THURGOOD FACULTY SPOTLIGHT

TSU Texas Southern University
Thurgood Marshall School of Law

October 1, 2019

Assistant Director of Academic Success and Bar Readiness Lisa DeLaTorre, presented at the Thurgood Marshall School of Law Fall 2019 Faculty Lecture Series regarding Texas's transition from the state law-specific bar exam to the Uniform Bar Exam (UBE) on September 11. The last state law-specific bar exam in Texas will be administered in July 2020, and the UBE will be administered in Texas from February 2021 onward. Texas will begin accepting transferred UBE scores from examinees who took the UBE in other states beginning in December 2019.

This means that some TMSL 2020 graduates might benefit from traveling out of state to take the UBE, and transferring the score to Texas for admission based on that transferred UBE score. For others, taking the state law-specific Texas bar exam in Texas in July 2020 might be the right decision. Ms. DeLaTorre focused on the importance of students making a thoughtful, considered decision, rather than assuming that one choice is best for all 2020 graduates. She emphasized that it is a very individual decision, that students should consider many factors including:

- The geographic location of the student's family or other support network;
- Whether a student is partnered, has children enrolled in Texas schools, or otherwise has deep roots in Texas;
- Whether the student has employment offers, where licensure is required for those offers, and whether they are willing to relocate to accept a dream job;
- A student's relative strengths on the component tests of the Texas state law-specific bar exam compared to the component tests of the UBE;
- A student's tolerance for risk, given that admission based on the UBE score will also require completion of a Texas Law Component, which is presently undefined, and there may be other fees or administrative hurdles to admission based on a transferred UBE score.

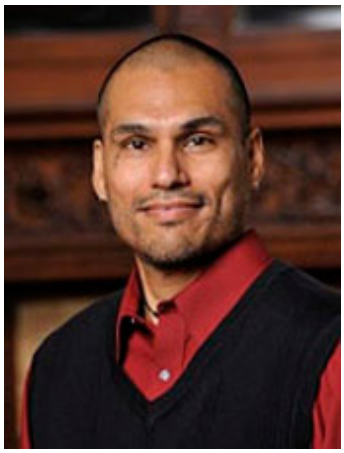
DeLaTorre discussed a few geographically close jurisdictions, and the fees for taking those bar exams. She emphasized that any student considering going out of state for the UBE should confirm their eligibility to sit by contacting the jurisdiction's board of law examiners directly.

DeLaTorre discussed the component tests of the UBE—two thirds of which are a part of the current Texas state law-specific bar exam—and their weight in the overall UBE score. She discussed that the Texas Supreme Court had ordered the UBE task force to create and implement the Texas Law Component by June 1, 2020, but that no additional information regarding the Texas Law Component is available for now. Still, because the goal of the Uniform Bar Exam is to provide the examinee with a portable score to use for admission in any UBE jurisdiction, it seems unlikely that the Texas Law Component would be a difficult hurdle for non-Texas-educated graduates seeking admission in Texas based on a UBE score. That is, an overly-rigorous Texas Law Component would negate the UBE's purpose of providing a portable score for bar admission.

Associate Dean for Research & Faculty Development Roberson King Professor of Law L. Darnell Weeden received a Certificate of Appreciation from Texas Southern University Thurgood Marshall School of Law for his outstanding service and dedication to the "Constitution Law Day CLE" at Thurgood Marshall School of Law on September 17, 2019. Weeden delivered a thirty minute lecture entitled Discriminatory Use of Race in the Jury Selection Process Violates the Constitution's Equal Protection Clause involved a discussion of the United States Supreme Court's holding in *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019) on June 21, 2019.

Weeden said while he supports the following assertion made by Justice Kavanaugh in *Mississippi v. Flowers* thinks Justice Kavanaugh may have been overly optimistic about the practice effect of the Supreme Court's ruling *Batson*. "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants. By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system. *Batson* immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States." Id. at 2242-43. The Supreme Court held that the trial court in Flowers committed clear error in concluding that Mississippi's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. Weeden believes the Supreme Court's decision in *Mississippi v. Flowers* is a step in the right direction but he is not ready to accept the proposition that *Batson* revolutionize the jury selection process because for people of color race still matters in the jury selection process all too often.

