

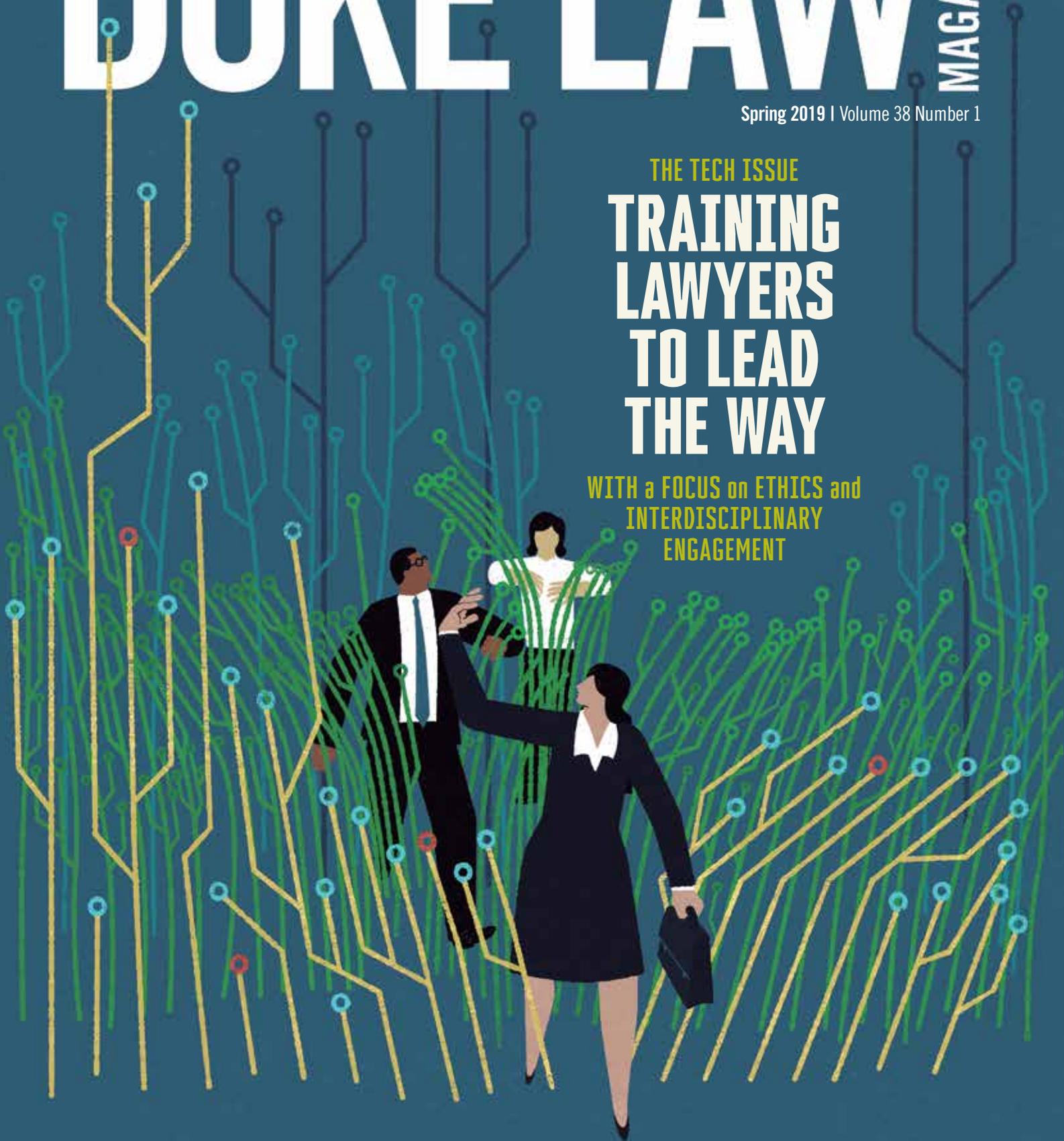
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THE TECH ISSUE

TRAINING LAWYERS TO LEAD THE WAY

WITH a FOCUS on ETHICS and
INTERDISCIPLINARY
ENGAGEMENT





Joseph Blocher, left, and Darrell Miller

“With the new Center for Firearms Law, Duke Law School is poised to become the leader in sober scholarly thinking and research regarding the Second Amendment.”

— Dean Kerry Abrams

Second Amendment scholars Blocher and Miller co-direct **Duke Center for Firearms Law**

DUKE LAW SCHOOL'S newest research center is devoted to the development and dissemination of reliable and balanced scholarship on issues surrounding firearms, gun rights and regulation, and the Second Amendment.

The Duke Center for Firearms Law launched in August with Professors Joseph Blocher and Darrell Miller as co-directors. Blocher and Miller are leading constitutional scholars who have written extensively about the Second Amendment, most recently co-authoring

The Positive Second Amendment: Rights, Regulation, and the Future of Heller, published in September by Cambridge University Press (see page 16). Through its programming and development of resources, they hope the center will encourage others to undertake serious research and scholarship that reclaims the Second Amendment from distortions and misconceptions they argue currently surround it.

