

The Honorable Arlen Specter
 Chairman
 United States Senate Judiciary Committee
 711 Hart Senate Office Building
 Washington, D.C. 20510

The Honorable Patrick Leahy
 Ranking Member
 United States Senate Judiciary Committee
 433 Russell Senate Office Building
 Washington, D.C. 20510

January 5, 2006

Dear Senators Specter and Leahy,

As law professors from across the United States, we write to express our opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court.

Nominated by President Bush to replace moderately conservative Justice Sandra Day O'Connor, Judge Alito has a 15-year record of trying to push the law sharply to the right. According to the *National Law Journal*, Judge Alito "is described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues."¹ Analyses show that in close cases – the kinds of cases the Supreme Court reviews – Judge Alito consistently takes positions that devalue individual rights and protections. And despite the president's pledge to nominate someone who embraces the principle of judicial restraint, Judge Alito often reaches his conclusions by overturning or weakening federal statutes, diminishing constitutional safeguards, and hollowing out precedent.

Invalidating Federal Statutory Protections

Judge Alito has sought to curb Congress' authority to tackle issues of national importance, voting to invalidate the federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. Republicans and Democrats alike have criticized both the Supreme Court and lower federal courts for voting to strike down federal protections without appropriately deferring to Congress as a co-equal branch of government. While several decisions in the past two years have slowed the trend, Judge Alito's record suggests that he would accelerate it once again.² There are several significant federalism cases already before the Court this term.

Machine Gun Ban. In *United States v. Rybar*,³ Judge Alito argued in dissent that the federal ban on machine gun possession – which had been on the books in some form since 1934 – is unconstitutional Commerce Clause legislation. His colleagues accused him of disrespectfully requiring the "coordinate branches of government" to "play 'Show and Tell' with the federal courts at the peril of invalidation of a Congressional statute."⁴ All of the other appeals courts that had considered the law in the wake of the Supreme Court's 1995 ruling in *United States v. Lopez*⁵ agreed with Judge Alito's colleagues. Every court to have looked at the law since then has done the same, except one, and the Supreme Court

¹ Joseph Slobodzin, *Third Circuit – Microcosm of Change*, NAT'L L. J., Dec. 7, 1992, at 1.

² As Jeffrey Rosen has noted, between 1995 and 2003 the Rehnquist court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005.

³ 103 F.3d 273 (3d Cir. 1996), cert. denied 522 U.S. 807 (1997).

⁴ *Id.* at 282.

⁵ 514 U.S. 549 (1995).

summarily vacated that decision this year after issuing its decision in *Gonzales v. Raich*,⁶ which rejected Judge Alito's cramped view of Congress' law-making authority.

Family and Medical Leave Act. In *Chittister v. Department of Community and Economic Development*,⁷ Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of personal unpaid sick leave. Facing a similar challenge in *Nevada Department of Human Resources v. Hibbs*,⁸ the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave.

Weakening Federal Statutory Protections

Judge Alito has voted, often in dissent, to curb judicial enforcement of vital federal statutes, including the following.

Title VII of the Civil Rights Act of 1964. In several divided decisions, Judge Alito has also undermined Congressional intent by voting in dissent to make it harder to prove claims of job discrimination. In *Bray v. Marriott Hotels*,⁹ Judge Alito unsuccessfully tried to keep a worker's claim of race discrimination from being heard by the jury. His colleagues in the majority asserted that anti-discrimination statutes "would be eviscerated if our analysis were to halt where [Alito's] dissent suggests."¹⁰ In *Sheridan v. E.I. DuPont de Nemours & Co.*,¹¹ he was outvoted 10-1 by the *en banc* Third Circuit when he tried to get around precedent to throw out a jury verdict in favor of a worker claiming sex discrimination.

Clean Water Act. In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,¹² Judge Alito voted to make it harder than Congress intended for citizens to establish standing to sue for toxic emissions that violate the Clean Water Act; in fact, he agreed that Congress lacked the authority to authorize certain citizen suits. Several years later, by a 7-2 vote in *Friends of the Earth v. Laidlaw*,¹³ with only Justices Scalia and Thomas dissenting, the Supreme Court effectively rejected Judge Alito's position.

Sherman Antitrust Act. In *LePage's, Inc. v. 3M Corp.*,¹⁴ Judge Alito voted in dissent to strike down a \$68 million jury verdict against 3M Corporation for violating the Sherman Antitrust Act by monopolizing scotch tape sales at the expense of a smaller competitor with less diverse product lines.

Rehabilitation Act. In *Nathanson v. Medical College of Pennsylvania*,¹⁵ Judge Alito tried to raise the bar for proving disability discrimination. He dissented from a ruling finding that a disabled medical student had produced sufficient evidence to take to a jury her claim that she had to drop out because the school failed to provide her a seating arrangement that accommodated her disability. The majority

⁶ 125 S. Ct. 2195 (2005).

⁷ 226 F.3d 223 (3d Cir. 2000).

⁸ 538 U.S. 721 (2003).

⁹ 110 F.3d 986 (3d Cir. 1997).

¹⁰ *Id.* at 993.

¹¹ 100 F. 3d 1061 (3d Cir. 1996) (*en banc*).

¹² 123 F.3d 111 (3d Cir. 1997).

¹³ 528 U.S. 167 (2000).

¹⁴ 324 F.3d 141 (3d Cir. 2003) (*en banc*).

