Interest Section and presented awards to this year's recipients at the annual meeting of AALL.

JUDY CORNETT'S article, "Goodbye Significant Contacts: General Personal Jurisdiction after *Daimler AG v. Bauman,*" co-authored with Michael H. Hoffheimer, will appear in the *Ohio State Law Journal.* Cornett taught Comparative Law and Literature at UT's summer program in Cambridge.

IRIS GOODWIN presented her paper, "Access to Justice: What to Do about the Law of Wills," at the University of Florida Levin College of Law.

JOAN HEMINWAY'S book chapter, "The Legal Aspects of Crowdfunding and U.S. Law," was published in *Crowdfunding: A Guide to Raising Capital on the Internet* (Wiley/Bloomberg Press); her chapter, "The Sarbanes-Oxley Act of 2002: A Regulatory Hodge-Podge Arising from Highly Visible Financial Fraud," was published in the *Research Handbook on Securities Regulation in the United States* (Edward Elgar Publishing); and her article, "The New Intermediary on the Block: Funding Portals under the CROWDFUND Act," which appeared originally in the *UC Davis Business Law Journal* in 2013, has been reprinted in the *Corporate Practice Commentator.* She presented at the Emory University School of Law conference "Educating the Transactional Lawyers of Tomorrow" on the value in teaching the drafting of resolutions to law students, and she chaired the recent Association of American Law Schools' (AALS) mid-year meeting on "Blurring Boundaries in Financial and Corporate Law."

AMY HESS participated in the spring leadership meeting of the ABA Real Property, Trust, and Estate Law Section in Chicago.

BECKY JACOBS spoke at the Tennessee Bar Association Dispute Resolution Forum.

LUCY JEWEL'S article, "The Indie Lawyer of the Future: How Cultural Trends, New Technology, and Market Forces Can Transform the Solo Practice of Law," has been accepted for publication by the *SMU Science and Technology Law Review,* and her

FACULTY FORUM (CONTINUED)

related essay, "The Indie Lawyer of the Future," has been accepted for publication by the *Journal of the Professional Lawyer*. Jewel spoke on this subject at the International Legal Ethics Conference in London. Jewel was awarded a competitive grant from Wyoming's Center for the Study of Written Advocacy for a presentation that she and a co-author gave at the Biennial Legal Writing Institute Conference in Philadelphia.

BRIAN KRUMM recently gave the presentation "Using LawMeets Materials in the Classroom to Teach Drafting and Negotiation Skills" and served on the steering committee for the Fourth Biennial Transactional Conference, "Educating the Transactional Lawyer of Tomorrow," at the Emory Law Center for Transactional Law and Practice. Krumm has been named to the Research Council of the Anderson Center for Entrepreneurship and Innovation, based at UT.

West Academic Publishing has published the fourth edition of **GEORGE KUNEY'S** book, *The Elements of Contract Drafting*. He has been selected as a peer reviewer for the American Association for Justice's *Trial* magazine. Kuney has also been asked to serve as an advisory editor for the International Interdisciplinary Advisory and Editorial Board, based at the University of Canberra in Australia.

MICHELLE KWON participated in the University of Kentucky's Developing Ideas Conference in Lexington.

PLI will publish **DON LEATHERMAN'S** most recent article in its thirty-one-volume set on the federal income tax consequences of mergers and acquisitions. He was quoted in *Tax Notes* concerning problems with Treasury regulations that treat a stock sale as an asset sale in some ways for federal income tax purposes. He spoke at the recent meeting of the American Law Institute in Washington, DC, for a panel that discussed taxable acquisitions, focusing on section 336(e) regulations. He is also serving on an ABA committee that will draft comments on the same regulations.

BOB LLOYD participated in the Uniform Law Commission's annual meeting in Seattle.

ALEX LONG'S article, "Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism," was published in the *UC Davis Law Review* (see page 13); his article, "The Forgotten Role of Consent in Defamation and Employment Reference Cases," was published in the *Florida Law Review*; and his co-authored book, *Advanced Torts: A Context and Practice Series Casebook*, was published by Carolina Academic Press. Long spoke at the International Legal Ethics Conference in London, presenting a paper, "Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism," and serving on a panel titled "Diversity and Inclusion in the Legal Profession: A Question of Business or Ethics?" In addition, Long's 2006 *Georgia Law Review* article was cited twice by the Iowa Supreme Court.

Faculty active at Law & Society Association annual meeting

Several professors traveled to Minneapolis earlier this year to participate in the annual meeting of the Law and Society Association.

BRAD AREHEART spoke on "Accommodation as a Civil Right: Forms and Limits" as part of a panel on "Understanding Accommodation as a Civil Right."

WENDY BACH chaired panels on "Assisted Reproductive Technology and Parentage Feminist Legal Theory" and on "Race, Class and the Legal Perpetuation of Subordination: Historical Reflections and Modern Trends."

JOAN HEMINWAY participated in the roundtable discussion "Defending Disclosure: Examining the SEC's Role in Information Disclosure" and gave a presentation on "Theorizing Crowdfunding Disclosure" as part of a panel on "Market Information & Mandatory Disclosures."

LUCY JEWEL gave a presentation on "The Biology of Income Inequality: New Legal Questions" as part of a panel titled "Conversations between Law and Science."

GREG STEIN gave a presentation on "Chinese Real Estate Laws, Actual Business Practice, and the Law and Development Theory" as part of the panel "Chinese and Foreign Real Estate Investment: History, Ritual, Contemporary Boom and Nebulous Law."

VALORIE VOJDIK spoke on "Theorizing Violence Against Men and Boys" for a panel on "Sexual Violence—Feminist Legal Theory" and served as chair and discussant for a panel on "Gender and the Law: Comparative Perspectives."

KARLA MCKANDERS will speak at the *North Carolina Law Review* Symposium.

CAROL PARKER'S 1997 *Nebraska Law Review* article, "Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It," was noted favorably in a recent article by Kristen Konrad Tiscione of Georgetown Law School.

The *Uniform Commercial Code Law Journal* has invited **TOM PLANK** to write an article on the control of electronic chattel paper, such as the typical automobile loan agreement.

GLENN REYNOLDS is ranked forty-ninth out of the 260,000 authors on the Social Science Research Network, with more than 79,000 downloads as of August 1. He recently published a chapter (co-authored by **BRANNON DENNING, '95**), in *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge). He was interviewed by Alexis Garcia of Reason TV about his recent book, *The New School*, and he appeared on Fox Business Network's *The Independents* to talk about his *USA Today* column on CIA espionage. The *Chicago Tribune* praised Reynolds's work analyzing higher education debt in a recent editorial.

DEAN RIVKIN was interviewed recently by **VISITING PROFESSOR STEWART HARRIS** for Harris's public radio show, *Your Weekly Constitutional*, on the subject of school-based arrests, school discipline, and truancy, and WUOT Radio interviewed Rivkin and **BRENDA MCGEE ('84)** for the call-in program *Dialogue*, on "The School-to-Prison Pipeline." Rivkin was interviewed on a related topic for *The Gist*.

BRIANA ROSENBAUM'S article, "Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review," has been published in the *Journal of Appellate Practice and Process*.

PAULA SCHAEFER'S article, "A Primer on Professionalism for Doctrinal Professors," has been published in the *Tennessee Law Review*. The article was noted favorably on the Legal Skills Prof Blog. Schaefer also presented a continuing legal education program, "2012 Attorney Ethics Update," to lawyers attending the Tennessee Department of Environment and Conservation's Solid/Hazardous Waste Conference and Exhibition.

GREG STEIN'S article, "Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets," will appear in the *Pepperdine Law Review*.

MAURICE STUCKE participated in a workshop concerning privacy, competition law, and consumer protection law at the European Parliament in Brussels, Belgium. Stucke has been quoted and cited recently in *The New York Times*, *The Wall Street Journal*, and *Business Insider*, and has been interviewed on *The Capitol Forum*. He co-authored an op-ed piece in *Roll Call* about the proposed merger between Time Warner Cable and Comcast.

VALORIE VOJDIK was one of the keynote speakers at the International Conference on Gender and the Law: Limits, Contestations, and Beyond, held in Izmir, Turkey.

