FOREWORD

CONVERGING PATHS: JUDGES AND SCHOLARS

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This edition of *Law & Contemporary Problems* marks the first time a scholarly journal has been devoted entirely to original works of scholarship by sitting judges. This is a remarkable event.

The authors are all judges who have graduated from the Master's of Judicial Studies program at Duke Law's Bolch Judicial Institute. The intense course of study, culminating in a master's thesis, is the only such program in the United States offered to sitting judges by a law school. The program invites state, federal, and international judges to learn from top scholars and leading experts on a wide range of subject areas related to the third branch—including the study of judicial institutions, judicial behavior, and judicial decision-making. The curriculum is designed to address those issues most relevant to the judiciary, expose judges to recent scholarship about the judiciary, and provide intellectually ambitious members of the judiciary the extraordinary opportunity to engage in research and scholarship under the guidance of leading academicians. Judges in the program therefore engage not just in traditional substantive topics like constitutional, statutory, federal, and international law, but also learn analytic methods and research skills and explore emerging legal issues, judicial practices, and judicial reform efforts. The program has graduated more than sixty judicial students since its founding in 2012.

A typical class brings perspectives from all levels of the judiciary, including state judges from trial, intermediate appellate, and supreme courts. Similarly, all levels of the federal bench are represented by district and circuit judges, as well as by magistrate and bankruptcy judges. The curriculum is demanding, and the course work is challenging. The faculty regularly consists of numerous Duke Law professors, and often extends to federal and even U.S. Supreme Court justices. Many top practitioners and other legal experts provide added views and insights as guest speakers. As in all good classrooms, the students learn as much from one another as they do from their instructors and readings, and our remarkable faculty learn as much as our judicial students. Many of our faculty report that the experience of teaching these self-selected judges, eager to become better judges and more understanding observers or our legal system, has been one of the most

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extraordinary teaching experiences in their careers.

As part of their studies, judges in the program are asked to write a thesis—an original work often buttressed by empirical research on a topic of great import to the judiciary. The program provides members of the bench with the resources, support, and formal structure to use their unique experiences and understanding of judicial methods and institutions within a sound research framework. The thesis component is intended to promote the collaboration between judges and scholars in order to encourage a deeper understanding between the judiciary and the academy, bridging a divide that has received considerable comment by judges and academics alike.[1]

This edition is the product of those papers. And the editors are, appropriately, three teachers in the Master's program: Duke Law professors Mitu Gulati, Jack Knight, and Margaret Lemos, all distinguished scholars of the third branch. Impressed by the quality of scholarship generated during the program, they proposed this special edition of the journal in order to provide a forum for judges to share their perspectives on various approaches to improving the judiciary. Recognizing that courts are essential institutions to the welfare of society as a whole, they envisioned a volume that would add to the important discussion about how to preserve and protect the judicial branch. The works selected from the impressive pool of papers were chosen because of their empirical quality and creative insights.

Three articles in this volume tackle the thorny process of judicial selections. Vice Chief Justice Robert M. Brutinel of the Arizona Supreme Court examines the appointment of leadership judges on trial courts. These judges—variably known as chief judges, presiding judges, assignment judges, and administrative judges—undertake the administrative and governance functions of their respective courts, such as assigning caseloads and handling personnel issues. In *Choosing Leadership Judges by State Supreme Court Appointment: Analysis of a Court Reform*, Vice Chief Justice Brutinel provides a thorough overview of the

1. *See, e.g.*, RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY xii (2016) ("[T]here really is a gulf between these two branches of the legal profession, and this gulf has been growing."); Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592, 2607 (2015) ("To the extent that legal scholarship can spark a new way of thinking about law, and by fanning the flame become influential, it is worthwhile. But most of those sparks, unfortunately, do not fall on judges."); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1345 (2011) ("Contrary to the claims of Chief Justice Roberts and Judge Edwards, and contrary to the results of prior studies, this study finds that over the last fifty-nine years there has been a marked increase in the frequency of citation to legal scholarship in the reported opinions of the circuit courts of appeals."); Chief Justice John G. Roberts, Jr., *A Conversation with John Roberts*, C-SPAN (June 25, 2011), http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts [http://perma.cc/PL96-DZYG] ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.").

fourteen states that select leadership judges by either the state's chief justice or the state's highest court, detailing their institutional differences, processes, and—supported by interviews with serving leadership judges—their roles. Against the backdrop of these states' various processes, he finds that state supreme court selection of such judges tends to yield better management outcomes for the judicial branch and the local courts as well.