¹⁵ 926 F.2d 1368 (3d Cir. 1991).

accused Judge Alito of raising the student's burden of proof to the point where "few if any Rehabilitation Act cases could survive" a defendant's motion to have a case dismissed before trial.¹⁶

Immigrants' Statutory Rights. In *Dia v. Ashcroft*, a majority of the full court accepted a Guinean citizen's asylum claims and said that Judge Alito's dissent "not only guts the statutory standard, but ignores our precedent."¹⁷ In *Lee v. Ashcroft*, the court majority agreed with a Korean immigrant's claim that a conviction for filing a false tax return did not make him deportable and said that Judge Alito's dissent engaged in "speculation" about what Congress intended, in violation of the "well-recognized rules of statutory construction."¹⁸ In *Sandoval v. Reno*,¹⁹ Judge Alito wrote in dissent that certain aliens in custody could not seek waivers of their deportation orders in court; the Supreme Court rejected his view in *INS v. St. Cyr*.²⁰

Diminishing Constitutional Protections and Hollowing Out Precedent

Freedom from Illegal Search and Seizure. In a series of cases, Judge Alito pushed to narrow the Fourth Amendment's protection against unreasonable search and seizure.²¹ In *Doe v. Groody*,²² for instance, he wrote in dissent that police officers did not violate the Constitution when they strip-searched a mother and her 10 year-old daughter – who were not criminal suspects – while executing a warrant that only authorized the search of the target of their investigation. Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, then Judge Alito's colleague on the Third Circuit, wrote the majority opinion, asserting that if the court were to accept Judge Alito's theory that the judge who issued the warrant intended to authorize everything the police sought, even though the warrant he signed did not, it would "transform the judicial officer into little more than the cliché 'rubber stamp.'"²³

Women's Reproductive Freedoms. In *Planned Parenthood v. Casey*,²⁴ Judge Alito wrote in dissent that he would uphold a Pennsylvania law requiring a woman in certain circumstances to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view. It found that the restriction placed an undue burden on women's reproductive freedom, saying that "women do not lose their constitutionally protected liberty when they marry."²⁵ Commentators from across the political spectrum believe that Judge Alito's dissent in *Casey*, together with his terse, seemingly grudging concurrences in other abortion cases, demonstrate that he disagrees with *Roe v. Wade*²⁶ and would, at the very least, uphold significant restrictions on the right to choose.²⁷

Right to Effective Counsel. In *Rompilla v. Horn*,²⁸ Judge Alito evaded recently decided Supreme Court precedent to hold that a death row inmate's defense attorneys were not constitutionally ineffective, even though they failed to investigate key files containing important evidence about their client's

¹⁶ *Id.* at 1387.

¹⁷ *Dia v. Ashcroft*, 353 F.3d 228, 251 n.22 (3d Cir. 2003) (*en banc*).

¹⁸ *Lee v. Ashcroft*, 368 F.3d 218, n.11 (3d Cir. 2004).

¹⁹ 166 F.3d 225 (3d Cir. 1999).

²⁰ 533 U.S. 289 (2001).

²¹ Robert Gordon, *If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005 at <http://www.slate.com/id/2129107/>.

²² 361 F.3d 232 (3d Cir.) *cert. denied*, 125 S. Ct. 111 (2004).

²³ *Id.* at 243.

²⁴ 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

²⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).

²⁶ 410 U.S. 113 (1973).

²⁷ See Charles Lane, *Nominee's Reasoning Points to a Likely Vote Against Roe v. Wade*, WASH. POST, Nov. 2, 2005.

²⁸ 355 F.3d 233 (2004), *rev'd*, 125 S. Ct. 2456 (2005).

troubled childhood which may have persuaded a jury not to impose the death sentence. The dissent called the lawyers' performance "shocking," and Judge Alito's holding "inexplicable."²⁹ By a 5-4 margin, with Justice O'Connor casting the deciding vote, the Supreme Court rejected Judge Alito's conclusion. Justice O'Connor noted in a concurrence that the evidence the lawyers failed to investigate went to the "very heart" of the prosecution's case for the death penalty.³⁰

Right to Race-Neutral Jury Selection. In *Riley v. Taylor*,³¹ Judge Alito dissented from the full Third Circuit's grant of *habeas corpus* to a death row inmate who claimed that the prosecution violated the holding of *Batson v. Kentucky*³² by using racially-motivated peremptory strikes to remove African Americans from the jury. Judge Alito said that inferring racial discrimination from the striking of every single potential black juror from all of Delaware's four first-degree murder trials during the year Riley was tried was no more reasonable than inferring an electoral preference for lefties from the hypothetical fact that five of the last six presidents happened to be left-handed. The majority condemned the analogy, writing that it ignored the underlying constitutional right and "minimize[d] the history of discrimination against prospective black jurors and black defendants"³³

Church-State Separation. In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,³⁴ Judge Alito argued in dissent that a public school board could get around an earlier Supreme Court ruling, which barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers at graduation ceremonies. Effectively disagreeing with Judge Alito in *Santa Fe Independent School District v. Doe*,³⁵ decided several years later, a six-justice Supreme Court majority, including Justice O'Connor, held that a public school board policy of allowing student-approved, student-led prayers at public high school football games was unconstitutional.

The Supreme Court is the guardian of our rights and freedoms. For decades to come, Judge Alito's one vote could work significant changes in the law affecting these rights and freedoms. This is particularly true given that Judge Alito is nominated to replace Justice O'Connor, who has provided the swing vote in many important 5-4 decisions. Based on his fifteen-year record on the bench, we believe that Judge Alito would reshape the law in ways that make our country less equal and less free.

We urge you to reject the nomination of Judge Alito nomination to the Supreme Court.

²⁹ *Id.* at 273-274 (Sloviter, J., dissenting).

³⁰ *Rompilla v. Beard*, 125 S. Ct. 2456, 2470 (2005) (O'Connor, J., concurring).

³¹ 277 F.3d 261 (3d Cir. 2001) (*en banc*).

³² 476 U.S. 79 (1986).

³³ *Riley*, 277 F.3d at 292.

³⁴ 84 F.3d 1471 (3d Cir. 1996) (*en banc*).

³⁵ 530 U.S. 290 (2000).