The National Judicial College (NJC) presented **PENNY WHITE** with its Advancement of Justice Award. White served as a guest lecturer at Yale Law School, where she discussed the topic of judicial impartiality, judicial elections, and campaign financing. She presented four programs for members of the Louisiana bench and bar at their recent annual summer school, and she was selected as a faculty consultant to work with the NJC at the University of Nevada to produce innovative programs for judges on the topic of weighing and admitting scientific evidence in criminal cases. White was interviewed by **VISITING PROFESSOR STEWART HARRIS** for his public radio show, *Your Weekly Constitutional*, on the subject of judicial retention elections. She also served as keynote speaker for the annual convention of the Oregon Trial Lawyers Association.

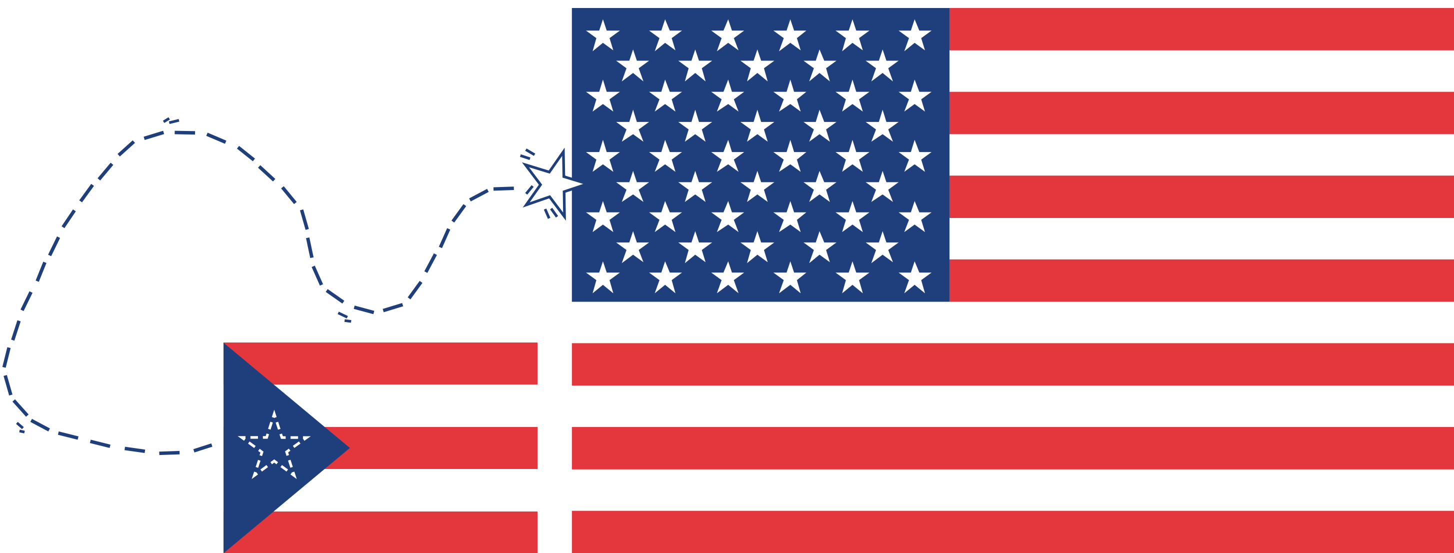
DAVID WOLITZ was quoted in the *Chattanooga Times Free Press* regarding a petition seeking to bar the use of Latin in US legal proceedings. The US Supreme Court recently denied certiorari in the case. ◈

The celebration begins this spring...

A late-summer view of the Tennessee River, with the UT campus and Knoxville skyline in the distance

PHOTO BY PATRICK MURPHY-RACEY

Deliberation



Incorporating the lonely star

BY WILLIE SANTANA ('14)

When the United States invaded the Spanish-controlled island of Puerto Rico during the Spanish–American War of 1898, they were greeted with cheers of "¡Viva Puerto Rico Americano!" The invasion of the island was encouraged by the annexation movement that developed into the island's modern movement toward statehood. The pro-annexation group believed that after the invasion, Puerto Rico would be on the path to becoming a state. It's taken 116 years, but Puerto Rico is finally progressing toward statehood.

Prior to the twentieth century, territories followed a standard path to statehood. Most states followed the path created by the Northwest Ordinance of 1787, which established a three-stage process that concludes with admission to the union. The process starts with direct federal governance, followed by local governance with congressional supervision, and finally statehood. A handful of states followed the "Tennessee Plan," where the territory itself actively pursues and demands statehood, rather than waiting for Congress to act.

Puerto Rico appeared to be on the path to statehood. In 1900, Congress passed an organizing law for Puerto Rico that mirrored the first phase of the Northwest Ordinance process. Meanwhile, the presidential election was fought on the issue of whether the Constitution "followed the flag." William McKinley, who argued that the Constitution should not extend to the territories, won the election, and the Supreme Court essentially adopted the same idea in the Insular Cases.

The Insular Cases created the constitutional principle of unincorporated territories—those that cease to be foreign countries in the "international sense," but remain foreign to the United States in the "domestic sense" and are, therefore, not on the path to statehood. The court feared "serious consequences" if the "savages" of these territories became full citizens and ruled that unless Congress incorporated the territories, placing them on the path to statehood, these territories could be subject to the supreme power of Congress forever.

Today, the Insular Cases continue to form the basis of decisions about Puerto Rico and its fellow territories—American Samoa, Guam, the Northern Mariana Islands, and the US Virgin Islands—but the Supreme Court has started to cast doubt on the cases' continued applicability. The court noted in a recent case that the scope of the Insular Cases was limited to facilitating the "temporary" government of the territories and did not have wider applicability. In another case, the court went further by stating that it "may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance."

The ties between Puerto Rico and the United States have indeed strengthened in significant ways. Today, more Puerto Ricans reside in the mainland than in Puerto Rico. Supreme Court Justice Sonia Sotomayor is of Puerto Rican descent. And 400,000 Puerto Ricans have served with distinction in the US armed forces since the Spanish–American War. With Puerto Ricans in prominent, visible roles at all levels of American society, Puerto Ricans are no more foreign to the United States than are New Yorkers, Texans, or Hawaiians.

If the Insular Cases were intended to facilitate the "temporary" government of Puerto Rico, then, more than a century later, a permanent solution is needed. There are three choices: commonwealth, independence, or statehood.

The commonwealth option has lost favor both on the island and the mainland, and the island's Commonwealth Party has proposed an "enhanced commonwealth" to replace it. Under the proposal, Puerto Ricans on the island would remain US citizens and Puerto Rico would assume sovereignty over its own internal and external affairs. The proposal would require a treaty of free association that would continue federal funding for programs on the island while reducing the administrative footprint there. The proposal is constitutionally suspect because its promises of sovereignty and continued birthright citizenship are incompatible. Remaining subject to the jurisdiction of the United States is necessary for birthright citizenship, but being separately sovereign is critical to achieving the proposal's goals.

For the independence option, there's precedent in Cuba and the Philippines, which were US territories that transitioned to nationhood. An independent Puerto Rico would be able to preserve its culture and identity, but it's doubtful the island could support itself as an independent nation. Additionally, the Puerto Rican diaspora on the mainland is significant, and severing the communities would have wide-ranging sociocultural repercussions. Puerto Ricans also do not wish to lose their American citizenship. Unsurprisingly, Puerto Rican support for independence is very low. The island has voted on the question of status four times since 1967, and the most support that independence has been able to garner was 5.5 percent of the vote.

Willie Santana ('14)

SANTANA PHOTO BY KARA SANTANA

> **Statehood best respects the sacrifices made by Puerto Ricans in the past century and reflects the gradual but significant integration of the island into American society.**

Thus, the remaining option is statehood. The idea of becoming a state has gained support in Puerto Rico since the first status vote. In the century since the island's invasion, Puerto Ricans have integrated into American culture, and the institutions of American government have grown on the island. The local political organization is identical to those in the states, and Puerto Rico's economy is integrated with that of the mainland. This high degree of sociopolitical integration over the past century makes a transition to statehood the most easily implemented of the non-territorial options.

Statehood opposition both on the island and in the mainland is founded on shaky grounds. On the island, detractors fear losing Puerto Rico's cultural identity, but they ignore that the states are already culturally distinct. The mainland critics focus largely on preserving the political balance of Congress, but they also ignore the key fact that Puerto Ricans on the island do not view politics from a Republican or Democrat point of view. Until recently, the two highest offices on the island were held by a Republican and a Democrat, both members of the Statehood Party. Attempting to predict how Puerto Ricans might vote as a state is futile.