Justice Ann A. Scott Timmer, also of the Arizona Supreme Court, asks in *The Influence of Re-Selection on Independent Decision Making in State Supreme Courts* whether and how various re-selection systems affect sitting state supreme court justices. Her research is grounded in a fascinating history of the evolution of judicial elections and merit selections, supported by a study of justices' dissents and concurrences in the years before and after a re-selection event, and punctuated by poignant and revealing insights from confidential interviews with numerous judges. The data suggest to her that justices are able to prioritize the rule of law despite temptations to render decisions in a way that would preserve their positions.

Magistrate Judge Jennifer L. Thurston of the U.S. District Court for the Eastern District of California explores the diversity of judges in *Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench*. Relying on a wealth of data—including from numerous federal agencies, bar associations, and surveys of nearly 100 federal district chief judges, all active federal magistrate judges, and several members of merit selection panels—Judge Thurston examines whether race or gender affects outcomes from the magistrate bench, the relationship between the diversity of district and magistrate benches, and approaches to increasing diversity in both courts. She finds that, ultimately, diversity is largely a matter of a court's "consistent will to achieve it."[2]

Once a court is constituted, how are decisions made? Two articles address this question, focusing on the effect of court norms and law clerks, respectively. Judge Renée Cohn Jubelirer of the Commonwealth Court of Pennsylvania researches the collective decision-making approaches of appellate judges in *Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court*. Judge Cohn Jubelirer uses interviews and empirical data to conclude that the procedural rules and informal norms within her own court affect the interactions between judges, lessening the costs of disagreement and increasing the benefits of the group's decision-making. Specifically, she finds that the ability to disagree internally—rather than through written dissent—and the culture of tolerating multiple points of view are key to ensuring a net gain in the tradeoff between the costs of disagreement and the benefits of group decision-making. Breaking down the inner workings of her own court on practices related to case assignment, argued cases, voting, and judicial conferences, Judge Cohn Jubelirer explains how such norms promote democratic decision-making.

2. Jennifer L. Thurston, *Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench*, 82 LAW & CONTEMP. PROBS. No. 2, 2019 at 63.

Judge Donald W. Molloy of the U.S. District Court for the District of Montana also investigates the effect of internal court procedures by taking up the subject of law clerks and term clerks in *Designated Hitters, Pinch Hitters, and Bat Boys: Judges Dealing with Judgment and Inexperience, Career Clerks or Term Clerks*. Providing the most edifying kind of inside baseball, Judge Molloy likens a judge's potential use of his or her staff to that of a coach directing various members of a team—and examines, in interviews with nearly thirty federal judges, when and whether clerks are relied upon heavily (designated hitters), in certain situations (pinch hitters), or for more limited purposes (bat boys). He also discusses necessary training and offers strategies to address the "August Effect"—the effect on a chambers' decision-making process that stems from clerk turnover and the introduction of newly graduated law students to the clerkship and chambers team.

Finally, two judges focus on specific criminal law issues. Justice David Collins of the High Court of New Zealand proposes a new test to evaluate competence to stand trial in *Re-Evaluating Competence to Stand Trial*. Providing a detailed history of the applicable statute and landmark U.S. Supreme Court case, *Dusky v. United States*,[3] Justice Collins posits that the current standard yields confusing and conflicting decisions and is applied too narrowly, promoting the "criminalization of mental illness" and resulting in more than one million mentally ill prisoners. A new test, he argues, should account for various conditions—personality disorders, neurological disorders, incapacitation through legal medications, and even deafness and cancer—that the current standard ignores. Justice Collins formulates such a test, drawing on historical principles underlying the rights at stake and the rationale for the competence requirement. He suggests that four pillars—understanding, evaluation, decision making, and communication—ought to inform the standard, and explains the advantages of this new test over the old one.

In *Mass Incarceration: The Obstruction of Judges*, Judge Tracie A. Todd of the Alabama 10th Judicial Circuit examines the largely overlooked question of the role of state judges—who handle 95% of criminal cases filed—in relation to the rates and length of incarceration in the states. To shed light on the matter, Judge Todd interviews judges in Alabama (one of the highest rates of incarceration in the country) and Massachusetts (one of the lowest). She explains that systemic issues, including legislative mandates and institutional features of the judiciary, such as the degree of judicial funding and training, as well as the selection process, may contribute to these differences.

Taken together, this volume addresses important topics in the study of the judiciary: how should courts be constituted, how do judges decide cases, and what can courts do to improve the delivery of justice. The breadth of these topics and the depth of the research in this volume serve as evidence that the goals of the Master's program are being realized. We are grateful to our judge-student-

3. 362 U.S. 402 (1960).

authors and to the student editors of *Law & Contemporary Problems* for lending such a special and well respected forum to these matters. Their hard work benefits us all. Congratulations and thanks to our faculty, judges, and students for bringing our shared vision to fulfillment.