- Mark N. Aaronson
Clinical Professor of Law and Civil Justice Clinic
Director
University of California - Hastings College of the
Law
- Richard L. Abel
Connell Professor of Law
University of California at Los Angeles School of
Law
- Paula Abrams
Professor of Law
Lewis and Clark Law School
- Harold Abramson
Professor of Law
Touro Law Center
- Cynthia Matson Adams
Clinical Associate Professor of Law
Indiana University School of Law
- Robert W. Adler
James I. Farr Chair and Professor of Law
University of Utah, S.J. Quinney College of Law
- Muneer Ahmad
Associate Professor of Law
American University, Washington College of Law
- Janet Ainsworth
Professor of Law
Seattle University School of Law
- Raquel Aldana
Associate Professor of Law
University of Nevada Las Vegas, William S. Boyd
School of Law
- Barbara Bader Aldave
Loran L. Stewart Professor
University of Oregon School of Law
- Janet Cooper Alexander
Frederick I. Richman Professor of Law
Stanford University Law School
- Ty Alper
Visiting Clinical Professor of Law
Boalt Hall School of Law, University of California
at Berkeley
- Derek Alphan
Associate Professor of Law
University of the District of Columbia, David A.
Clarke School of Law
- Anthony G. Amsterdam
University Professor and Professor of Law
New York University School of Law
- William R. Andersen
Judson Falknor Professor of Law Emeritus &
Freeman Professor of Law, Center for Chinese
American Studies
University of Washington School of Law &
Johns-Hopkins/Nanjing University
- Jill Anderson
Assistant Professor of Law
Western New England College School of Law
- Mark F. Anderson
Associate Professor of Law
Temple University, James E. Beasley School of
Law
- Michelle J. Anderson
Professor of Law
Villanova University School of Law
- William L. Andreen
Edgar L. Clarkson Professor of Law
University of Alabama School of Law
- Claudia Angelos
Professor of Clinical Law
New York University School of Law
- Fran Ansley
Distinguished Professor of Law
University of Tennessee College of Law

- Annette R. Appell
William S. Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd
School of Law
- Maria Arias
Adjunct Professor of Law
City University of New York School of Law
- Robert H. Aronson
Betts, Patterson & Mines Professor of Law
University of Washington School of Law
- Marie Ashe
Professor of Law
Suffolk University Law School
- Michael Avery
President, National Lawyers Guild, Professor of
Law
Suffolk University Law School
- Barbara Allen Babcock
Judge John Crown Professor of Law, Emeritus
Stanford University Law School
- James Francis Bailey III
Professor of Law Emeritus and Director Emeritus
of the Ruth Lilly Law Library
Indiana University School of Law
- Brian L. Baker
Director of the Law Library and Assistant
Professor of Law
University of the District of Columbia, David A.
Clarke School of Law
- C. Edwin Baker
Nicholas Gallicchio Professor
University of Pennsylvania Law School
- David C. Baldus
Professor of Law
University of Iowa College of Law
- Fletcher Baldwin
Chesterfield Smith Professor of Law
University of Florida Fredric G. Levin College of
Law
- Milner S. Ball
Harmon W. Caldwell Chair in Constitutional Law
University of Georgia School of Law
- Beverly Balos
Clinical Professor of Law
University of Minnesota Law School
- Mark Barenberg
Professor of Law
Columbia University School of Law
- Robert Bartels
Professor of Law
Arizona State University College of Law
- Elizabeth Bartholet
Morris Wasserstein Public Interest Professor of
Law; Faculty Director, Child Advocacy
Harvard Law School
- Robert Batey
Professor of Law
Stetson University College of Law
- Linda M. Beale
Richard W. and Marie L. Corman Scholar and
Associate Professor
University of Illinois College of Law
- Loftus Becker
Professor of Law
University of Connecticut School of Law
- Theresa Beiner
Nadine H. Baum Distinguished Professor of Law
University of Arkansas at Little Rock, William H.
Bowen School of Law
- George Bell
Associate Professor of Clinical Law
University of Illinois College of Law
- Derrick Bell
Visiting Professor of Law
New York University School of Law

- Leslie Bender
Board of Advisors Professor of Law
Syracuse University College of Law
- Steven Bender
James and Ilene Hershner Professor of Law
University of Oregon School of Law
- Robert Benson
Professor of Law
Loyola Law School
- Steve Berenson
Associate Professor of Law
Thomas Jefferson School of Law
- Paula Berg
Professor of Law
City University of New York School of Law
- Adele Bernhard
Associate Professor of Law; Director, Pace
Criminal Justice Clinic & Post-Conviction Project
Pace University School of Law
- Tori Berres-Paul
Legal Writing Professor
Lewis and Clark Law School
- Donald N. Bersoff
Professor of Law Emeritus
Villanova University School of Law
- Tamar R. Birkhead
Clinical Assistant Professor of Law
University of North Carolina School of Law
- Dorothy Bisbee
Assistant Professor of Law
Southern New England School of Law
- Susan Bisom-Rapp
Professor of Law
Thomas Jefferson School of Law
- Susan H. Bitensky
Professor of Law
Michigan State University College of Law
- Susan H. Bitensky
Professor of Law
Michigan State University College of Law
- Barbara Aronstein Black
George Welwood Murray Professor of Legal
History
Columbia University School of Law
- Walker J. Blakey
Professor of Law
University of North Carolina School of Law
- Beryl Blaustone
Professor of Law; Director, Mediation Clinic,
Main Street Legal Services
City University of New York School of Law
- Robert M. Bloom
Professor of Law and Popeo Scholar
Boston College Law School
- Carolyn P. Blum
Clinical Professor of Law Emeritus
Boalt Hall School of Law, University of California
at Berkeley
- Karen M. Blum
Professor of Law
Suffolk University Law School
- Grace Ganz Blumberg
Professor of Law
University of California at Los Angeles School of
Law
- Eric Blumenson
Professor of Law
Suffolk University Law School
- Michael C. Blumm
Professor of Law
Lewis and Clark Law School
- Charles S. Bobis
Professor of Law
St. John's University School of Law