Ninety-seven years have passed since Puerto Ricans joined the brotherhood of citizenship with their mainland counterparts. Four hundred thousand Puerto Ricans have served in the US military and have risen to the highest ranks of American society and leadership. Yet Puerto Ricans on the island remain sentenced to second-class citizenship. This situation is unfair to Puerto Ricans on the island who have no vote in a Congress with supreme power over their affairs. The situation is also unfair to Americans on the mainland who largely subsidize Puerto Rico's government. Everyone involved is best served by a final resolution to the status of Puerto Rico, and that can only come through statehood or independence. Of those, statehood best respects the sacrifices made by Puerto Ricans in the past century and reflects the gradual but significant integration of the island into American society.

Adapted by Santana from his article, "Incorporating the Lonely Star: How Puerto Rico Became Incorporated and Earned a Place in the Sisterhood of States," published in the spring 2014 issue of the *Tennessee Journal of Law and Policy*.

Starting at the ENDA

BY BEN M. ROSE ('00)

When I was a young legislative staffer in the US Congress, I met with a member of the transgender community who urged my boss to support the Employment Non-Discrimination Act (ENDA). Until that day, I had never heard of this initiative, which endeavored to eliminate all sexual orientation and related discrimination in employment throughout our country.

Some twenty years later, this legislation has yet to be enacted into law, despite seemingly favorable political winds. Because of Congress's slow pace, many states and municipalities have taken this matter into their own hands. In Tennessee, for example, Memphis, Nashville, and Knoxville have enacted ordinances prohibiting sexual orientation discrimination for municipal employees. Voters in Chattanooga recently decided to repeal a similar ordinance.

The Chattanooga experience is fairly representative of the politics surrounding similar campaigns. Ordinance supporters claim the initiative will be the ultimate "end all, be all," an opportunity to fill a void left by Congress's stubborn inaction. Opponents claim the proposed ordinance will inevitably lead to more lawsuits and increased costs and headaches for already cash-strapped local governments. Neither side is ultimately correct. Regardless, as demonstrated by the voters in Chattanooga, such proposals remain controversial.

Ironically, once this type of municipal ordinance is enacted, both sides seem to be completely disinterested in how it will be enforced, if at all. The stakeholders would be well served to focus at least as much effort on enforcement of the ordinance once it is enacted as they did on the question of whether to adopt it in the first place. In my opinion, it is simply illogical to expect municipalities to enforce their own ordinances of this kind. It is the equivalent of a fox guarding a hen house.

Enforcement of a non-discrimination ordinance is one of the central issues my law firm has raised in federal litigation, the first of its kind in Tennessee, on behalf of a former park police sergeant in Nashville. In 2009, the Music City enacted an ordinance prohibiting discrimination based on sexual orientation and gender identity for its employees, to much fanfare. However, Nashville's non-discrimination ordinance curiously did not contain an explicit enforcement mechanism.

In the litigation, Nashville's lawyers urged a district judge to dismiss our client's claims based on the ordinance because the only way an employee could enforce the ordinance—if it was to be enforced at all—was through the municipality's pre-existing, toothless administrative scheme. However, the administrative process is the ultimate paper tiger. The only thing it requires is for claims of discrimination to merely be "investigated." In response, we reviewed the legislative record of Nashville's city council when it passed the ordinance.

That record is clear. The Nashville City Council intended for its ordinance to be enforced, not through an impotent administrative process, but by the courts. As one city council member remarked during the debate on the ordinance:

> It is simply illogical to expect municipalities to enforce their own ordinances [prohibiting sexual orientation employment discrimination]...It is the equivalent of a fox guarding a hen house.

"Friends, I think we all know what we are discussing tonight and I think we all know, and we've heard, specific allegations of discrimination within our government over the last several years. We've heard of fear, we've heard of experiences of intimidation, a fear of discovery. We simply are not protecting our employees. We simply are not upholding the rights of our employees when it comes to discrimination in the workplace. We can cast a broad paintbrush, but that won't stand up in court. What will stand up in court is our delineation of the kind of activity we will not tolerate. And this bill expressly provides for that."

Another member, who was opposed to the ordinance, noted, "The sponsor is quoted as saying, 'This would be a basis for individuals to bring legal court action against this government.' That doesn't make sense to me. We strive to not get in situations that result in court actions against our government."

It remains to be seen whether Nashville's non-discrimination ordinance will be enforced in any meaningful way. While public employees may have a constitutional right to be free from sexual orientation discrimination in the workplace, it is equally plausible that their only avenue of relief in the courts is through enforcement of a municipal ordinance, like Nashville's ordinance.

Until enactment of ENDA, the question of outlawing sexual orientation employment discrimination will remain hotly debated, as the Chattanooga experience recently demonstrated. However, once a municipality agrees to do so, it cannot seriously be argued that the ordinance should not be enforced.

Rose is an attorney in Brentwood, Tennessee, where he owns his firm, the Law Offices of Ben M. Rose, PLLC. He earned a bachelor's degree from American University before earning his JD at UT Law.

Accommodation as professionalism

BY ALEX LONG, PROFESSOR OF LAW

Whether it's working to promote equal treatment under the law, equal access to justice, or equal employment opportunity, lawyers have special obligations when it comes to equality. Despite these obligations, there are some areas where the profession has lagged behind. One of the most glaring instances of underrepresentation involves lawyers with disabilities. According to the Census Bureau, roughly 19 percent of the US population has some type of disability. Yet, according to the National Association of Law Placement, only 0.23 percent of law firm lawyers identify as having disabilities.

Alex Long

> For many years, if you were a person with a severe mobility impairment...your only options to reach a second-floor courtroom were to be carried up the stairs or crawl up the stairs.

The Americans with Disabilities Act (ADA) seeks to promote equality of opportunity for people with disabilities by requiring that employers provide reasonable accommodations for qualified individuals with disabilities. This requirement is best viewed as a means of eliminating unnecessary barriers that prevent people with disabilities from enjoying equality of opportunity. In the case of law firms, this might mean that a firm provides inexpensive technological devices to enable disabled lawyers to perform their jobs, or a supervisor provides written—as opposed to verbal—instructions.

One reason for the lack of diversity in the legal profession almost certainly has to do with the fact that some firms are reluctant to provide the required reasonable accommodations. Many lawyers with disabilities report they have faced reluctance from their employers to provide accommodations and a lack of resources or procedures for dealing with accommodation requests.

While the ADA—along with Title VII and other anti-discrimination statutes—requires important legal obligations of lawyers, it is likely to do little to improve equality of opportunity until more members of the profession internalize the values that underlie the statute. For example, for many years, if you were a person with a severe mobility impairment in Tennessee and you had business in court, in many counties your only options to reach a second-floor courtroom were to be carried up the stairs or crawl up the stairs. In 1998, two individuals decided they didn't want to choose from those options and filed suit, alleging they had been denied access to the court system. The ADA had been in effect for six years and states were under a legal obligation to make their courtrooms accessible. But in Tennessee and many other states, many courtrooms remained inaccessible.

Ultimately, the Supreme Court's decision in this case, *Tennessee v. Lane*, clarified the scope of a state's obligations to make its services accessible. Since that decision, the legal system has made great strides in improving access to justice for people with disabilities. The Tennessee Supreme Court's Access to Justice Commission has identified as one of its goals the removal of "barriers to access to justice, including but not limited to disability." Courtrooms themselves are now more accessible. A diabled person who needs to appear in a Tennessee court can now go to the Tennessee Supreme Court website and learn about available accommodations and how to request those accommodations. It's entirely possible states made these changes out of fear of future ADA lawsuits, but what seems more likely is that the image in *Tennessee v. Lane* of a disabled person literally crawling up the courthouse steps helped focus the attention of the legal profession on the issues of courtroom accessibility and access to justice for people with disabilities. The efforts to improve accessibility to the legal system have been part of a broader recognition that promoting equality, including equal access to justice, is a fundamental value of the legal profession.

There is a similar symmetry between these legal obligations and the ethical and professional obligations faced by lawyers. Supervisory lawyers in firms have an ethical duty to make reasonable efforts to ensure subordinate lawyers are practicing competently. If this means modifying policies or practices within reason, this is what is ethically required. In other words, the legal obligations of the ADA simply complement the ethical and professional obligations lawyers already face.

The underrepresentation of lawyers with disabilities in the profession and continued problems of access to justice for people with disabilities should be of particular concern to the profession. By emphasizing how the reasonable accommodation requirement is a matter of professional responsibility and professionalism, the legal profession can take another step toward equality of opportunity for people with disabilities.

Adapted by Long from his article, "Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism," published in volume 47 of the *UC Davis Law Review*.