Adjunct Professor D'Andra Shu has been invited to present her work in progress at the 2020 AALS Annual Meeting in January in Washington, D.C. Her work—*Food Allergy Bullying as Disability-Based Harassment: Holding Schools Accountable*—argues that food allergy should be considered a disability under federal disability statutes so that schools who know or should know of this bullying fail to take appropriate action can be held liable. This piece builds on her earlier article, entitled *When Food is a Weapon: Parental Liability for Food Allergy Bullying*, recently accepted for publication in the Marquette Law Review.



Professor SpearIt maintains a position in the top 10% of Authors on the Social Science Research Network (SSRN.com) by all-time downloads. His page can be found at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1504583. His scholarship has been recently cited in a number of publications including the introduction to the book, Islamophobia and the Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3364431. This book is a forthcoming edited volume that features an abridged version of his article, *Muslim Radicalization in Prison: Responding with Sound Policy or the Sound of Alarm?*, 49 Gonz. L. Rev. 37 (2014). His work was also cited in a Vera Institute article, "Back to School: A Common Sense Strategy to Lower Recidivism" (9/19/19), https://www.vera.org/blog/back-to-school-a-common-sense-strategy-to-lower-recidivism; Reframing Radical Religion, 11 Geo. J. L. & Mod. Crit. Race Persp. 1 (2019); *Higher Education in Prison: Thoughts on Building a Community of Scholarship and Practice*, 10 Crit. Ed. 1 (2019); and the book, Inmate Radicalisation and Recruitment in Prisons (Routledge 2018).

Professor Shaundra Kellam Lewis's articles, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109 (2016), *Bullets and Books by Legislative Fiat—When Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1 (2011), and *Symposium on Texas Gun Law and the Future: The Fatal Flaws in Texas's Campus Carry Law*, 41 T. MARSHALL L. REV. 135 (2016) were cited by Cameron W. Arnold in *Standing in the Line of Fire: Compulsory Campus Carry Laws and Hostile Speech Environments*, 49 SETON HALL L. REV. 807 (2019). Professor Arnold cites Professor Lewis's articles to support his proposal that the Title VII "hostile work environment framework" should be applied to cases challenging compulsory campus carry laws on First Amendment free speech and academic freedom grounds.

Professor Craig L. Jackson received a Certificate of Appreciation from Texas Southern University Thurgood Marshall School of Law for his outstanding service and dedication to the "Constitution Law Day CLE" at Thurgood Marshall School of Law on September 17, 2019. Professor Jackson's presentation was part of a series of Constitution Day presentations that attempt to deconstruct the mythology surrounding the Constitution as a "divinely inspired" testament to liberal republican governance. Instead, Professor Jackson posits that the Constitution, made by men, white land and many slave owning men, is likely as prone to error as any product that such a grouping of persons might be expected to produce.

This year, using comments from colleagues from across the nation, Professor Jackson focused on the present crisis of presidential power through observations on the nature and pitfalls to the Article II "enumeration" of power, which in reality leaves a lot to the imagination. According to Professor Jackson, that is the problem with the Constitution—its inability to speak clearly to contemporary problems of presidential authority due to an unwise faith held by the Framers, in the basic honor of the persons occupying the seats of power. This faith has been tested--especially now.

This speech is available on Professor Jackson's blog "Boisterous Thoughts and Modest Rants about the Constitution" https://boisterousthoughtsandmodestrant.wordpress.com/

Earl Carl Professor Constance Fain, received a Certificate of Appreciation from Texas Southern University, Thurgood Marshall School of Law for her outstanding service and dedication to the "Constitution Law Day CLE" at the Law School on September 17, 2019. Fain served on a three person panel where she made a thirty minute presentation entitled "The Constitution and Racial Profiling: the Galveston Police Arrest of Donald Neely."

Fain addressed the following points in her presentation: (1) The protest march in Galveston; (2) Facts: the Donald Neely incident; (3) "Racial Profiling" defined; (4) The public's reaction to the incident; (5) Police department and police union responses; (6) The Fourteenth Amendment Equal Protection Clause; and (7) Did the two mounted Galveston police officers violate Neely's equal protection rights? (Was this a case of racial profiling?).