Jacob Charles '13 returned to Duke Law on Feb. 25 as the center's inaugural executive director.

Addressing a paucity of serious scholarship

“There are not enough constitutional law scholars working on Second Amendment issues, an area where the impact of scholarship can be — and has been — profound,” said Blocher, the Lanty L. Smith ’67 Professor of Law. He cited the landmark 2008 Supreme Court opinion in *District of Columbia v. Heller*, in which the Court found, for the first time, a right to keep and bear arms for private purposes. The opinion relied heavily on gun rights scholarship, citing scholarly and secondary materials more often than all constitutional provisions, statutes, and cases combined, Blocher said.

He and Miller agree that gun rights scholarship is, by and large, unbalanced, suffering from hyper-partisanship and lack of rigor, which often make it even harder to find reasonable solutions to problems of gun violence. For example, there’s still scholarly disagreement on when a weapon is “dangerous and unusual,” and therefore unprotected by the Constitution, and the full extent of gun regulation in states and municipalities prior to the 1930s. “This has real consequences for firearms law and policy,” said Miller, the Melvin G. Shimm Professor of Law. “The paucity of solid, balanced, responsible, and reliable scholarship on firearms law is bad for the academy, bad for the judicial system, and bad for the public.”

Through its conferences and symposia and mentoring of scholars and fellows, the two hope the center can significantly shape firearms law and policy as a scholarly field by developing resources to help inform the opinions and actions of lawyers and policymakers, among others.

“With the new Center for Firearms Law, Duke Law School is poised to become the leader in sober scholarly thinking and research regarding the Second Amendment,” said Kerry Abrams, the James B. Duke and Benjamin N. Duke Dean of the School of Law. “With their extensive and impressive body of scholarship on the Second Amendment, Darrell Miller and Joseph Blocher are perfectly suited to lead this endeavor.”

A deep dive into the history of gun laws

One major resource of the new center is the searchable Repository of Historical Gun Laws, a database compiling English statutes from the Middle Ages through 1776 and those in the United States from the Colonial era to the middle of the 20th century. Miller and Blocher brought the repository to Duke Law in 2017 for use as a research tool for scholars, litigators, journalists, and others interested in firearms regula-

tion and the Second Amendment. Conceived as a resource by Saul Cornell, the Paul and Diane Guenther Chair in American History at Fordham University, and created in partnership with researchers at Duke, Fordham, and elsewhere, the repository contains more than 1,500 examples of American gun regulations as well as historical European regulations that informed U.S. lawmakers’ thoughts on the issue.

The opinions in *Heller* and *McDonald v. City of Chicago* relied heavily on history to define the scope of the right to bear arms, said Miller. “In fact, Justice [Antonin] Scalia says in the *Heller* opinion that you understand the contours of the Second Amendment by reference to regulations that are longstanding.” Yet the repository is the first catalogue of historical regulations.

“Part of our goal, with the repository and with the center, is to correct the misconception that gun regulation is a brand-new phenomenon,” Blocher said. “The 1,500 examples in the repository are only a subset of the different ways guns have been regulated in the United States. Any legal or scholarly analysis of the Second Amendment has to take into account this history of gun regulation.”

Scholars of the Second Amendment

In addition to their new book, which offers the first comprehensive account of the history, theory, and law of the right to keep and bear arms in the aftermath of *Heller*, Miller’s and Blocher’s scholarship on the issue has been cited extensively by scholars, in briefs to and opinions of the Supreme Court and other federal and state courts, and in congressional testimony.

They are co-authors of “What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment,” 83 *University of Chicago Law Review* 295 (2016), an exploration of how and whether the Second Amendment applies to general common law concepts like negligence or assault; and “Lethality, Public Carry, and Adequate Alternatives,” 53 *Harvard Journal on Legislation* 279 (2016), an investigation on how the availability of non-lethal self-defense technology affects the constitutionality of regulations of public carrying of lethal arms.

Miller’s works on firearms law and the Second Amendment include “Text History and Tradition: What the Seventh Amendment Can Teach Us About the Second,” 122 *Yale Law Journal* 852 (2013), which maps out what a history-centric approach to Second Amendment claims would look like, and “Second Amendment Traditionalism and Desuetude,” 14 *Georgetown Journal of Law & Public Policy* 223 (2016), about the role of traditionalism in Supreme Court decisions involving government regulation.

Blocher and co-author Eric Ruben offer a comprehensive examination of all post-*Heller* judicial opinions through Feb. 1, 2016, in “From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After *Heller*,” 67 *Duke Law Journal* 1433 (2018). The concept of the article echoes the fundamental mission of the center and the repository, Blocher said. “*Heller* is not going anywhere. Politically and legally, *Heller* is established law. So, leaving aside the partisanship, what does a serious examination of legal challenges to gun regulations in *Heller*’s wake look like? It turns out that courts have generally upheld existing regulations, which is very much in keeping with the actual wording in *Heller*.”