EQUALITY

50 YEARS OF THE CIVIL RIGHTS ACT

How far we've come...
and how far we still have to go

BY ROBERT S. BENCHLEY

The 1963 March on Washington, DC (Photo by Marion S. Trikosko, courtesy Library of Congress)

WE

must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions—divisions which have lasted all too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity."

It was half a century ago—July 2, 1964, to be exact—that President Lyndon B. Johnson, sitting in the East Room at the White House, spoke those words in an address to the nation upon signing into law the Civil Rights Act of 1964.

The Act was a landmark piece of civil rights legislation that outlawed discrimination based on race, color, religion, sex, or national origin. It ended unequal application of voter registration requirements and racial segregation in schools, at the workplace, and by facilities that served the general public.

Or did it? Looking back fifty years later, one hears in LBJ's words a sense of hope that telling people to do the right thing would somehow end three centuries of one group's mistreatment of another. But if the law is a system of rules enforced through social institutions to govern behavior, then it has to have teeth, because old habits die hard.

In fact, the Civil Rights Act of 1964 has been bolstered by additional legislation several times in the intervening years to extend protections in instances or to groups not written into the original law. Examples are the Voting Rights Act of 1965, which prohibits racial discrimination in voting; the Civil Rights Act of 1968, which provides equal housing opportunities; and the Americans with Disabilities Act of 1990, which used the Civil Rights Act of 1964 as a template.

Civil rights scholars at UT Law believe we have made significant, if uneven, progress in the past fifty years. Equality remains a moving target—employment, gender, and immigration issues are the current hot buttons—in large measure because institutional discrimination has deep cultural roots.

PROVISIONS VS. PROTECTIONS

Fifteen years after the act's passage, a UT Law student named Penny White ('81)—who today is the Elvin E. Overton Distinguished Professor of Law and director of the Center for Advocacy and Dispute Resolution—found a summer job working for a legal services office in Johnson City, Tennessee.

"I spent the entire summer learning about Title VII as it related to an African American client's claims against the area's largest employer, Tennessee Eastman Company," White says. "The anger that the suit generated was extreme. It was suggested that those of us representing the plaintiff were unappreciative of all that Eastman had done for the area, that we were somehow not civic-minded or patriotic because we had sued. In that first summer out of law school, a great deal of my own naïveté evaporated as I learned the great difference between the

Women march in 1970 for equal rights in Washington, DC. (Photo by Warren K. Leffler, courtesy Library of Congress)

provisions of the law and the actual protections of the law."

Filled with enthusiasm for making the law do what it promised, White returned to UT Law in the fall and spent the next two years assisting Joseph G. Cook, the Williford Gragg Distinguished Professor of Law, and John L. Sobieski Jr., the Lindsay Young Distinguished Professor of Law, on what would become a seminal text on the subject: the five-volume *Civil Rights Actions*, which continues to be updated twice a year.

Regular updates are needed because the courtroom dockets remain full. "In terms of civil rights, the area most people think of first today is employment," says Sobieski. "If asked, they will say that there has been progress. But lawsuits challenging employment practices as discriminatory—the protections under Title VII of the act—have not gone away. In fact, Section 1983 actions, which allow a party to bring action against state and local officials who act in an unconstitutional manner, now account for the overwhelming majority of civil rights actions. The prohibitions against discrimination by gender have not kept pace with other protections, and age-discrimination cases are only going to increase as the baby boomers get older."

GENDER BARRIERS REMAIN

Valorie Vojdik, director of clinical programs and a professor of law who specializes in gender law, agrees. She believes the Civil Rights Act has succeeded in eliminating many of the barriers that once barred women from jobs, but she says gender segregation remains rampant in the work force, requiring new legal theories and ideas to end it.

"Full participation is still a problem," Vojdik says, and she offers a long list of examples. "Women earn only seventy cents for every dollar paid to men, and the people who run companies continue to be men. Women are subject to many employment practices that appear to be neutral, but which affect women negatively. This is why some discrimination is difficult to prove. A good example is when a company doesn't permit part-time work, which lessens employment opportunities for women needing time with their children. It's often difficult to raise certain claims under Title VII because many courts think its protections don't apply to discrimination based on sexual orientation. And women's reproductive rights are increasingly being threatened.

"I was the lead lawyer in getting women admitted to The Citadel in 1995," she says. "This was a case in which a state military college banned women, when women had been permitted in national military service since 1978. As a society, we have to look deeper into the reasons such practices still exist."

Although civil rights were considered largely a racial issue in 1964, the face of America, like the act itself, has changed greatly.

"As human beings, we tend to focus on differences: ability, skin color, religion, and other personal attributes," says Corbin Payne, a 3L and disability advocate (see sidebar). "Over time, the focus of discrimination has become fixed on new groups."

THE NEW OPPRESSED

Karla McKanders, associate professor of law and director of UT's Immigration Clinic, cites immigrants as one of the most visible of those groups.

"As a law professor who is engaged with my law students in the pro bono representation of immigrants, I am exposed daily to the gaps in our legal and immigration systems that often deny indigent immigrants access to attorneys or the right to defend against their removal from the United States," McKanders says. "As an educator of a future generation of lawyers, I remain engaged and dedicated to teaching the important principles of the Civil Rights Act and facilitating equal opportunities and access to the justice system. I also remain dedicated to instilling in my students the need to use their legal degrees to serve people who may not have access to the justice system."

The College of Law's Immigration Clinic accomplishes this goal through the representation of indigent immigrants seeking relief before immigration courts and the US Department of Homeland Security. Immigration Clinic students have successfully represented abused and abandoned children who have entered the United States without their parents, women who fled their home countries due to domestic violence, and refugees from various countries across the globe.

"The attainment of civil rights is a continuing goal that we must diligently monitor," McKanders says. "We must always strive to ameliorate the conditions of vulnerable groups who may be victims of institutionalized and other forms of discrimination that may not be as overt as when the act passed. The fiftieth anniversary of the Civil Rights Act reminds us that we must remain forever aware and vigilant to ensure that civil and human rights are upheld through the rule of law and that principles of equality and justice are affirmed." ◈

PAYNE PHOTO BY PATRICK MORRISON

CHAMPION FOR THE DISABLED

CORBIN PAYNE HAS A HEAD FOR business and a heart for justice. The 3L majored in accounting as an undergraduate and plans to establish a practice providing legal services to young entrepreneurs. At the same time, his current work on the staff of the disABILITY Resource Center of Knoxville, a nonprofit organization that provides independent living services to people with disabilities, has convinced him that personal advocacy will also be a part of his future.

Payne was inspired to become a lawyer at the age of 9, when his parents rented the film *To Kill a Mockingbird*. "I wanted to be Atticus Finch," he says, citing the story's central figure, an attorney who must overcome the complex interrelationship between race and rights in the small-town South of the 1930s when he defends a black man accused of raping a white girl. The irony is that, in a sense, Payne has already achieved his ambition. In the film, Finch proves his client could not have committed the crime because he is disabled. In real life, Payne spends much of his extracurricular time championing the rights of people with disabilities—and winning.

"There are a lot of businesses out there that will present a contract to someone with a mental or cognitive disability and then misrepresent when explaining the terms of the transaction," he says. "The customer with a disability gets locked into an obligation they can never pay off."

Payne's response is to draft what he calls "a kick-butt letter," which is sent out on agency stationery with his director's signature. "In every instance," he says, "I've gotten the offending company to cave. They realize they have done something they shouldn't have."

Through his work with the disABILITY Resource Center, Payne has also become involved in Access Knoxville.

"We evaluate restaurants in terms of physical access, how the staff interacts with individuals with disabilities, whether they allow service animals, and other considerations," he says. "Restaurants and other places of public accommodation are supposed to be compliant with the Americans with Disabilities Act of 1990, but many business owners think of it as an inconvenient expense.

"What I like is that we aren't involved with enforcement," he says. "We simply explain the value of including everyone in the community. With 55 million Americans having some form of disability, it means that improving access can increase their potential customer base by 25 percent. That's when business owners sit up and take notice."

—Robert S. Benchley

Corbin Payne

Alumna Regina Lambert (center) with her clients and close friends, Sophy Jesty (left) and Val Tanco

‘Inevitable’

A UT Law alumna, two UT vet med professors, and their case for legalized same-sex marriage

BY ROGER HAGY, JR.

PHOTOGRAPHY BY PATRICK MURPHY-RACEY

IT'S A "MEET-CUTE" MOMENT STRAIGHT OUT OF A ROMANTIC COMEDY.