Regarding the protest march, hundreds of protesters and activists gathered in Galveston on September 15, 2019 to protest the arrest of Donald Neely, a 43-year-old homeless African American mentally ill male. Protesters said they wanted to do more than just complain on social media. They wanted to show city officials that they disagreed with how Neely was treated on August 3rd when two mounted Galveston police officers arrested Neely for trespassing. Instead of waiting for a cruiser to transport Neely to a mounted officer staging area, the officers while riding their horses, led a cooperative Neely through the streets while his hands were handcuffed behind his back with a rope type device or line clipped to the handcuffs. Many persons viewed this type of behavior as "racial profiling", which has been described by one scholar as "police use of race as the sole basis for initiating law enforcement activity, such as stopping, searching, and detaining a person," and a common defense used by those who engage in this conduct is that "African Americans are more criminal than others." Since numerous community members and others viewed the Neely incident as racial profiling, it is understandable that viral photos and videos sparked outrage across the United States. The scene invoked anger, disgust and statements that Neely was dehumanized.

Many argued that the image of a handcuffed Black man walking behind mounted officers was eerily reminiscent of the use of slave patrols used to catch enslaved men and women who fled Southern plantations before the Civil War. In a press release, Galveston Police Chief Vernon Hale apologized to Neely for unnecessary embarrassment and stated the two officers showed poor judgement, but there was no malicious intent at the time of the arrest. Additionally, the Chief said that the technique used in Neely's case would be changed immediately, and that the department will review all mounted training and procedures for more appropriate methods. However, the Chairman of the Galveston Municipal Police Association Political Action Committee stated that the method of arrest used in Neely's case has been used on all ethnic groups, and provides for the safety of the horse, the officers, the police, and the suspects. In fact, the Chairman said, "these police officers deserve an apology."

Fain stated that the Fourteenth Amendment Equal Protection Clause of the United States Constitution provides: No State shall...deny to any person within its jurisdiction the equal protection of the laws." Since race is a suspect classification that falls under the strict scrutiny test, if Neely were to claim a violation of his equal protection rights, he would have to prove discriminatory intent and discriminatory impact by the police in his arrest and the methodology utilized. If this was indeed race discrimination, the burden of proof would shift to the Galveston Police Department to show that the method or techniques used in this case was necessary to achieve a compelling governmental interest or purpose, which is quite onerous. Finally, in order to determine if Neely's equal protection rights were violated based on racial profiling, questions that must be answered, among others, include: Did the officers request a transport unit?; If a transport unit was requested, how long did they wait before choosing to lead Neely by a rope type device?; What does the body camera footage reveal?; When was the last time the Galveston Police Department used this arrest method, and what were the circumstances?; and Does Internal Affairs' records reveal a pattern of officers using this method to arrest offenders?

Instructor of Law Mary Kelly presented at the Thurgood Marshall School of Law Fall 2019 Faculty Lecture Series on the subject entitled, "The Harvey Flood—the Lawsuits, the Legislation, the Lingering Damage: Is Resilience Enough?" on September 18, 2019. Kelly stated that the floods resulting from Hurricane Harvey, which landed on the Texas coast in late August 2017, caused huge amounts of damage to Houston-area residents and properties. The hurricane itself caused close to 100 deaths, and thousands of Texans found their home ruined or severely damaged by both pelting rain and rising water. Many residents, still waiting for uncertain financial relief, are living in substandard conditions. Among those affected are property owners who suffered substantial damage from the intentional release of water from two large earthen dams, Addicks and Barker, located west of Houston just north (Addicks) and south (Barker) of Interstate 10. This presentation will review the legal claims of those owners. A complete review of all the Harvey-related legal claims would take at least a semester.

Addicks and Barker dams, owned and operated by the US Army Corps of Engineers (USACE), were constructed almost 70 years ago as part of a program to prevent massive amounts of water from inundating the central business district of Houston. When full of water, they create large reservoirs. During periods of heavy rainfall in the west, water will overflow the banks of Buffalo Bayou and be held back several miles upstream by the earthen dams. The bayou extends from northwest Houston eastward, through downtown, toward the channels leading to the Gulf of Mexico. USACE owns large areas of real property just west of each of the dams to serve as flood pools whenever water accumulates, but most of the time the flood pool areas are marsh-like or dry.