Ivan Bodensteiner Professor of Law Valparaiso University School of Law	Jacquelyn Bridgeman Associate Professor of Law University of Wyoming College of Law
John Charles Boger Wade Edwards Distinguished Professor of Law University of North Carolina School of Law	Pamela D. Bridgewater Professor of Law American University, Washington College of Law
Carl T. Bogus Professor of Law Roger Williams University School of Law	Paul H. Brietzke Professor of Law Valparaiso University School of Law
John E. Bonine Professor of Law University of Oregon School of Law	Katherine S. Broderick Dean and Professor of Law University of the District of Columbia, David A. Clarke School of Law
Amelia Helen Boss Professor of Law Temple University, James E. Beasley School of Law	Mark S. Brodin Professor of Law Boston College Law School
Ida L. Bostian Teaching Scholar, Center for Social Justice and Public Service Santa Clara University School of Law	Robert Brookins Professor of Law; Labor Arbitrator Indiana University School of Law
Richard Boswell Professor of Law University of California - Hastings College of the Law	Mark R. Brown Newton D. Baker/Baker & Hostetler Professor of Law Capital University Law School
Kristi L. Bowman Assistant Professor of Law Drake University	Elizabeth M. Bruch Associate Professor of Law Valparaiso University School of Law
Cynthia Grant Bowman Professor of Law Northwestern University School of Law	Susan Bryant Director of Clinical Education and Associate Professor of Law City University of New York School of Law
Karen Boxx Professor of Law University of Washington School of Law	Neil H. Buchanan Assistant Professor of Law Rutgers University School of Law - Newark
Carolyn S. Bratt W.L. Matthews Professor of Law University of Kentucky College of Law	Sande L. Buhai Clinical Professor of Law Loyola Law School

1190

Lewis Burke Professor of Law and Director of Clinics University of South Carolina School of Law	Kathleen Carrick Law Library Director and Associate Professor of Law Case Western Reserve University School of Law
Marcilynn A. Burke Assistant Professor of Law University of Houston Law Center	Sheryll Cashin Professor of Law Georgetown University Law Center
John M. Burman Professor of Law and Faculty Supervisor, Legal Services Program University of Wyoming College of Law	Francis Catania Associate Professor of Law; Director, Judicial Externship Program Widener University School of Law
Margaret Burnham Associate Professor of Law Northeastern University School of Law	Rosanna Cavallaro Professor of Law Suffolk University Law School
Burton Caine Professor of Law Temple University, James E. Beasley School of Law	Leonard L. Cavise Professor of Law DePaul University College of Law
Robert Calhoun Professor of Law Golden Gate University School of Law	Martha Chamallas Robert J. Lynn Chair in Law The Ohio State University, Moritz College of Law
Emily Calhoun Professor of Law University of Colorado School of Law	David Chambers Professor of Law University of Michigan Law School
Janet M. Calvo Professor of Law City University of New York School of Law	Ellen P. Chapnick Dean for Social Justice Initiatives and Lecturer-in-Law Columbia University School of Law
John J. Capowski Associate Professor of Law Widener University School of Law	Erwin Chemerinsky Alston & Bird Professor of Law and Professor of Political Science Duke University School of Law
W. Jonathan Card Assistant Professor of Law University of Kentucky College of Law	William Childs Assistant Professor of Law Western New England College School of Law
Gilbert Paul Carrasco Professor of Law Willamette University School of Law	Carol Chomsky Professor of Law University of Minnesota Law School

Margaret Chon Professor and Dean's Distinguished Scholar Seattle University School of Law	Rhonda Copelon Professor of Law City University of New York School of Law
Craig W. Christensen Professor of Law Southwestern Law School	Roberto L. Corrada Professor of Law University of Denver, Sturm College of Law
Marisa S. Cianciarulo Reuschlein Clinical Teaching Fellow Villanova University School of Law, Clinic for Asylum, Refugee & Emigrant Services	Lois Cox Clinical Professor of Law University of Iowa College of Law
Stephen Clark Associate Professor of Law Albany Law School	Andrea Curcio Professor of Law Georgia State University College of Law
Donald Clarke Professor of Law George Washington University Law School	Judith Daar Professor of Law Whittier Law School
Marjorie Cohn President-elect, National Lawyers Guild; Professor of Law Thomas Jefferson School of Law	Thomas J. Davis Professor of Law Arizona State University College of Law
Douglas Colbert Professor of Law University of Maryland School of Law	Peter L. Davis Associate Professor of Law Touro Law Center
Luke Cole Visiting Professor of Law University of California - Hastings College of the Law	Michael H. Davis Professor of Law Cleveland State University Cleveland-Marshall College of Law
Carl H. Coleman Professor of Law & Director, Health Law & Policy Program Seton Hall University School of Law	Benjamin Davis Associate Professor of Law University of Toledo College of Law
Malina Coleman Associate Professor of Law University of Akron School of Law	Richard A. Daynard Professor of Law Northeastern University School of Law
Nancy Cook Associate Professor of Law and Director of the Community Justice and Legal Assistance Clinic Roger Williams University School of Law	Connie de la Vega Professor of Law University of San Francisco School of Law
	Frank Deale Associate Professor of Law City University of New York School of Law

Richard Delgado University Distinguished Professor of Law & Derrick Bell Fellow University of Pittsburgh School of Law	Pamela Edwards Professor of Law City University of New York School of Law
Christine Desan Professor of Law Harvard Law School	Linda Edwards Professor of Law Mercer University School of Law
Robert Dinerstein Professor of Law American University, Washington College of Law	Howard Eglit Professor of Law Chicago-Kent College of Law
Victoria Dodd Professor of Law Suffolk University Law School	Nancy Ehrenreich Professor of Law University of Denver, Sturm College of Law
Curtis Doebbler Professor of Law An-Najah National University in Nablus	Maxine Eichner Associate Professor of Law University of North Carolina School of Law
Jane Dolkart Associate Professor of Law Southern Methodist University School of Law	Jon B. Eisenberg Adjunct Professor of Law University of California - Hastings College of the Law
Sharon Dolovich Professor of Law University of California at Los Angeles School of Law	Steven Eisenstat Professor of Law Suffolk University Law School
Nancy E. Dowd Chesterfield Smith Professor of Law; Co-Director, Center for Children and Families University of Florida Fredric G. Levin College of Law	Jorge Elorza Assistant Professor of Law Roger Williams University School of Law
Melinda Drew Director, Academic Success Program Northeastern University School of Law	Anne Emanuel Professor of Law Georgia State University College of Law
Melvyn R. Durchslag Professor of Law Case Western Reserve University School of Law	Russell Engler Clinical Director & Professor of Law New England School of Law
Peter Edelman Professor of Law Georgetown University Law Center	Garrett Epps Orlando John and Marian H. Hollis Professor of Law University of Oregon School of Law