"This might seem cheesy, but it was meant to be," says Val Tanco of the serendipitous moment she met Sophy Jesty. "I literally just ran into her in an elevator. I thought the elevator was going one way, but it turns out it was going the other. I had to very embarrassingly get off the elevator while she looked at me like, 'What's wrong with you?'"

Tanco and Jesty went out for drinks later that day, began dating a few months later, and eventually got married in New York City.

"We got married in a Brooklyn courthouse on September..." Tanco pauses to look sideways at Jesty. "Ninth?"

Jesty nods, smiling wryly. "That is correct."

"September 9, 2011," Tanco says with a proud smile, sitting up straight. "Three years ago."

A lot can happen in three years. In 2013, the US Supreme Court overturned the federal portion (Section 3) of the Defense of Marriage Act in *United States v. Windsor*, holding that under federal law, recognizing only heterosexual couples' marriages is unconstitutional under the Fifth Amendment, leading to federal tax and other benefits for same-sex couples. Quickly, a flood of lawsuits was filed by advocacy groups and same-sex couples to challenge individual states' bans on same-sex marriage.

Among those couples are Tanco and Jesty, who have since moved to Tennessee (which currently doesn't recognize same-sex marriage) to serve as veterinary medicine professors at UT. "We sort of knew that these types of cases were going to happen," says Jesty, "but it didn't really occur to us that we might take part in it—and we certainly didn't go out looking to be plaintiffs."

Instead, they became involved in the matter thanks to the efforts of their friend, Regina Lambert ('01), a UT Law alumna and frequent adjunct instructor.

A FRIEND AND ADVOCATE

When the *Windsor* decision was announced in 2013, Lambert had just celebrated her twenty-fifth anniversary with her partner, Jackie Stanfill (UT Martin, '80), and was celebrating her fiftieth birthday in France. Once back in the States, they married in Vermont.

Then Lambert was ready to get back to work. Although a corporate lawyer by day, Lambert got involved with Nashville attorney Abby Rubenfeld and the National Center for Lesbian Rights and decided to file a suit in Tennessee. The goal was to include attorneys and plaintiffs from across the state. Soon, Bill Harbison and attorneys from his Nashville firm, Sherrod & Roe, became involved. Maureen Holland, who practices in Memphis, also joined the team.

"When we started to put this legal team together, we had to decide whether we were going to have a full challenge to the state ban or start off with the 'baby step' of recognizing marriages from other states," says Lambert. "Since we were going to be one of the first southern states to file, we thought 'recognition only' might be a better start. And we wanted plaintiffs that would really be able to reflect the mobile society that we live in in the United States."

For plaintiffs from Knoxville, Lambert quickly thought of her friends, Tanco and Jesty, and approached them about participating. At first, though, the couple was wary of wading into what would obviously be a very public case. Ultimately, they saw the case as a way to help other couples. They said yes. "We've never regretted that decision because we're lucky enough to have friends and family who support us and a workplace that already knew we were together," Jesty says. "So it's not like we had to worry about losing jobs, losing family, losing friends by being as 'out' as we now are. That really gave us a luxury of saying yes, whereas I think a lot of people are in more precarious situations than us."

Decision made, Lambert invited the couple over to her house to celebrate. However, Tanco and Jesty brought with them a slight twist. "I poured a glass of wine to toast," Lambert says, "and that's when Val said, 'Well, I really can't drink…I'm pregnant.'"

AN ADDITION TO THE FAMILY

Lambert says the pregnancy gave an added immediacy to their situation. One of the other couples in the Tennessee filing—two husbands in Memphis—already had children, but the complications surrounding giving birth to a new child in the middle of the upcoming legal battle presented new challenges—namely, whether Jesty could be legally recognized as one of the parents. The legal team acted quickly, filing a preliminary injunction for the state to recognize Tanco and Jesty's marriage for the time being, which would allow them to purchase health insurance together and put both of their names on the birth certificate. A federal judge granted the request.

Soon after, Tanco gave birth to Emilia, the first baby born in Tennessee to have a woman listed as "father" on her birth certificate. Lambert immediately became "one of Emilia's biggest fans," Tanco says. "Regina was the first person to meet Emilia outside the family. She was there the day after Emilia was born, and she's the only one of our friends who got to see her in the hospital. I just can't imagine—even once this case is done—I can't imagine not having Regina in our lives."

But when will the case be done? The US Supreme Court decided in October to deny cert in seven marriage cases before them, a decision that has allowed same-sex marriages to proceed in several states while other federal appellate courts continue to make decisions. However, the Sixth Circuit US Court of Appeals—which heard in August the Tennessee cases, along with cases from Kentucky, Michigan, and Ohio—decided in early November to uphold the four states' right to ban same-sex marriage. Judge Jeffrey Sutton wrote the two-to-one majority opinion, saying legalized same-sex marriage in the United States is "inevitable," but the decision should be made through "the less expedient, but usually reliable, work of the state democratic processes."

"But during that period of time, people won't have rights and protections for five, ten, twenty years until some of the states legalize gay marriage," Jesty argues.

In her dissent, Judge Martha Craig Daughtrey wrote that the court's decision portrayed the families as "mere abstractions." During arguments in August, she spoke along the same lines, citing the long road for women's rights in America.

"Judge Daughtrey pointed out that it took seventy-eight years for women to fight for the right to vote," says Lambert. "Even then, they couldn't vote in federal elections; they had to get a constitutional amendment. Sometimes the democratic process isn't effective, especially when you're talking about a constitutional right."

Brian Krumm, a UT associate professor of business law and close friend to Lambert, agrees. "Equal protection and full faith and credit are the two things that all people should be able to rely on," Krumm says. "We can't selectively apply those concepts…Why go the long way around something when we can resolve it more expeditiously?"

Now, the question of legalized same-sex marriage will return to the Supreme Court in DC—although there's still no guarantee the justices will grant cert and hear a case.

For now, Lambert and her clients—and all the families involved—must wait.

A QUESTION OF RIGHTS

"You can see where the different sides are trying to frame the question differently," Lambert says. "Opponents would say that same-sex marriage is a new right that we're talking about. And the equality folks say, 'No, this is *marriage*—it's marriage that would now be accessible to a group that had, in the past, been denied the right, an existing right."

"One argument is that that's what the Constitution is for: to protect minorities that don't have power in the legislative process," says Wendy Bach, a UT associate professor of law. "That's what judges are supposed to do."

"I think things, decision by decision, will move along the same way as they did for African Americans," Krumm says. "Over time, all the decisions will back up the fact that we're all people, we all deserve the same rights, privileges, and responsibilities. It may take a year, it may take five years, it may take a generation before everyone looks back and says, 'I can't believe that once upon a time in America, we treated people that way.'"

Meanwhile, the states opposing same-sex marriage are employing a variety of arguments, including Kentucky's "perpetuation of the human race" argument and Tennessee's argument that the state's intention is to ensure that children (especially those born accidentally) are born into a stable environment, defined by the state as a heterosexual marriage. "As one of the attorneys pointed out for the plaintiffs, opposite-sex couples have children all the time and there's no test they take, no certification," Lambert says. "They can screw up horribly, they can do wonderful jobs…The only difference is that same-sex couples surely have to want to have a child. There are no accidental pregnancies; it's a very conscious decision." The lack of commonality among the states' arguments is telling, she says. "I think that points to the fact that if there was this really strong legal justification against gay marriage, probably everyone defending state bans would latch onto it."

Regina Lambert ('01)

"If there was this really strong legal justification against gay marriage, probably everyone defending state bans would latch onto it.

REGINA LAMBERT ('01)

Bach says she encountered an interesting alternative argument suggested by a student at a UT panel: If states abolished marriage, would divorce still be possible? "I think his point was to get the states entirely out of the institution of marriage," Bach says, leaving the concept of marriage a purely personal one. "As a practical matter, it's an impossibility, because marriage is deeply intertwined with legal and regulatory regimes. But it was an interesting thought, that instead of privileging certain family forms, we should instead support everyone's choices.

"The harder question," Bach says, "is what's going to happen in the next year. It's really going to come down to what the Supreme Court says *Windsor* means."

'THE BEST YEAR'

For now, Lambert and her clients are unflinchingly optimistic.

"It's inevitable," Lambert says of legalized same-sex marriage, astonished at how far gay rights have come in her lifetime—and the new outlook young gay people have. "It's a different approach to life when they meet and date people because they see them as potential spouses, a person they'll potentially parent with, and it wasn't that way for me. I never saw a case like *Windsor* happening in my lifetime."