The article is the subject of an online *Duke Law Journal* symposium, which includes a piece on the future of Second Amendment scholarship co-authored by Blocher and Ruben, a fellow of the Brennan Center for Justice at New York University School of Law who will soon join the faculty at SMU Dedman School of Law. Blocher’s scholarship on the post-*Heller* legal landscape also includes “Firearm Localism,” 123 *Yale Law Journal* 82 (2013), which argues that Second

Amendment doctrine and state preemption laws can and should incorporate longstanding and sensible differences between urban and rural gun use and regulation.

Charles '13 oversees programming as inaugural executive director

Charles joins the center as executive director after focusing on consumer and products litigation in state and federal courts as an associate at McGuireWoods in Raleigh. He earlier clerked for Judge Allyson K. Duncan '75 of the U.S. Court of Appeals for the Fourth Circuit and now-Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York, and practiced for two years in the Washington, D.C., office of O'Melveny & Myers, where he represented clients in civil litigation as well as government and congressional investigations.

"Jake is the perfect person to help achieve the center's scholarly mission," Blocher said. "In addition to his strong professional background as a law clerk and an attorney, he has a long-standing commitment to legal scholarship. His student note and master's thesis were incisive, ambitious, and well-researched, and he did superb work as part of a team of students I took to Ghana in the spring of 2013 to study issues of free speech. We're very lucky to have him back in the building."

Charles is facilitating and overseeing a slate of programming that in the spring semester has so far included a Feb. 28 panel discussion on the future of the Second Amendment with two leading firearms law scholars: David Kopel, research director at the Independence Institute and associate policy analyst at the Cato Institute, and George Mocsary of the Southern Illinois University School of Law, and a March 4 conversation about the Supreme Court, the Second Amendment, and the future of gun rights regulation with constitutional scholars Walter Dellinger, the Douglas B. Maggs Professor Emeritus of Law, and Sanford Levinson of the University of Texas. Next fall, the center will host a symposium titled "Gun Rights and Regulation Outside the Home," the proceedings of which will be published by *Law & Contemporary Problems*. The center is also participating in ongoing interdisciplinary research with Duke's Department of Psychiatry on the relationship between mental health and guns.

The Center for Firearms Law is supported by grants from the Katie McGrath & J. J. Abrams Family Foundation, Crankstart, Everytown for Gun Safety, the Joyce Foundation, Andrew Marks, Howard and Nancy Marks, and Arthur and Toni Rembe Rock. ♡

Faculty, students help investigate N.C.'s role in

CIA renditions

A COMMISSION that included faculty from Duke University and Duke Law and was supported by the Law School's International Human Rights Clinic has issued a report on North Carolina's role in a Central Intelligence Agency-led program to apprehend, detain, and transport suspected terrorists to be held, interrogated, and tortured outside the United States.

The report by the citizen-led North Carolina Commission of Inquiry on Torture (NCCIT) is the culmination of a 13-year effort to hold federal, state, and local officials accountable for the state's involvement in the post-9/11 "rendition, detention, and interrogation" program. Most notably, according to the report, a Smithfield-based aviation company operating out of two public airfields in Johnston County and Lenoir County was hired to deliver suspects into CIA or foreign custody, where many were subjected to torture and other forms of abuse.

The renditions themselves may have also amounted to torture. Suspects, who included a 16-year-old student and a pregnant woman, were "forcibly seized without any due process, in a manner that itself amounted to torture and cruel, inhuman or degrading treatment," according to the report. International law requires the prevention of and accountability and redress for torture and enforced disappearances.

"What the report makes very clear ... is that the U.S. government not only violated rights of individuals throughout the duration of the program, but by failing to investigate what happened, by failing to provide a remedy, this is an ongoing violation," said Clinical Professor Jayne Huckerby, who directs the International Human Rights Clinic, at a Nov. 12 Duke Law presentation. "And until there has been an accounting for those victims, the U.S. government will continue to be in breach of its international human rights law obligations."

Huckerby testified before the commission during two days of public hearings it held in late 2017. Robin Kirk, faculty co-chair of the Duke Human Rights Center at the Franklin Humanities Institute, served as commission co-chair and James E. Coleman, Jr., the John S. Bradway Professor of the Practice of Law, was one of 11 members.

The commission found that between 2001 and 2004, Aero Contractors, Ltd. transported 49 individuals to foreign countries to be interrogated by either the CIA at one of its undisclosed "black sites" or by foreign governments. The company leased space at two public airports in Johnston County and Lenoir County and used a hangar that was built specially for one of the two aircraft it operated.

The commission also investigated allegations that other North Carolina companies participated in the torture program and that military personnel at Fort Bragg played a major role in developing abusive techniques against suspected terrorists. While the legality of the renditions and the state's role in them have been scrutinized through inquiries held by European authorities