Patricia J. Falk
Professor of Law
Cleveland State University Cleveland-Marshall
College of Law

Anthony Paul Farley
Associate Professor of Law
Boston College Law School

Marvin A. Fein
Associate Professor of Legal Writing and
Director, John P. Gismondi Civil Litigation
Certificate Program
University of Pittsburgh School of Law

Stephen M. Feldman
Jerry W. House/Carl F. Arnold Distinguished
Professor of Law
University of Wyoming College of Law

Mary Louise Fellows
Everett Fraser Professor of Law
University of Minnesota Law School

Zanita E. Fenton
Professor of Law
University of Miami School of Law

Todd D. Fernow
Professor of Law
University of Connecticut School of Law

Paul Finkelman
Chapman Distinguished Professor
University of Tulsa College of Law

Arlene Rivera Finkelstein
Professor of Legal Methods; Director, Public
Interest Resource Center
Widener University School of Law

Paul Fisher
Adjunct Professor of Law, Straus Institute for
Dispute Resolution
Pepperdine University School of Law

Linda E. Fisher
Professor of Law & Director, Center for Social
Justice
Seton Hall University School of Law

Matthew L. M. Fletcher
Assistant Professor of Law
University of North Dakota School of Law

Taylor Flynn
Associate Professor of Law
Northeastern University School of Law

James W. Fox, Jr.
Associate Professor of Law
Stetson University College of Law

Mary Louise Frampton
Professor of Law, Director, Center for Social
Justice
Boalt Hall School of Law, University of California
at Berkeley

Leslie Francis
Alfred C. Emery Professor of Law
University of Utah, S.J. Quinney College of Law

Sally Frank
Professor of Law
Drake University

Kris Franklin
Associate Professor of Law; Director, Academic
Skills Program
New York Law School

Lawrence Friedman
Assistant Professor of Law
New England School of Law

Leon Friedman
Professor of Law
Hofstra Law School

Craig B. Futterman
Associate Clinical Professor of Law
University of Chicago Law School, Edwin F.
Mandel Legal Aid Clinic

- Christine D. Galbraith
Associate Professor of Law
University of Maine School of Law
- Paula Galowitz
Clinical Professor Law
New York University School of Law
- Steven G. Gey
David and Deborah Fonvielle & Donald and Janet
Hinkle Professor of Law
Florida State University College of Law
- Llewellyn Joseph Gibbons
Associate Professor of Law
University of Toledo College of Law
- Lauren Gilbert
Associate Professor of Law
St. Thomas University School of Law
- Barbara J. Gilchrist
Clinical Professor of Law
St. Louis University School of Law
- Theresa Glennon
Professor of Law
Temple University, James E. Beasley School of
Law
- Brian Glick
Associate Clinical Professor of Law
Fordham University School of Law
- Howard A. Glickstein
Dean Emeritus and Professor of Law
Touro Law Center
- Dale D. Goble
Margaret Wilson Schimke Distinguished Professor
of Law
University of Idaho College of Law
- Dwight Golann
Professor of Law
Suffolk University Law School
- Carole Goldberg
Professor of Law
University of California at Los Angeles School of
Law
- A. Thomas Golden
Professor of Law
Thomas Jefferson School of Law
- Phyllis Goldfarb
Professor of Law
Boston College Law School
- Alvin L. Goldman
William T. Lafferty Professor of Law
University of Kentucky College of Law
- Jesse A. Goldner
John D. Valentine Professor of Law
Saint Louis University School of Law
- Julie Goldscheid
Associate Professor of Law
City University of New York School of Law
- Anne B. Goldstein
Professor of Law
Western New England College School of Law
- Toby Golick
Clinical Professor of Law
Yeshiva University, Cardozo School of Law
- Laura E. Gómez
Professor of Law
University of New Mexico School of Law
- Carmen G. Gonzalez
Associate Professor of Law
Seattle University School of Law
- Victor M. Goode
Associate Professor of Law
City University of New York School of Law
- Robert W. Gordon
Chancellor Kent Professor of Law and Legal
History
Yale Law School

1195

David J. Gottlieb Professor of Law University of Kansas School of Law	Phoebe A. Haddon Professor of Law Temple University, James E. Beasley School of Law
Stephen E. Gottlieb Professor of Law Albany Law School	David Hall Professor of Law Northeastern University School of Law
Sonia Bychkov Green Assistant Professor of Law, Associate Director, Lawyering Skills Program The John Marshall Law School	Louise Halper Professor of Law Washington & Lee University School of Law
Stuart P. Green Professor of Law & Director, Pugh Institute for Justice Louisiana State University Law School	Vivian Hamilton Associate Professor of Law West Virginia University College of Law
Michael Green Bess & Walter Williams Professor of Law Wake Forest University School of Law	Gwen Thayer Handelman Scholar in Residence Nova Southeastern University, Shepard Broad Law Center
Steven K. Green Associate Professor of Law Willamette University School of Law	Ian F. Haney Lopez Professor of Law Boalt Hall School of Law, University of California at Berkeley
David A. Green Associate Dean and Associate Professor of Law North Carolina Central University School of Law	Sidney L. Harring Professor of Law City University of New York School of Law
Martin Guggenheim Fiorello LaGuardia Professor of Clinical Law New York University School of Law	David A. Harris E.N. Balk Professor of Law and Values University of Toledo College of Law
Isabelle R. Gunning Professor of Law Southwestern Law School	Keith M. Harrison Professor of Law Franklin Pierce Law Center
Kaaryn Gustafson Associate Professor of Law University of Connecticut School of Law	Robert Harrison Lecturer in Legal Method, Yale Law School Yale Law School
Jonathan M. Gutoff Associate Professor of Law Roger Williams University School of Law	Jeffrey H. Hartje Professor of Law University of Denver, Sturm College of Law