Tanco and Jesty are excited for the changed world that their daughter will experience. "I hope Emilia will grow up in a place where her family isn't different than anyone else's, where, at least legally, she doesn't have to worry about anything," Tanco says. "I think the key to all of this is that we're not asking for anything that would take away something from another person. It'll just bring us all to the same place and the same level in the eyes of the law. No one else except the people that are being kept from their rights are really going to have anything to lose. What does a straight couple have to lose if we're married? Absolutely nothing."

Lambert, Tanco, and Jesty readily recognize that not everyone agrees with them ideologically.

"I think everyone has the right to believe whatever they want to believe," Lambert says. "I would be one of the first lawyers to sign up to defend any church that didn't want to perform a same-sex marriage. That's definitely a right that I am in full agreement with. But I don't think personal or religious beliefs should have any justification for blocking gay marriage under the law."

The three women have enjoyed support from the UT and Knoxville communities. Lambert says her UT Law students have offered to help with the case in any way they can, and Tanco and Jesty have met many people who thank them for leading the way for change through the case.

"Our impression has been that even down here in the South, when people get to know you, they recognize that we're hard-working, we love each other, our relationship is really remarkable and solid," says Jesty. "It makes it hard for them to dislike us on a personal level, even if they might not agree with what we're asking for legally."

Above all else, the women appreciate the case for how much it has enhanced their friendship.

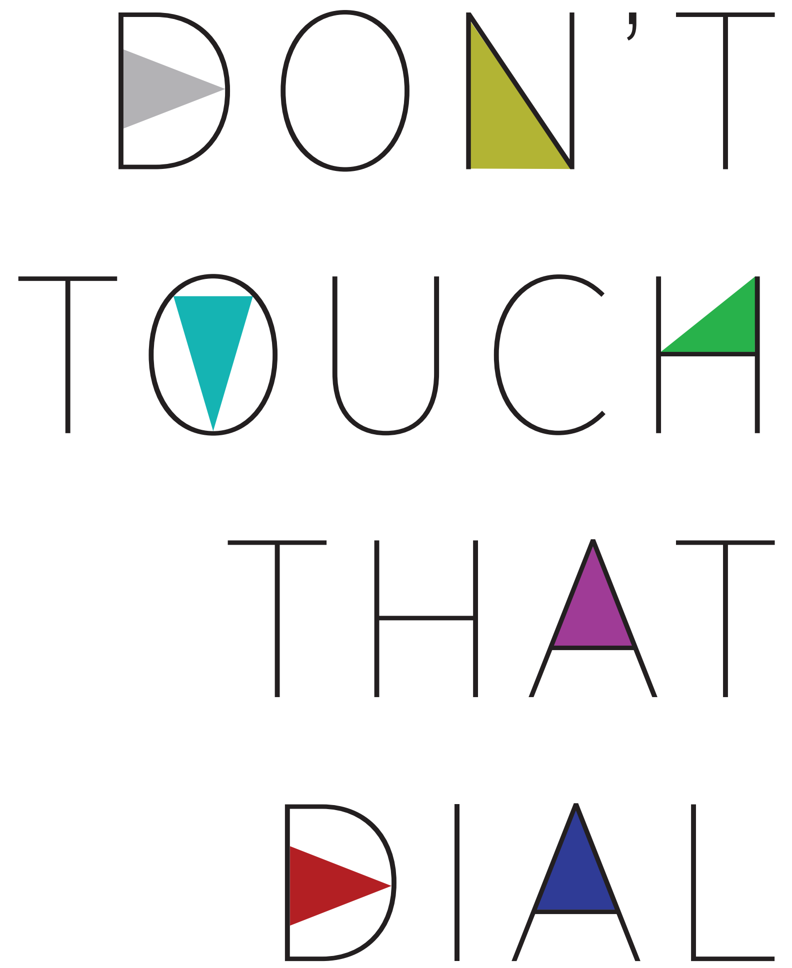
"One of the most precious parts of this whole thing has been our relationship with Regina," Jesty says. "We have such a special, unique bond because we've been going through this process together. None of the three of us will ever forget this."

"It's been such a privilege, and it's just been the best year," Lambert says. "Everything happened: the big birthday, the big anniversary, the wedding, this case..."

She lets her sentence drift away, lost in wistful thought. She smiles.

"Yeah, it's been a nice ride." ◈

> "I think the key to all of this is that we're not asking for anything that would take away something from another person. It'll just bring us all to the same place and the same level in the eyes of the law. No one else except the people that are being kept from their rights are really going to have anything to lose. What does a straight couple have to lose if we're married? Absolutely nothing.
>
> VAL TANCO



DON'T TOUCH THAT DIAL

Cable and Internet companies: Can't live with them, can't live without them. And if Comcast's acquisition of Time Warner Cable is approved, most Americans will have a single choice for their telecomm services. **Professor Maurice Stucke** argues the merger will damage market competition and net neutrality—and he has joined the fight against it.

BY ROGER HAGY, JR.

So it's Friday night, and you're ready to finally catch up on the latest season of *House of Cards* on Netflix. You've got the popcorn ready, the lights dimmed, feet propped up, and you press play. You wait for the show to load and Kevin Spacey to appear. Instead, you watch the red progress bar slowly creep toward the right, bit by bit. A couple minutes pass, and the show begins with a grainy picture on your 60-inch TV. You wrinkle your nose at the quality, but watch a minute or so of the show, hoping the picture quality will improve. But the progress bar returns. Your popcorn's cold, and you're no longer relaxing on a Friday night. You suppose that you should go ahead and pay for that faster, more expensive broadband service through your cable company so that Netflix will run smoothly and hassle-free.

Just like it used to.

It may sound like an extreme hypothetical, but this Friday night may actually be in your future if you're an avid Netflix fan or one of the growing number of Americans trying to "cut the cord" and quit cable altogether.

If Comcast's proposed acquisition of Time Warner Cable (TWC) is approved by the Department of Justice (DOJ) and the Federal Communications Commission (FCC), Comcast's cable, broadband, and telephone services will be available to 70 percent of

Maurice Stucke

We're crossing the Rubicon. If Comcast is allowed to acquire Time Warner Cable, how can the DOJ *not* allow it to acquire smaller similar companies?

▶ MAURICE STUCKE

consumers, says Maurice Stucke, associate professor of law. The choice for alternatives will be slim to nonexistent for most of those consumers. "We're crossing the Rubicon," Stucke says. "If Comcast is allowed to acquire Time Warner Cable, how can the DOJ *not* allow it to acquire smaller, similar companies?"

NO COMPETITION?

Comcast argues that the acquisition doesn't lessen competition because it doesn't compete with TWC in the same geographic markets. Stucke and his co-author, attorney Allen Grunes, argue this is wrong on several fronts.

For one, through Section 7 of the Clayton Antitrust Act, "Congress sought to prevent situations where 'several large enterprises [were] extending their power by successive small acquisitions,'" Stucke and Grunes write in their June 2014 *Global Competition Review* article, "Crossing the Rubicon." "Here Comcast is extending its power through a significant acquisition—one that expands its reach to most of the US population."

Also important to consider is the very nature of the Comcast empire. Comcast is already the nation's largest provider of cable television, Internet, and telephone services. "Comcast controls the pipes," as Stucke and Grunes write. However, Comcast is also a significant content creator through broadcast television (NBC and Telemundo), cable networks (CNBC, MSNBC, USA), regional sports networks, and Hollywood studio Universal Pictures, which has worldwide reach through its movies. Therefore, the rise of Netflix and other online video programming distributors (OVDs) is at odds with Comcast's interests in promoting its own content through its own services. Plus, Netflix, Amazon, and Hulu are also producing their own content (often successfully, in Netflix's case, with hit shows like *House of Cards*, *Orange Is the New Black*, and *Arrested Development*). That original content further competes with Comcast's cable services and content offerings.

"Netflix and other OVDs rely on Internet service providers [ISPs] like Comcast and TWC to deliver their television shows and movies to subscribers," write Stucke and Grunes. "In acquiring TWC, Comcast will have even more power to thwart Netflix or other emerging OVD rivals by impairing or delaying the delivery of their content."

NETFLIX IN SLOW MOTION

In fact, Comcast may already be doing just that. In February 2014, Netflix agreed to pay Comcast for faster access to Comcast customers (or, as Comcast implied, to ensure smooth delivery of Netflix programming, which was taxing the Internet pipeline). Netflix has been outspoken in relaying its reluctance to agree to the deal, which they see as a slap in the face of net neutrality (the ideal in which ISPs like Comcast allow equal access to all web content and services without favoritism).