The dams and watersheds can be readily seen online on the maps of the Harris County Flood Control District.

The areas owned by USACE are not large enough to contain all the water. Flowage onto adjacent properties had been predicted for many years. In the decades since the dams were built, the flood pools were used mostly as parkland and ball fields, and the property further west of the flood pools was developed for residences—hundreds of handsome homes as Houston continued to expand west toward Katy.

Many of those residences upstream (behind) the dams were affected by the accumulated rainfall during Harvey, and hundreds of residences downstream (in front of) the dams were likewise affected by flood waters when USACE determined to release was from the dams' floodgates. Many of the upstream and downstream homeowners had no idea their property was in or close to the dams. Neither Harris County nor the developers provided home purchasers notices of the risk of flood damage. An exception was Fort Bend County, which required a brief warning on affected filed plat plans that the area was subject to flooding because it was adjacent to the small portion of the Barker flood pool extending into that county.

Hundreds of lawsuits were filed by owners against USACE, there being no governmental immunity from such property damage. The plaintiffs were aligned as either upstream parties or downstream parties, and the claims of each group of owners were considered separately as "takings." For upstream owners, the claims were against USACE for the inadequate design of the flood pools; for downstream owners, the claims were for property damage resulting from the intentional release of water from the dams when it appeared they were inadequate to hold back the huge inundation. The federal government's motion to dismiss the upstream group's 12 "test cases" was denied after a hearing in May 2019, and very recently, on September 13, 2019, the US Court of Clams held its final hearing in D.C. on the claims of the upstream owners. The consolidated suit by downstream owners, not a class action, will be tried in fall 2019, with a ruling expected in early 2020.

The issues are cloudy: No federal case has addressed whether a relatively brief and unprecedented taking of property is compensable. Kelly's prediction is that the upstream owners of property outside the USACE-owned flood pools will be able to recover for the values of their "taken" real property, but perhaps not for the values of their improvements. Kelly stated that she is unsure if the downstream owners, who had inadequate warnings, should also be able to recover under takings law for the temporary losses and damage to their property. Those owners may have to sue the developers and municipal utility districts (and their counsel), who failed to warn them, to recover for the cost of repairing their residences and other losses. *Somebody should have checked the placement and adequacy of the dams—and did not!*

Professor Hew's Experiences: Recovering from flooding is time-consuming and expensive, even for those who have flood insurance. TMSL Professor Maurice Hew discussed his experiences with FEMA. Hew's family home, in Meyerland, was flooded in 2015, 2016, and by Harvey in 2017. He explained the difficulties of describing and proving losses in the short space of time allowed; the need for photographs of possessions; the ever-changing requirements. He reconstructed his damaged home to comply with FEMA height requirements that changed again after Harvey. He explained the floods have taught his family to be minimalists.

In addition to dealing with the physical damages, Hew explained the issues with taxing authorities. The appraisal of his rebuilt house was based on pre-construction estimates made long before his family could occupy their residence. The appraisal staff do not comprehend, he found. The Meyerland area, located in the Brays Bayou watershed in southwest Houston, is affected by several factors: the increased amount of impervious cover resulting from Houston's growth and the flood-control structures built to prevent flood damage in Houston's medical center the east.

As in most of Houston, corporate boom and development—structures, freeways, and streets—have led to our strong economy but also caused the designations of "floodplains" to be inadequate and unreliable. Experts now contend that the entire Houston metropolitan area should be designated a 100-year floodplain.

Please send any announcements you would like to include in the next Thurgood Faculty Spotlight to Ms. Toyann Timmons (Toyann.Timmons@tmslaw.tsu.edu) and Dean Weeden (Larry.Weeden@tmslaw.tsu.edu) by 5p.m. Friday, October 11, 2019

Thurgood Faculty Spotlight is a twice Monthly journal (the 1st and 15th during the fall and spring semester) recording the achievements, experience, and awards of The Texas Southern University Thurgood Marshall School of Law faculty of distinction.

L. Darnell Weeden, Associate Dean for Faculty Development & Research, is the editor of Thurgood Faculty Spotlight