Lisa H. Healy
Professor of Legal Writing
Suffolk University Law School

William Hellerstein
Professor of Law
Brooklyn Law School

Virginia E. Hench
Professor of Law
University of Hawaii at Manoa, William S.
Richardson School of Law

Lynne Henderson
Visiting Professor of Law
Santa Clara University School of Law

Randy Hertz
Professor of Law
New York University School of Law

Steven J. Heyman
Professor of Law
Chicago-Kent College of Law

Gregory Hicks
Professor of Law
University of Washington School of Law

Michael H. Hoffheimer
Professor of Law
University of Mississippi Law School

Betsey R. Hollingsworth
Clinical Professor of Law
Seattle University School of Law

Wythe W. Holt, Jr.
University Research Professor of Law Emeritus
University of Alabama School of Law

Andrew Horwitz
Professor of Law and Director of Clinical
Programs
Roger Williams University School of Law

Oliver A. Houck
Professor of Law
Tulane University Law School

H. Cabanne Howard
Assistant Professor of Law
University of Maine School of Law

Joan W. Howarth
Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd
School of Law

Kent Hull
Adjunct Associate Professor
University of Notre Dame Law School

Linda Hume
Professor of Law
University of Washington School of Law

Tim Iglesias
Associate Professor of Law
University of San Francisco School of Law

Lisa C. Ikemoto
Professor of Law
Loyola Law School

Anthony C. Infanti
Associate Professor of Law
University of Pittsburgh School of Law

David B. Isbell
Adjunct Professor of Law
University of Virginia School of Law

Carol L. Izumi
Professor of Clinical Law and Associate Dean for
Clinical Affairs
George Washington University Law School

Peter Jaszi
Professor of Law
American University, Washington College of Law

Stewart Jay
Professor of Law, William L. Dwyer Chair in Law
University of Washington School of Law

Steven Jonas
Adjunct Professor of Legal Education
Touro Law Center

William S. Jordan III
C. Blake McDowell Professor of Law
University of Akron School of Law

Timothy S. Jost
Robert L. Willett Family Professor
Washington & Lee University School of Law

Jose Roberto Juarez, Jr.
Professor of Law
St. Mary's University School of Law

James L. Kainen
Director of Trial Advocacy Competitions,
Associate Professor
Fordham University School of Law

David Kairys
James E. Beasley Professor of Law
Temple University, James E. Beasley School of
Law

Howard Kalodner
Professor of Law
Western New England College School of Law

Pamela S. Karlan
Kenneth and Harle Montgomery Professor of
Public Interest Law
Stanford University Law School

Madeline June Kass
Assistant Professor of Law
Thomas Jefferson School of Law

Eileen Kaufman
Professor of Law
Touro Law Center

Susan L. Kay
Clinical Professor Law
Vanderbilt University Law School

Kevin B. Kelly
Associate Clinical Professor of Law
Seton Hall University School of Law

Michael Kelly
Professor of Law
Creighton University School of Law

Walter J. Kendall III
Professor of Law
The John Marshall Law School

Joseph E. Kennedy
Associate Professor of Law, Associate Dean for
Academic Affairs
University of North Carolina School of Law

Robert B. Kent
Distinguished Visiting Professor of Law
Roger Williams University School of Law

Paul Kibel
Adjunct Professor of Law
Golden Gate University School of Law

Kenneth Kimerling
Adjunct Professor of Law
Fordham University School of Law

Kenneth J. King
Practitioner in Residence
Suffolk University Law School, Juvenile Justice
Center

Neil Kinkopf
Associate Professor of Law
Georgia State University College of Law

Alan Kirtley
Associate Professor & Director of Clinics
University of Washington School of Law

Karl Klare
Professor of Law
Northeastern University School of Law

James M. Klebba
Victor H. Schiro Professor of Law
Loyola University of New Orleans

Ilene Klein
Clinical Professor of Law
New England School of Law

- Richard Klein
Professor of Law
Touro Law Center
- Minna J. Kotkin
Professor of Law
Brooklyn Law School
- Svitlana Krarchenko
Adjunct Professor of Law
University of Oregon School of Law
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Assistant Professor of Law
Roger Williams University School of Law
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Professor of Law
Southwestern Law School
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Professor of Law
Lewis and Clark Law School
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John F Kennedy University School of Law
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Professor of Law
Georgetown University Law Center
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Professor of Law
University of Kentucky College of Law
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City University of New York School of Law
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Professor of Law
New York Law School
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Professor of Law Emeritus
University of California at Los Angeles School of Law
- Laurie L. Levenson
Professor of Law, William M. Rains Fellow and
Director, Center for Ethical Advocacy
Loyola Law School
- Betsy Levin
Visiting Professor of Law
Nova Southeastern University, Shepard Broad
Law Center
- Mark Levin
Associate Professor of Law
University of Hawaii at Manoa, William S.
Richardson School of Law
- Lawrence C. Levine
Professor of Law
University of the Pacific, McGeorge School of
Law
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Associate Professor of Law
William Mitchell College of Law
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William and Mary Law School
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Pace University School of Law
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Clinical Professor of Law
Seattle University School of Law
- Vicki J. Limas
Associate Dean of Students and Professor of Law
University of Tulsa College of Law
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University of Houston Law Center
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Professor of Law
Widener University School of Law