But it may have been a necessary evil, as illustrated in the graph on page 25. For better or worse, the ISPs show gradual change in Netflix streaming/download speed. For some, like Cox, the speed has improved steadily over time, while for others, like Verizon DSL, it has steadily worsened. However, take a close look at Comcast's speed. In late 2013, the speed for Comcast customers plummeted. Then, in February 2014—the month in which Netflix agreed to pay Comcast for faster access—Comcast's speed skyrocketed.

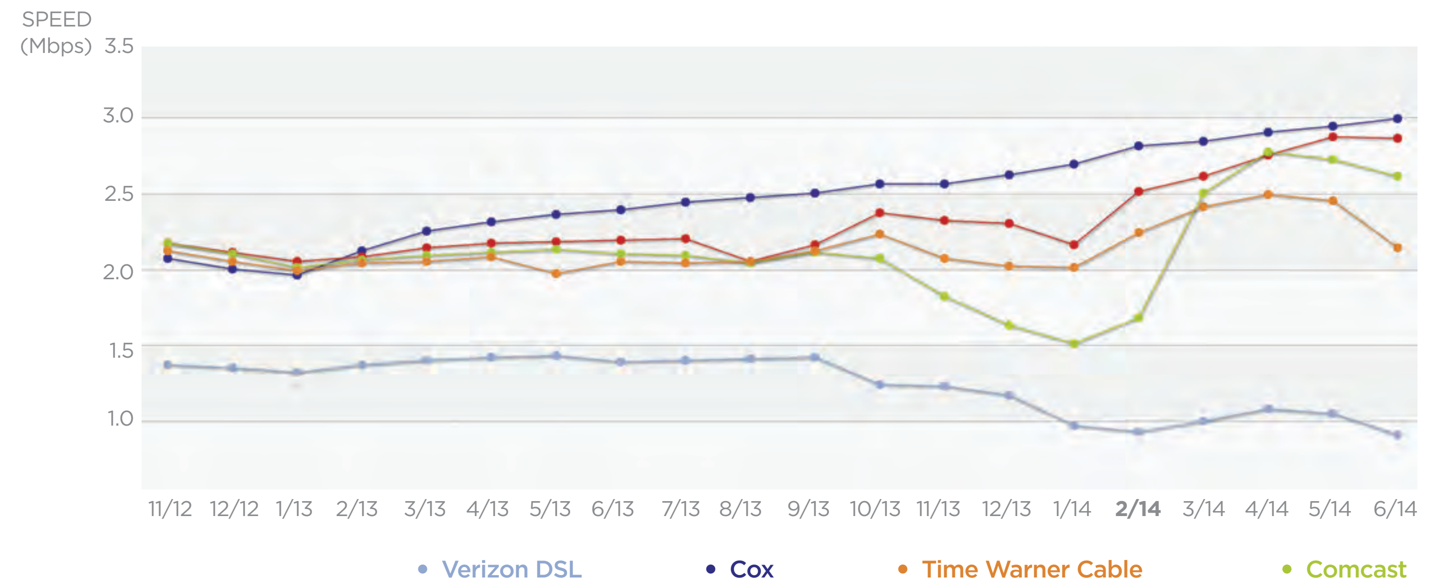
Stucke says if the "toll" paid by Netflix truly reflected capacity constraints on Comcast's network, we wouldn't see such a dramatic increase in speed; the speed would gradually improve over time, as Comcast was able to add capacity. Not to mention that if Netflix were truly overloading the Internet, then there wouldn't be such a strong disparity between the different ISPs' download speeds—and the other ISPs would be joining Comcast in criticizing Netflix.

"Few Americans have a meaningful choice in broadband service providers: Comcast subscribers are largely stuck with Comcast," Netflix wrote in an April 2014 letter to US Senator Al Franken (a major proponent of net neutrality). "By degrading consumers' experience, Comcast can demand that content providers pay them a toll to avoid congestion and reach their captive subscribers. If content providers cannot effectively reach Comcast subscribers, they cannot compete. So they have little alternative for an uncongested connection unless they agree to Comcast's terms."

If a major player like Netflix—which has more subscribers than Comcast has for its cable services—can be coerced into paying for faster service, Stucke says, then what chance can any OVD stand against the merged Comcast and Time Warner Cable?

STUCKE PHOTO BY PATRICK MORRISON

Netflix: USA ISP Speed Index Results, November 2012 to June 2014



PRESSING PAUSE ON THE MERGER

The rights and interests of American consumers are at stake, as well. That's why two groups approached Stucke and Grunes—both former attorneys for the DOJ's Antitrust Division—to request their help in opposing the merger before the FCC and DOJ. As that case moves forward and the DOJ and FCC otherwise continue to look at the proposed merger, Stucke says Comcast will most likely argue that it will continue to be within the parameters of the DOJ's previous judgment when Comcast acquired NBCUniversal—including extending net neutrality to TWC subscribers, an increase in broadband speed, expansion in rural and low-income areas, and divesting some subscribers to competing companies to remain below 30 percent of cable subscribers.

However, that isn't good enough, says Stucke. "At what point does the DOJ become concerned and wonder whether its NBCU final judgment will protect suppliers and consumers?" write Stucke and Grunes. "The judgment, for example, requires Comcast to maintain its Internet access speed above a certain level. But the DOJ cannot know what a competitive market could bring...That is a fatal flaw of behavioral remedies. Comcast continues to deliver expensive and (according to some critics) inferior broadband. In the U.S., it lags [behind] Google [Fiber] and other Internet service providers. And there is less incentive for Comcast, after acquiring TWC, to innovate and compete."

In another article, "The Beneficent Monopolist," (published April 2014 in *Competition Policy International*), Stucke and Grunes write that combining two dominant companies like Comcast and TWC doesn't improve service, lower prices, lead to more innovation, or give better choices to consumers.

"Comcast and TWC have not overcome the presumption of illegality for this merger and are unlikely to do so," they write. "[The] DOJ should just say no." ◈

Alumni

A presidential legacy

BY LUIS RUUSKA

"Three greats and a grand" is how Judge Andrew Jackson VI ('81) describes his lineage to the seventh president of the United States, Andrew Jackson.

Jackson VI often cites the coincidental similarities between himself and the former president to visitors of the Hermitage, his ancestor's estate in Nashville.

"I always like to say, 'Andrew Jackson was a lawyer, I'm a lawyer; Andrew Jackson was a prosecutor, I was a prosecutor; Andrew Jackson served in the military, I served in the military,'" says Jackson. However, he makes it clear that he and his ancestor share career commonalities up to a point: "Andrew Jackson was a judge, I'm a judge; Andrew Jackson was president, I'm a judge."

President Jackson's rise to prominence is something Jackson VI finds particularly captivating. "It really is a rags-to-riches story as far as Andrew Jackson is concerned," he says. "Jackson was the first [president] who was born poor but worked his way up, and I think that shows in this country, you can do that."

Since graduating from UT Law, Jackson has spent nearly his entire career working in public service. He initially worked in private practice but soon found himself working as an assistant district attorney with the Knox County Attorney General's Office. "I loved working for the attorney general," he says. "That's a job where you can serve people and you're helping society as a whole—and it's a fun job, to boot."

Jackson admits the position came with its challenges when facing unwinnable cases where justice was clearly needed but could not always be served. "I think you've got to draw the balance between doing what is right and sometimes what you'd like to do," he says. "There are some instances around the country where prosecutors have gotten in trouble for getting cloudy and thinking the ends justify the means."

For the future, Jackson doesn't plan to climb the political ladder like his ancestor did. "I'd like to be king, but I wouldn't like to be president. I think most people feel that way,"

Judge Andrew Jackson VI ('81)

he says. "No, I'll just stay with the judicial part of it. I think it suits me." He ultimately plans to keep his roots in the Volunteer State. "Tennessee has been my family's home for a very long time," he says. "Tennessee will always be my home." ◈

Law alumni Lauria, Flowers receive university awards

Two UT Law alumni were honored this year by the university. Thomas Lauria (Liberal Arts, '82; Law, '86) received the Distinguished Alumnus Award, and Joshua Flowers (Arch., '01; Law, '05) received the Alumni Promise Award.

Dedicated to the spirit of the Volunteer, the Distinguished Alumnus/Alumna Award is the single highest alumni award given by UT and is reserved for alumni who have excelled at the national or international level. The Alumni Promise Award recognizes alumni no older than 40 who have demonstrated distinctive achievement in a career, through civic involvement, or both.

Lauria is one of the foremost bankruptcy attorneys in the world. As global head of the Financial Restructuring and Insolvency Practice at White & Case LLP in Miami, he oversees a group of 150 lawyers worldwide and helps major corporations through complex restructuring issues. He is a dedicated supporter of the College of Law, hiring students at White & Case, funding a scholarship to help recruit out-of-state students, supporting faculty endowments, and serving as a Distinguished Alumni Lecturer.

Flowers is one of only a handful of individuals in the nation who are both registered architects and licensed attorneys. The general counsel for Hnedak Bobo Group Architects in Memphis, he has had a unique and substantial impact on the practice of each discipline and to the citizens of Tennessee. He has written numerous publications to influence legislation to protect the welfare of the public and safeguard the architectural profession. He recently won the 2014 Young Architect Award from the American Institute of Architects.

CLASS NOTES

SUBMIT YOUR NEWS AT LAW.UTK.EDU/CLASSNOTES

'67 **SIDNEY W. GILREATH** was selected by his peers for inclusion in *The Best Lawyers in America*. He was also named a Best Lawyers' 2015 "Lawyer of the Year."

'82 **KELLY L. FREY** has joined Frost Brown Todd. He has also been selected as one of the *Nashville Business Journal*'s 2014 "Best of the Bar" winners and has been elected president of the Nashville Film Festival. He is the author of the legal practice guide *Frey on Intellectual Property and Technology Transactions*.

'84 **ELIZABETH ASBURY** became one of the first women elected to judicial office within the Eighth Judicial District of Tennessee when she was elected chancery court judge for the district in August.

'86 **ROBERT D. MEYERS** of Glankler Brown, PLLC, was selected for inclusion in *The Best Lawyers in America* for labor and employment litigation and municipal litigation.

R. DAVID PROCTOR was appointed by US Supreme Court Chief Justice John Roberts to serve on the Judicial Panel on Multidistrict Litigation. The panel consists of seven federal judges. Proctor recently celebrated his tenth year as a US district judge.

'88 **STEPHEN RAGLAND** has been elected a fellow of the American Bar Foundation.

'92 **SHERRARD "BUTCH" HAYES** of the Austin law firm Weisbart Springer Hayes was included in the 2015 edition of *The Best Lawyers in America* for employment and labor law.

'96 **JASON H. LONG** has been elected vice president of the Tennessee Bar Association. After serving a year as vice president, Long will ascend to president-elect in 2015–2016 and president in 2016–2017.

'97 **CHAD EMERSON** was recently hired as CEO for Downtown Huntsville Inc.

'01 **MATT HARDIN** has opened his own firm, Matt Hardin Law, PLLC, with offices in Nashville, Lebanon, and Cookeville.

NORA KOFFMAN has recently joined Green Chestnut & Hughes PLLC in Lexington, Kentucky.

'03 **KERI D. WHITE CALLOCCHIA** was appointed administrative law judge for the City of Buffalo, New York.

'04 **AMANDA HATHCOCK SAMMONS** became one of the first women elected to judicial office in the Eighth Judicial District of Tennessee when she was elected Campbell County general sessions judge in August.

'05 **WALT BURTON** and **MELISSA MARTIN BURTON ('07)** welcomed their second son, James Edward "Jeb," on June 18.

REAGAN TAYLOR recently joined the Criminal Divisions of the US Attorney's Office for the Western District of Tennessee.

JON MIZE, a Womble Carlyle attorney, was named to the *Triangle Business Journal*'s 40 Under 40 list.

'06 **MIRANDA CHRISTY**, a Stites & Harbison attorney, received a 2014 Nashville Emerging Leader Award and was a 2014 *Nashville Business Journal* Women of Influence finalist.

'08 **TAMARA J. LINDSAY** joined the New Orleans office of Coats Rose. Lindsay is an associate in the construction and surety litigation group.

'09 **NICOLE JUMPER** has joined the law firm of Sherrard & Roe, PLC, as an associate in the corporate practice group. In her free time, she enjoys volunteering with the Nashville Humane Association and serving as a running guide for Achilles Nashville.

'10 **K. CHRIS COLLINS** has returned to Husch Blackwell as a business litigation associate.

'12 **MILI SHAH** was named an honoree for the Hot List 2014 by Lawyers of Color.

BRITTANY THOMAS, an attorney with the Chattanooga firm Grant, Konvalinka & Harrison, PC, was honored as a "Pro Bono Hero" by the American Immigration Lawyers Association. Thomas was one of only four attorneys chosen for the honor.

'13 **ZACKARIJ GARDNER** joined Kennerly, Montgomery & Finley as an associate.

WILLIAM L. GIBBONS JR. has joined Wyatt, Tarrant & Combs, LLP, in Memphis as a member of the law firm's Intellectual Property Protection and Litigation Service Team.

ORDERING A TRANSCRIPT? If you attended UT Law in fall 2006 or later and request an official transcript online, indicate you were a law student in the comment box. This will prompt the inclusion of an official notice outlining the current grading policy (effective fall 2006) to be sent with your official transcript. More info: tiny.utk.edu/transcript

Colleague

Life in the 'Vortex'

BY LUIS RUUSKA

For Jeff Groah (Lib. Arts, '84), a circulation supervisor and classroom technology coordinator, UT and the Knoxville area have been home for much of the past three decades.

Before planting roots in Knoxville, Groah attended Davis and Elkins College in West Virginia, where he graduated with an associate's degree in engineering technology. He then graduated in 1984 with a bachelor's in geology. Ten years later, he landed at UT Law and hasn't left since.

Jeff Groah

Q: Throughout your time here, how have you seen UT and Knoxville change?

GROAH: There's been all sorts of changes in the technology we use daily to do our jobs and to stay in touch with one another. Our networked world has changed so much of how we do things. But in many ways, things haven't changed all that much. When I was a student, we waited in long lines to register; now we wait online.

What has excited you most about the technological advancements that have been made in the past twenty years?

Getting our classrooms up to speed as far as being able to provide different tools for students to use when they're doing presentations and recording different events. Those are all things that I've been involved with.

What do you hope to see from technology in the future?

Someday it's all going to be easier [laughs], but not likely in my lifetime.

What have you liked most about Knoxville that has kept you here?

Knoxville's proximity to the mountains and the good climate. For many years I worked both on campus and also as a river guide. Twelve months a year you can get out and play in the mountains and take advantage of what's around us. I ride my bicycle through town every evening on my way home and there's always people roaming around Market Square...It's become a more pleasant place to live over the years. I've actually come and gone several times, and I keep getting pulled back here. I've heard Knoxville referred to as the "Vortex" because it's one of those places that you kind of get tugged back to somehow.

So you were a river guide. How did you first get into rafting and canoeing?

Growing up, my folks loved the outdoors. When I was a student [at UT], there was a club called the Canoeing and Hiking Club, and they would do weekly trips—sometimes they'd do four or five a week—and I got involved.

Other than rafting and canoeing, what are some of your other interests?

Cycling...I've been doing that since 2000 or 2001. I hiked the Appalachian Trail in 2000 and came back from that wanting to transition from being someone who walked everywhere to someone who got around a little bit faster, but not necessarily by driving.

What's the best part about your career at UT Law?

The community here, working with all the different people and the different people that come through our doors...not just the people that are here every day, but some of the folks that we invite to speak here. Working with adjunct professors, working with full-time professors, working with students...it's fun to stay involved with all of that.

How do you see life ten years down the road?

From one day to the next, you never know what's going to change...but I hope I'll still be riding a bicycle. ◈

GROAH PHOTO BY PATRICK MORRISON

Shop Volunteer Traditions and Support the College of Law

This holiday season, grab a few of your gift items at Volunteer Traditions and support the University of Tennessee College of Law at the same time

Mason Jones ('07), founder of Volunteer Traditions, is offering a great deal for UT Law alumni and friends. Simply enter "UT Law" in the organization box on the checkout page, and 30 percent of your entire purchase will be donated to the College of Law.

VolunteerTraditions.com

COLLEGE OF LAW

1505 W. Cumberland Ave.
Knoxville, TN 37996-1810

law.utk.edu
law@utk.edu
865-974-6788

NONPROFIT ORG.
U.S. POSTAGE
PAID
PERMIT #481
KNOXVILLE, TN