- Stephen Loffredo
Professor of Law
City University of New York School of Law
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University of New Mexico School of Law
- William V. Luneburg
Professor of Law
University of Pittsburgh School of Law
- Mary Lynch
Clinical Professor of Law and Director, Clinical
Legal Studies Program
Albany Law School
- David Lyons
Professor of Law and Philosophy
Boston University School of Law
- Gregory P. Magarian
Professor of Law
Villanova University School of Law
- Rhonda Magee
Professor of Law
University of San Francisco School of Law
- Holly Maguigan
Professor of Clinical Law
New York University School of Law
- Joan Mahoney
Professor of Law
Wayne State University Law School
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Clinical Professor of Law
Rutgers University School of Law - Newark
- Karl Manheim
Professor of Law
Loyola Law School
- Mari Matsuda
Professor of Law
Georgetown University Law Center
- Gary M. Maveal
Associate Dean for Academic Affairs & Associate
Professor of Law
University of Detroit Mercy School of Law
- Martha McCluskey
Professor of Law
State University of New York at Buffalo
- Ann C. McGinley
William S. Boyd Professor of Law
University of Nevada Las Vegas, William S. Boyd
School of Law
- Patrick C. McGinley
Professor of Law
West Virginia University College of Law
- Kathleen McGinnis
Senior Lecturer
University of Washington School of Law
- Susan McGraugh
Assistant Professor of Law
Saint Louis University School of Law
- Betsy McKenzie
Professor of Law
Suffolk University Law School
- Michael Meltsner
Matthews Distinguished University Professor of
Law
Northeastern University School of Law
- Vanessa Merton
Professor of Law
Pace University School of Law
- Carlin Meyer
Professor of Law
New York Law School
- Binny Miller
Professor of Law
American University, Washington College of Law

1200

Elliot S. Milstein Professor of Law American University, Washington College of Law	Michael deHaven Newsom Professor of Law Howard University School of Law
Joel A. Mintz Professor of Law Nova Southeastern University, Shepard Broad Law Center	Cheryl Nichols Assistant Professor of Law Howard University School of Law
Alan D. Minuskin Associate Clinical Professor of Law Boston College Law School	Sheldon M Novick Adjunct Professor of Law and History Vermont Law School
Margaret E. Montoya Professor of Law University of New Mexico School of Law	Michelle Oberman Professor of Law Santa Clara University School of Law
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Scott Moss Assistant Professor of Law Marquette University Law School	Angela Onwuachi-Willig Professor of Law University of California at Davis School of Law
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Smita Narula Assistant Professor of Clinical Law New York University School of Law	Anthony J. Pagano Professor of Law Golden Gate University School of Law
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1201

Patrick Parenteau Professor of Law Vermont Law School	Madeleine Plasencia Associate Professor of Law University of Tulsa College of Law
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Andrew Perlman Associate Professor of Law Suffolk University Law School	john a. powell Professor of Law, Williams Chair in Civil Rights and Civil Liberties The Ohio State University, Moritz College of Law
Richard M. Perlmutter Professor of Law Suffolk University Law School	Ann Powers Associate Professor of Law Pace University School of Law
LeRoy Pernell Dean and Professor of Law Northern Illinois University College of Law	Kathleen Price Associate Dean for Library and Technology; Clarence J. TeSelle Professor of Law University of Florida Fredric G. Levin College of Law
Mark A. Peterson Clinical Professor of Law Lewis and Clark Law School	Harry G. Prince Professor of Law University of California - Hastings College of the Law
Mary Pickering Professor San Jose State University	Edward A. Purcell, Jr. Joseph Solomon Distinguished Professor New York Law School
Michael Pinard Assistant Professor of Law University of Maryland School of Law	Vernellia R. Randall Professor of Law University of Dayton School of Law
Ascanio Piomelli Associate Clinical Professor, Hastings Civil Justice Clinic University of California - Hastings College of the Law	Alan Raphael Associate Professor of Law Loyola University Chicago School of Law

1202

Jamin Raskin Professor of Constitutional Law American University, Washington College of Law	Joel Rogers Professor of Law University of Wisconsin Law School
Clifford Rechtschaffen Professor of Law Golden Gate University School of Law	Naomi Roht-Arriaza Professor of Law University of California - Hastings College of the Law
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Ann Bishop Richardson Associate Professor of Law and Associate Dean for Academic Affairs University of the District of Columbia, David A. Clarke School of Law	Mary Romero Professor of Law Arizona State University College of Law
Henry J. Richardson III Professor of Law Temple University, James E. Beasley School of Law	Victor C. Romero Maureen B. Cavanaugh Research Professor Pennsylvania State University Dickinson School of Law
William M. Richman Distinguished University Professor University of Toledo College of Law	Tom I. Romero, II Assistant Professor of Law Hamline University School of Law
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William Robinson Professor of Law University of the District of Columbia, David A. Clarke School of Law	Howard I. Rosenberg Professor of Law University of Denver, Sturm College of Law
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1203

Thomas Ross Professor of Law University of Pittsburgh School of Law	Herman Schwartz Professor of Law American University, Washington College of Law
Laura Rovner Professor of Law University of Denver, Sturm College of Law	Michael A. Schwartz Assistant Professor of Law; Director, Public Interest Law Firm Syracuse University College of Law
Judith Royster Professor of Law, Co-Director, Native American Law Center University of Tulsa College of Law	Sean Scott Professor of Law Loyola Law School
Constance L. Rudnick Professor of Law Massachusetts School of Law	Robert A. Sedler Distinguished Professor of Law Wayne State University Law School
Margaret M. Russell Professor of Law Santa Clara University School of Law	Kathryn J. Sedo Clinical Professor of Law University of Minnesota Law School
Susan Rutberg Director, Criminal Litigation Clinic Golden Gate University School of Law	Hene Seidman Clinical Professor of Law; Family Advocacy Clinic Suffolk University Law School
Herbert Sablove Adjunct Professor of Law Rutgers University School of Law - Camden	Elisabeth Semel Clinical Professor of Law Boalt Hall School of Law, University of California at Berkeley
Natsu Saito Professor of Law Georgia State University College of Law	Theodore P. Seto Professor of Law Loyola Law School
Kenneth Salzberg Associate Professor of Law Hamline University School of Law	Ann Shalleck Professor of Law & Carrington Shields Scholar American University, Washington College of Law
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Elizabeth M. Schneider Rose L. Hoffer Professor of Law Brooklyn Law School	Peter Shane Joseph S. Platt/Porter Wright Morris & Arthur Professor of Law The Ohio State University, Moritz College of Law
Anne N. Schroth Clinical Professor of Law; Director of Poverty Law Outreach, Michigan Clinical Law Program University of Michigan Law School	

Laurie Shanks Professor and Director, Field Placement Project Albany Law School	Amy Sinden Associate Professor of Law Temple University, James E. Beasley School of Law
Katherine C. Sheehan Professor of Law Southwestern Law School	Norman J. Singer Charles O. Stokes Professor of Law & Professor of Anthropology University of Alabama School of Law
Jeffrey G. Sherman Professor of Law Chicago-Kent College of Law	Deirdre M. Smith Associate Professor of Law and Director, Cumberland Legal Aid Clinic University of Maine School of Law
Edward F. Sherman Professor of Law Tulane University Law School	Gemma Solimene Clinical Associate Professor of Law Fordham University School of Law
Marjorie M. Shultz Professor of Law Boalt Hall School of Law, University of California at Berkeley	Mark Spiegel Professor of Law Boston College Law School
Arnold I. Siegel Clinical Professor and Director of Legal Writing Loyola Law School	Ralph Spritzer Professor of Law Arizona State University College of Law
Franklin Siegel Adjunct Professor of Law City University of New York School of Law	Jean Stefancic Research Professor of Law University of Pittsburgh School of Law
Jessica Silbey Assistant Professor of Law Suffolk University Law School	Joan Steinman Distinguished Professor of Law Chicago-Kent College of Law
Jay Silver Professor of Law St. Thomas University School of Law	Beth Stephens Professor of Law Rutgers University School of Law - Camden
Marjorie Silver Professor of Law Touro Law Center	Matthew C. Stiegler Adjunct Professor of Law University of North Carolina School of Law
Andy Silverman Joseph M. Livermore Professor & Director, Clinical Programs University of Arizona Rogers College of Law	Kristen Stilt Assistant Professor of Law University of Washington School of Law

- Randolph Stone
Clinical Professor of Law
University of Chicago Law School
- John A. Strait
Associate Professor of Law
Seattle University School of Law
- Mark Strasser
Trustees Professor of Law
Capital University Law School
- Robert N. Strassfeld
Professor of Law
Case Western Reserve University School of Law
- Andrew Strauss
Professor of Law
Widener University School of Law
- William Taylor
Adjunct Professor of Law
Georgetown University Law Center
- Kim Taylor-Thompson
Professor of Clinical Law
New York University School of Law
- Stephen C. Thaman
Professor of Law
Saint Louis University School of Law
- Erica Jayne Thorson
Clinical Professor of Law, International
Environmental Law Project
Lewis and Clark Law School
- Adam Thurschwell
Associate Professor of Law
Cleveland State University Cleveland-Marshall
College of Law
- Grace Calabrese Tonner
Clinical Professor of Law
University of Michigan Law School
- Michael Tonry
Sonosky Professor of Law and Public Policy
University of Minnesota Law School
- Debora Tuerkheimer
Associate Professor of Law
University of Maine School of Law
- Joseph B. Tulman
Professor of Law
University of the District of Columbia, David A.
Clarke School of Law
- Francisco Valdes
Professor of Law
University of Miami School of Law
- Reynaldo Anaya Valencia
Professor of Law
St. Mary's University School of Law
- Jon M. Van Dyke
Professor of Law
University of Hawaii at Manoa, William S.
Richardson School of Law
- Lawrence R. Velvel
Dean
Massachusetts School of Law
- Joan Vogel
Professor of Law
Vermont Law School
- Rachel Vorspan
Professor of Law
Fordham University School of Law
- Martin Wagner
Adjunct Professor of Law
Golden Gate University School of Law
- Nancy Wanderer
Professor of Law
University of Maine School of Law
- Lu-in Wang
Professor of Law
University of Pittsburgh School of Law
- Robert V. Ward, Jr.
Dean
Southern New England School of Law

Rhonda Wasserman
Professor of Law
University of Pittsburgh School of Law

Janet Weinstein
Professor of Law
California Western School of Law

Deborah M. Weissman
Professor of Law and Director of Clinical
Programs
University of North Carolina School of Law

James Wheaton
Visiting Lecturer, Journalism Law
Stanford University Graduate School of
Communications

Valerie White
Former Adjunct Professor of Legal Writing
Massachusetts School of Law

Donald E. Wilkes, Jr.
Professor of Law
University of Georgia School of Law

Kenneth Williams
Professor of Law
Southwestern Law School

Dan Williams
Associate Professor of Law
Northeastern University School of Law

Lucy A. Williams
Professor of Law
Northeastern University School of Law

Verna Williams
Associate Professor of Law
University of Cincinnati College of Law

Paulette J. Williams
Associate Professor of Law
University of Tennessee College of Law

Darryl C. Wilson
Professor of Law
Stetson University College of Law

Evelyn Wilson
Professor of Law
Southern University Law Center

Bruce J. Winick
Professor of Law, Professor of Psychiatry and
Behavioral Sciences
University of Miami School of Law

Adam Winkler
Acting Professor
University of California at Los Angeles School of
Law

Jane Winn
Professor of Law
University of Washington School of Law

Michael J. Wishnie
Professor of Clinical Law
New York University School of Law

Stephen Wizner
William O. Douglas Clinical Professor of Law and
Supervising Attorney
Yale Law School

Mark E. Wojcik
Professor of Law; Director, Global Legal Studies
The John Marshall Law School

Lou Wolcher
Professor of Law
University of Washington School of Law

William J. Woodward, Jr.
Professor of Law
Temple University, James E. Beasley School of
Law

Richard W. Wright
Professor of Law
Chicago-Kent College of Law

Jennifer L. Wright
Associate Professor of Law
University of St. Thomas School of Law

1207

Larry Yackle
Professor of Law
Boston University School of Law

Maryann Zavez
Professor of Law; Staff Attorney
Vermont Law School, South Royalton Legal
Clinic

Richard O. Zerbe, Jr.
Research in Law and Economics
University of Washington School of Law

Candace Zierdt
Alan E. Gray Professor of Law
University of North Dakota School of Law

Rebecca E. Zietlow
Charles W. Fornoff Professor of Law and Values
University of Toledo College of Law

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